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Contents

Federal Register

Vol. 88, No. 46

Thursday, March 9, 2023

Agency for Healthcare Research and Quality
NOTICES
Supplemental Evidence and Data Request on Genitourinary Syndrome of Menopause, 14616–14618

Agricultural Marketing Service
RULES
Decreased Assessment Rate:
Texas Oranges and Grapefruit, 14479–14481
Harmonized Tariff Schedule Numbers for the Paper and Paper-Based Packaging Products, 14484–14486
Increased Assessment Rate:
Dried Prunes Produced in California, 14481–14484
Marketing Order:
Florida Citrus; Exemption for Pummelos, 14477–14479
NOTICES
Intent to Certify Delegated Agencies:
Alabama Department of Agriculture and Industries and the Washington State Department of Agriculture, 14593

Agriculture Department
See Agricultural Marketing Service
See Forest Service
See The U.S. Codex Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 14593–14594

Bureau of Consumer Financial Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 14610

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic for Administration for Children and Families Program Monitoring Activities, 14618–14619

Civil Rights Commission
NOTICES
Meetings:
California Advisory Committee, 14597
Nebraska Advisory Committee, 14596–14597
Nevada Advisory Committee, 14595–14596
Ohio Advisory Committee, 14597–14598

Commerce Department
See Foreign-Trade Zones Board
See Industry and Security Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Community Living Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
State Plan for Independent Living Instrument and Instructions, 14619–14622

Defense Department
See Engineers Corps
See Navy Department

Election Assistance Commission
NOTICES
Voluntary Voting System Guidelines, 14612–14613

Energy Department
See Federal Energy Regulatory Commission

Engineers Corps
NOTICES
Meetings:
Inland Waterways Users Board, 14610–14611

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
New Jersey; Motor Vehicle Enhanced Inspection and Maintenance Program; Diesel Opacity Cutpoints, 14490–14491
Pesticide Tolerance; Exemptions, Petitions, Revocations, etc.:
Diglycerol in Pesticide Formulations, 14491–14495
Mandestrobin, 14495–14498

Federal Aviation Administration
RULES
Airspace Designations and Reporting Points:
Emmonak, AK, 14486–14487
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures, 14487–14490
PROPOSED RULES
Airspace Designations and Reporting Points:
Galena, AK, 14516–14517
Poughkeepsie, NY, 14514–14515
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Mitsubishi MU–2B Series Airplane Training Requirements, 14664–14665

Federal Communications Commission
PROPOSED RULES
In the Matter of Schools and Libraries Universal Support Mechanism, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., 14529–14536

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 14613–14615
Effectiveness of Exempt Wholesale Generator Status:
Moss Landing Energy Storage 3, LLC, Chesapeake Solar Project, LLC, East Point Energy Center, LLC, et al., 14613–14614
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
High Point Solar, LLC, 14615

Federal Motor Carrier Safety Administration
NOTICES
Exemption Application:
Parts and Accessories Necessary for Safe Operation; Waymo, LLC, and Aurora Operations, Inc., 14665–14666

Federal Railroad Administration
NOTICES
Positive Train Control Safety Plan and Request for Positive Train Control System Certification:
Brightline Trains Florida, LLC, 14666–14667

Federal Reserve System
NOTICES
Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 14616
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 14615–14616

Fish and Wildlife Service
RULES
Endangered and Threatened Species:
Threatened Species Status with Section 4(d) Rule for Longsolid and Round Hickorynut and Designation of Critical Habitat, 14794–14869
PROPOSED RULES
Endangered and Threatened Species:
Petition Finding for Joshua Trees (Yucca brevifolia and Y. jaegeriana), 14536–14560

Food and Drug Administration
NOTICES
Emergency Use Authorization:
In Vitro Diagnostic Devices for Detection and/or Diagnosis of COVID–19; Revocation, 14622–14625

Foreign-Trade Zones Board
NOTICES
Approval of Subzone Expansion:
Swagelok Co.; Valley City, OH, 14598
Proposed Production Activity:
Foreign-Trade Zone 124; Valero Refining-New Orleans, LLC (Renewable Fuels and By-Products); Norco, LA, 14598

Forest Service
PROPOSED RULES
Land Uses; Special Uses; Cost Recovery, Strict Liability Limit, and Insurance, 14517–14529

Health and Human Services Department
See Agency for Healthcare Research and Quality
See Children and Families Administration
See Community Living Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health

Health Resources and Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Ryan White HIV/AIDS Program: Expenditures Forms, 14625–14627
Freedom of Information Act Predisclosure, 14627–14628

Homeland Security Department
See Transportation Security Administration
See U.S. Citizenship and Immigration Services
RULES
Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Extending Enforcement Date, 14473–14476

Housing and Urban Development Department
NOTICES
Privacy Act; System of Records, 14634–14639
Section 8 Housing Assistance Payments Program:
Annual Adjustment Factors, Fiscal Year 2023, 14639–14641

Industry and Security Bureau
NOTICES
Denial of Export Privileges:
Edgar Ariel Bernal-Gonzalez, 14601–14602
Erick Samuel Chavez Gonzalez, 14598–14599
Mohammad Khazrai Shaneivar, 14600–14601
Parisa Mohamadi, 14599–14600

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See National Indian Gaming Commission

Internal Revenue Service
RULES
Recapture of Excess Employment Tax Credits Under the American Relief Plan Act of 2021; Correction, 14490

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, 14602–14605
Ripe Olives from Spain, 14605–14606

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Computer Network Security Equipment and Systems, Related Software, Components Thereof, and Products Containing Same, 14649–14650
Certain LTE- and 3G-Compliant Cellular Communications Devices, 14650
Meetings; Sunshine Act, 14649

Land Management Bureau
NOTICES
Plats of Survey:
Wyoming, 14641–14642

Legal Services Corporation
NOTICES
Meetings; Sunshine Act, 14650–14651

Management and Budget Office
PROPOSED RULES
Guidance:
Grants and Agreements; Correction, 14514
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 14651–14652

National Aeronautics and Space Administration
NOTICES
Meetings:
Astrophysics Advisory Committee, 14652

National Indian Gaming Commission
NOTICES
Privacy Act; Systems of Records, 14642–14649

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 14628

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Exclusive Economic Zone off Alaska:
Sablefish Managed Under the Individual Fishing Quota Program, 14512–14513
Fisheries of the Northeastern United States:
Magnuson-Stevens Fishery Conservation and Management Act Provisions; Framework Adjustment 17 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, and Framework Adjustment 6 to the Bluefish Fishery Management Plan, 14499–14512
PROPOSED RULES
Fisheries of the Northeastern United States:
Atlantic Spiny Dogfish Fishery; 2023 Specifications, 14590–14592
Taking or Importing of Marine Mammals:
U.S. Navy Construction of the Pier 3 Replacement Project at Naval Station Norfolk, 14560–14590

Navy Department
NOTICES
Meetings:
Board of Visitors, Marine Corps University, 14611–14612

Nuclear Regulatory Commission
NOTICES
Meetings:
Advisory Committee on Reactor Safeguards, 14652–14653

Patent and Trademark Office
NOTICES
First-Time Filer Expedited Examination Pilot Program, 14607–14609

Postal Service
NOTICES
Product Change:
Priority Mail, First-Class Package Service and Parcel Select Negotiated Service Agreement, 14653

Securities and Exchange Commission
PROPOSED RULES
Safeguarding Advisory Client Assets, 14672–14792
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Customer Account Statements, 14662
Application:
24X National Exchange LLC; Withdrawal, 14663
PGIM Private Real Estate Fund, Inc., et al., 14663–14664
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe EDGX Exchange, Inc., 14657–14662
Financial Industry Regulatory Authority, Inc., 14653–14657

Surface Transportation Board
NOTICES
Exemption:
Trackage Rights; Grainbelt Corp., BNSF Railway Co., 14664

The U.S. Codex Office
NOTICES
Meetings:
Codex Alimentarius Commission; Committee on Food Labelling, 14594–14595

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Electric Vehicle Inventory and Use Survey, 14667–14668

Transportation Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Cybersecurity Measures for Surface Modes, 14628–14630

Treasury Department
See Internal Revenue Service

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, 14631–14632
Application for Waiver of Grounds of Inadmissibility Under Sections 245A or 210 of the Immigration and Nationality Act, 14632–14633
Declaration of Financial Support, 14633–14634
Request for Reduced Fee, 14630
Waiver of Rights, Privileges, Exemptions and Immunities, 14631

Veterans Affairs Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Authority to Close Loans on an Automatic Basis Nonsupervised Lenders; Request for Agent Recognition, 14668–14669
Submission of School Catalog to the State Approving Agency, 14668

Separate Parts In This Issue

Part II
Securities and Exchange Commission, 14672–14792

Part III
Interior Department, Fish and Wildlife Service, 14794–14869

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

2 CFR
Proposed Rules:
184 14514
200 14514

6 CFR
37 14473

7 CFR
905 14477
906 14479
993 14481
1222 14484

14 CFR
71 14486
97 (2 documents) 14487, 14488

Proposed Rules:
71 (2 documents) 14514, 14516

17 CFR
Proposed Rules:
275 14672
279 14672

26 CFR
31 14490

36 CFR
Proposed Rules:
251 14517

40 CFR
52 14490
180 (2 documents) 14491, 14495

47 CFR
Proposed Rules:
54 14529

50 CFR
17 14794
648 14499
679 14512

Proposed Rules:
17 14536
217 14560
648 14590

Rules and Regulations

Federal Register
Vol. 88, No. 46
Thursday, March 9, 2023

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

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 37

[Docket No. DHS–2022–0061]

RIN 1601–AB03

Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Extending Enforcement Date

AGENCY: Office of the Secretary, DHS.

ACTION: Final rule.

SUMMARY: On May 3, 2021, DHS published an interim final rule (IFR) extending the card-based enforcement deadline to May 3, 2023. This rule finalizes that IFR and further extends the date for card-based enforcement of the REAL ID regulations from May 3, 2023 until May 7, 2025. Beginning on that date, Federal agencies are prohibited from accepting a state-issued driver's license or identification card for official purposes unless such license or card is a REAL ID compliant driver's license or identification card issued by a state that DHS has determined is in full compliance as defined under this part. The current regulations also permit Federal agencies to accept noncompliant driver's licenses and identification cards for official purposes until May 2, 2023. This rule also extends that date, authorizing Federal agencies to continue to accept non-compliant driver's licenses and identification cards for official purposes until May 6, 2025.

DATES: This rule is effective on March 9, 2023.

FOR FURTHER INFORMATION CONTACT: Steve Yonkers, Director, REAL ID Program Office; telephone (202) 447–3274; email *steve.yonkers@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. The REAL ID Act and Implementing Regulations

The REAL ID Act (the Act) sets minimum security requirements for the issuance and production of driver's licenses and identification cards issued by the states, territories, and the District of Columbia in order for Federal agencies to accept these documents for official purposes.[1] Official purposes include: (1) accessing Federal facilities, (2) boarding federally regulated commercial aircraft, (3) entering nuclear power plants, and (4) any other purposes that the Secretary of Homeland Security shall determine.[2]

On January 29, 2008, DHS published a final rule implementing the Act's requirements.[3] The regulations include both a deadline for state compliance with the REAL ID requirements and a deadline by which individuals must obtain a REAL ID compliant license or identification card in order to use that document for official purposes.[4] DHS refers to these deadlines as ''state-based'' and ''card-based'' enforcement, respectively.

Under existing regulations, card-based enforcement is scheduled to begin on May 3, 2023.[5] Beginning on the card-based enforcement date, Federal agencies are prohibited from accepting a license or identification card issued by a state for official purposes unless the license or card itself was issued in accordance with the REAL ID standards by a REAL ID compliant state.[6]

In addition to compliant licenses and identification cards, states may issue noncompliant licenses and identification cards, which are not acceptable by Federal agencies for official purposes, to individuals who are unable or unwilling to present the documents and information necessary to obtain a REAL ID compliant license or card. These noncompliant licenses and cards must (1) clearly state that the card is not acceptable for official purposes, and (2) have a unique design or color indicator that clearly distinguishes them from compliant licenses and identification cards.[7] The REAL ID regulations authorize, but do not require, Federal agencies to accept these noncompliant cards until card-based enforcement begins.[8]

B. Progress Towards Full Implementation

Since its enactment in 2005, DHS has worked with the states to implement the requirements of the REAL ID Act. DHS has provided funding, technical assistance, outreach, and engagement efforts. DHS has awarded over $263 million in grant funding to assist in enhancements to driver's license security programs.[9] These efforts have yielded significant progress towards full REAL ID implementation. Fifty-five of the 56 jurisdictions subject to REAL ID have achieved compliance with the REAL ID standards and are currently issuing REAL ID-compliant licenses and identification cards.[10] Based on REAL ID data compiled by compliant states, DHS estimates that compliant states, territories and the District of Columbia have issued approximately 151 million REAL ID compliant licenses and cards, which represent approximately 53 percent of the population possessing a state-issued driver's license or identification card.[11] Notwithstanding these efforts, however, DHS estimates that at the current 0.5 percent monthly REAL ID issuance rate, only approximately 56 percent of the population will have a REAL ID by the current May 3, 2023 card-based

[1] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Public Law 109–13, div. B. title II, May 11, 2005, as amended (codified at 49 U.S.C. 30301 note) (REAL ID Act).

[2] *Id.* at section 201.

[3] *See* 73 FR 5272 (Jan. 29, 2008) (codified as amended at 6 CFR part 37).

[4] 6 CFR 37.51(a) and 37.5.

[5] 6 CFR 37.5(b).

[6] The REAL ID Act and regulations define ''state'' to include the 50 U.S. states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. REAL ID Act section 201(5), 6 CFR 37.3.

[7] 6 CFR 37.71; REAL ID Act section 202(d)(11).

[8] *See* 86 FR 23237 (May 3, 2021) (codified at 6 CFR 37.5) (clarifying that the deadline by which Federal agencies may no longer accept non-compliant driver's licenses and identification cards for official purposes applies to all non-compliant cards, including state-issued driver's licenses and identification cards marked to indicate that they may not be used for official Federal purposes).

[9] Secure Identification State Progress Report-Fiscal Year 2012 Report to Congress.

[10] American Samoa, the remaining noncompliant jurisdiction, has been delayed in implementing some of the REAL ID requirements due to COVID–19-related travel restrictions. American Samoa is currently under DHS review for a compliance determination.

[11] Based on REAL ID issuance data voluntarily submitted monthly to DHS by the compliant states.

enforcement date. Data also indicates that states have issued approximately 113 million noncompliant marked licenses and identification cards and approximately 22 million individuals still have legacy licenses without any markings that were issued before a state's compliance determination. Without an extension of the card-based enforcement date, DHS estimates that beginning on May 3, 2023, 44 percent of the remaining population would need another acceptable form of identification, where identification is required for REAL ID official purposes, including for use as identification at the TSA airport security checkpoint.[12]

Since the card-based enforcement deadline was last extended by DHS on April 27, 2021, DHS has completed the nationwide REAL ID advertising campaign ''Be Your REAL ID Self'' and produced an advertising toolkit available for free to all DHS stakeholders. DHS continues to work with stakeholders to reach full implementation of the REAL ID Act.

C. Coronavirus Disease 2019 (COVID–19)

On March 13, 2020, the President declared a national emergency under sections 201 and 301 of the National Emergencies Act, 50 U.S.C. 1601 et seq, in response to COVID–19.[13] In February of 2022, the President issued a continuation of the National Emergency concerning the COVID–19 pandemic.[14] On January 11, 2023, the Secretary of the Department of Health and Human Services renewed the nationwide ''public health emergency,'' [15] originally declared on January 31, 2020, under section 319 of the Public Health Service Act, 42 U.S.C. 274d.[16]

As of January 31, 2023, there have been 753,479,439 million confirmed cases of COVID–19 identified globally, resulting in 6,812,798 million deaths.[17] In the United States, 102,171,644 cases have been identified, with 1,103,615 reported deaths due to the disease.[18] Currently, the FDA's *List of Approved Vaccines for Use in the United States* contains two COVID–19 vaccines [19] and CDC guidance states that eligible individuals should receive COVID–19 vaccine booster shots after certain periods of time.[20] Ongoing research demonstrates that while there is high effectiveness of approved vaccines among eligible individuals, fully vaccinated individuals continue to experience breakthrough COVID–19 infections and may be either symptomatic or asymptomatic.[21] Nevertheless, CDC reports show that individuals who are unvaccinated have a greater risk of testing positive for COVID–19 and a greater risk of dying from COVID–19 than individuals who are fully vaccinated.[22]

Although COVID–19 rates of infection and death are decreasing,[23] at least one study indicated that the COVID–19 pandemic is driven by seasonality.[24] Another study indicated that seasonal factors, alongside the increased demand for healthcare resources due to seasonal influenza, should be taken into account when developing future intervention measures.[25] Throughout this pandemic, state and local jurisdictions across the United States engaged in various social distancing practices and other efforts to reduce and mitigate against further spread of COVID–19, including closing or reducing service times at government offices and by accepting in-person visits by appointment only.[26] Although states have generally resumed normal operations, many have expressed concerns that it could take months or years for their DMVs to eliminate the backlogs caused by the pandemic-related delays and closures.[27] States have also raised concerns about their residents being turned away at airports and Federal buildings beginning on May 3, 2023.

D. The 2021 Interim Final Rule

Considering the impact of the COVID–19 pandemic on state and local government operations and the desire to reduce further spread by encouraging continued social distancing, DHS extended the card-based enforcement deadline twice during the pandemic. In April 2020 DHS issued a final rule extending the REAL ID card-based enforcement date for one year until October 1, 2021,[28] and in May 2021, DHS further extended the card-based enforcement date until May 3, 2023, through the issuance of an interim final rule (IFR) requesting comments.[29] DHS received one comment in response to the IFR.[30] The commenter supported the extension until May 3, 2023 stating that ''state agencies have either closed offices, shortened operating hours, or greatly limited occupancy in offices.'' [31] The commenter concludes their comments stating ''[p]roviding additional time to receive compl[ia]nt identifications assists those persons that do not have access to internet, those persons with serious health conditions that cannot visit government offices due to risks of contraction of the COVID–19 virus, and those persons that are in states or territories where health guidelines prohibit or limit 'in-person' contact.'' [32]

DHS issued these extensions to assist the states in avoiding in-person driver's licensing agency visits and in recognition of the fact that, as a result

[12] Although a significant segment of the population may not currently possess a REAL ID, they may have other forms of identification acceptable for official purposes (*e.g.,* a U.S. passport, U.S. passport card, or military identification). TSA's acceptable ID list is available at *tsa.gov/travel/security-screening/identification.*

[13] Proclamation 9994 of Mar. 13, 2020 on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

[14] Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic, 87 FR 10289 (Feb. 23, 2022); Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

[15] HHS, ''Renewal of Determination that a Public Health Emergency Exists,'' COVID–19: Renewal of Determination that a Public Health Emergency Exists (hhs.gov).

[16] HHS, ''Determination that a Public Health Emergency Exists,'' *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.*

[17] WHO Coronavirus (COVID–19) Dashboard (as of February 1, 2023), *https://covid19.who.int.*

[18] CDC COVID Data Tracker (as of February 1, 2023), *https://covid.cdc.gov/covid-data-tracker.*

[19] FDA, Vaccines Licensed for Use in the United States (July 5, 2022), *https://www.fda.gov/vaccines-blood-biologics/vaccines/vaccines-licensed-use-united-states.*

[20] CDC, COVID–19 Vaccine Booster Shots (updated Jan. 25, 2023), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html;* FDA, COVID–19 Frequently Asked Questions (updated Dec. 8, 2022), *https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions;* CDC, Stay Up to Date with Your Vaccines (updated Jan. 23, 2023), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html.*

[21] CDC, The Possibility of COVID–19 after Vaccination: Breakthrough Infections (updated June 23, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html.*

[22] CDC, Rate of COVID–19 Cases and Deaths by Vaccination Status, *https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status.*

[23] CDC, COVID Data Tracker, *https://covid.cdc.gov/covid-data-tracker/#datatracker-home.*

[24] Mario Coccia, COVID–19 Pandemic Over 2020 (With Lockdowns) and 2021 (With Vaccinations): Similar Effects for Seasonality and Environmental Factors, 208 Environmental Research (2022), *https://www.sciencedirect.com/science/article/pii/S001393512200038X?via%3Dihub.*

[25] NIH, The role of seasonality in the spread of COVID–19 pandemic (Feb. 19, 2021), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7892320/.*

[26] *https://www.nj.gov/governor/news/news/562020/20200315c.shtml* (Mar. 15, 2020); and PennDOT closes all driver and photo license centers across Pennsylvania (*wtae.com*) (Mar. 16, 2020);

[27] See, section 1:1. Introduction, 24 N.J. Prac., Motor Vehicle Law and Practice section 1:1 (5th ed.) (Nov. 2022).

[28] 85 FR 23205 (Apr. 27, 2020).

[29] 86 FR 23237 (May 3, 2021).

[30] See, *https://www.regulations.gov/comment/DHS-2021-0019-0002.*

[31] *Id.*

[32] *Id.*

of the pandemic, most if not all states severely curtailed driver's licensing agency operations and service hours and authorized extensions for expiring driver's licenses.

E. Further Extending the Card-Based Enforcement Deadline

The Secretary recognizes that significant challenges continue to persist with the upcoming REAL ID card-based enforcement deadline in light of the COVID–19 pandemic and related issuance backlogs. Based on discussions and information provided by the states, the COVID–19 pandemic has continuing impacts on state DMV operations and the issuance of REAL ID compliant licenses and identification cards. Reduced DMV service hours and facility closures during the pandemic caused many states to offer grace periods and extensions to those with expiring licenses and although states have generally resumed normal operations, the temporary procedures put in place during the pandemic continue to have a lingering impact on REAL ID issuance rates. States have expressed concern that they may not have enough time to process and issue REAL ID compliant cards before the upcoming deadline. DHS has heard similar concerns from individual license holders about their ability to make appointments at their local DMV to obtain a REAL ID. As a result, DHS does not believe that REAL ID adoption rates will significantly change by the current May 3, 2023, card-based enforcement date.

DHS's estimates of the REAL ID issuance rates align with these concerns. For example, since the beginning of the COVID–19 pandemic, the rate of REAL ID issuance has been reduced by almost half. Before the pandemic, the REAL ID adoption rate was increasing at over 1 percent per month. By contrast, the current adoption rate continues to stand at about half of that amount or at about 0.5 percent per month. At this rate of adoption, DHS estimates that only about 56 percent of the state driver's licenses and identification cards in circulation will be REAL ID compliant by the current May 3, 2023 card-based enforcement deadline.

As a result, without a change to the current card compliance deadline, DHS estimates that a significant number of individuals may arrive at an airport screening checkpoint without an acceptable form of identification.[33] TSA estimates up to half a million passengers per day without alternate acceptable IDs could be denied access to security screening. This could result in significant backlogs at the TSA security checkpoint, which would not only cause delays and missed flights but may also create a significant security risk both to passengers and TSA personnel by diverting the resources and attention of TSA personnel away from other passengers, including those known to pose an elevated risk.

The Secretary, with the commitment to fairness and equity in mind,[34] is taking this action to provide additional time for individuals to obtain a REAL ID compliant license or identification card. Notwithstanding this extension, DHS encourages those who are able and eligible to obtain a REAL ID at the earliest possible point, instead of waiting until the end of this extension period.

Accordingly, the Secretary is finalizing the 2021 interim final rule and extending the date when individuals must present a REAL ID compliant driver's license or identification card to use that document for official purposes until May 7, 2025. This extension is intended to provide sufficient time for individuals to obtain a REAL ID and for DMVs across the country to fully accommodate the demand for those licenses and identification cards.

Finally, to avoid any confusion about the ability of Federal agencies to continue to accept noncompliant licenses and identification cards issued under § 37.71, DHS also is extending the date by which Federal agencies may continue to accept these licenses and identification cards for official purposes until the end of May 6, 2025. Although some agencies, including TSA, accept noncompliant licenses and identification cards for official purposes, others may decide not to accept, or currently do not accept, noncompliant cards for official purposes. Individuals who need to visit a Federal facility, building, or office should check in advance whether the agency requires identification for access purposes and, if they do, the forms of identification they accept.

II. Regulatory Analysis

A. Administrative Procedure Act

The Administrative Procedure Act (5 U.S.C. 553) authorizes agencies to dispense with certain rulemaking procedures under certain circumstances. Section 553(d)(1) allows an agency to make a rule effective immediately, thereby avoiding the 30-day delayed effective date requirement in section 553(d), when a substantive rule grants or recognizes an exemption or relieves a restriction.

This final rule extends the card-based enforcement deadline due to the continuing impacts on REAL ID issuance caused by the measures put in place by state DMVs to address the COVID–19 pandemic, including temporary grace periods and extended expiration dates for expiring driver's licenses. Although states have generally resumed regular DMV operations, REAL ID adoption rates have not risen to meet their pre-pandemic levels. Before the start of the pandemic states were increasing their REAL ID adoption rates by over 1 percent a month. These rates dropped to 0.5 percent or less in May of 2020 and have not reached their pre-pandemic levels. At these rates, DHS estimates that only approximately 56 percent of the population will have a REAL ID by the May 3, 2023 card-based enforcement date. This rule reduces the burden on States to comply with the current deadline by further extending the card-based enforcement deadline to May 7, 2025. This new deadline allows States more time to fully recover from the COVID–19 pandemic and its continued impacts on their DMVs. Therefore, DHS is making this rule effective immediately.

B. Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

C. Executive Orders 12866 and 13563 Assessment

This rule constitutes a ''significant regulatory action'' under Executive Order 12866, as supplemented by Executive Order 13563, and therefore has been reviewed by the Office of Management and Budget (OMB). Executive Order 12866 defines ''significant regulatory action'' as one that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements,

[33] TSA's acceptable ID list is available at *tsa.gov/travel/security-screening/identification.*

[34] *See* E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (published Jan. 25, 2021); E.O. 13563, Improving Regulation and Regulatory Review, 76 FR 3821 (published Jan. 21, 2011).

grants, user fees, or loan programs or the rights or 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. DHS is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the urgent needs described above.

D. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies to consider the potential impact of regulations on small businesses, small government jurisdictions, and small organizations during the development of their rules. This rule, however, makes changes for which notice and comment are not necessary. Accordingly, DHS is not required to prepare a regulatory flexibility analysis. See 5 U.S.C. 603, 604.

E. Executive Order 13132 (Federalism)

A rule has federalism implications under Executive Order 13132, ''Federalism,'' if it has a substantial direct effect on state governments, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. DHS has analyzed this rule under that Order and has determined that although this rule affects the states, it does not impose substantial direct compliance costs or preempt state law. In fact, the rule is responsive to concerns expressed by state agencies regarding the upcoming deadlines. DHS has determined that the rule is consistent with Executive Order 13132.

F. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Unfunded Mandates Reform Act addresses actions that may result in the expenditure by a state, local, or Tribal government, in the aggregate, or by the private sector of $100 million (adjusted for inflation) or more in any one year. This rule will not result in such an expenditure.

G. Executive Order 13175 (Tribal Consultation)

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

H. Environment

DHS reviews actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. For an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

The delay effectuated by this rule fits within categorical exclusion A3(a) ''Promulgation of rules . . . of a strictly administrative or procedural nature.'' Instruction Manual, Appendix A, Table 1. Furthermore, the rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental impacts. Therefore, the rule is categorically excluded from further NEPA review.

I. Congressional Review Act

This rule is not a major rule as defined by the legislation commonly known as the Congressional Review Act, see Public Law 104–121, sec. 251, 110 Stat. 847, 868 (1996) (codified in relevant part at 5 U.S.C. 804) (''CRA''). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The Department has complied with the CRA's reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

List of Subjects in 6 CFR Part 37

Document security, Driver's licenses, Identification cards, Motor vehicle administrations, Physical security.

For the reasons set forth above, the Department of Homeland Security amends 6 CFR part 37 as follows:

PART 37—REAL ID DRIVER'S LICENSES AND IDENTIFICATION CARDS

■ 1. The authority citation for part 37 continues to read as follows:

Authority: 49 U.S.C. 30301 note; 6 U.S.C. 111, 112.

Subpart A—General

■ 2. Amend § 37.5 by revising paragraphs (b) and (c) to read as follows:

§ 37.5 Validity periods and deadlines for REAL ID driver's licenses and identification cards.

* * * * *

(b) On or after May 7, 2025, Federal agencies shall not accept a driver's license or identification card for official purposes from any individual unless such license or card is a REAL ID–compliant driver's license or identification card issued by a State that has been determined by DHS to be in full compliance as defined under this subpart.

(c) Through the end of May 6, 2025, Federal agencies may accept for official purposes a driver's license or identification card issued under § 37.71. On or after May 7, 2025, Federal agencies shall not accept for official purposes a driver's license or identification card issued under § 37.71.

* * * * *

Alejandro N. Mayorkas,

Secretary, Department of Homeland Security.

[FR Doc. 2023–04496 Filed 3–8–23; 8:45 am]

BILLING CODE 9110–9M–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Doc. No. AMS–SC–22–0001]

Florida Citrus Marketing Order; Exemption for Pummelos

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Citrus Administrative Committee (Committee) to exempt pummelos from requirements prescribed under the Florida citrus marketing order. This change exempts pummelos from all requirements under the marketing order, including registration, assessment, and reporting requirements.

DATES: Effective April 10, 2023.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Branch Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Jennie.Varela@usda.gov* or *Christian.Nissen@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 905, as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida. Part 905, (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of growers and handlers of fresh citrus operating within the production area, and a non-industry member.

The Agricultural Marketing Service (AMS) is issuing this rule in conformance with Executive Orders 12866 and 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 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. The Agricultural Marketing Service (AMS) has determined that this rule is unlikely to 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This rule exempts pummelos from all requirements under the Order, including registration, assessment, and reporting requirements. The Committee unanimously recommended this action at its November 30, 2021, meeting.

This action creates the exemption under a new § 905.130. Section 905.7 provides the authority to require handlers to be registered with the Committee pursuant to rules recommended by the Committee and approved by the Secretary of Agriculture (Secretary). Section 905.41 authorizes the Committee to collect assessments, such that each handler shall pay the Committee a pro rata share of the expenses.

Sections 905.70 and 905.71 provide the authority for the Committee to collect reports from handlers including, information regarding the variety, grade, and size of each standard packed carton of fruit shipped, and any other information deemed necessary to administer the Order, with the approval of the Secretary. Section 905.80 of the Order allows the Committee to specify additional types of shipments or purposes that would not be subject to regulation or payment of assessments, with the approval of the Secretary.

The regulations associated with these authorities include § 905.107, which outlines the registered handler requirements, § 905.171, which requires handlers to report the list of growers for whom they handled, and § 905.235, which requires handlers pay assessments of $0.015 per 4/5-bushel carton to the Committee.

The Florida citrus industry voted to incorporate pummelos into the Order when it was amended in 2016, as pummelos were being used to develop new citrus hybrids. However, there are not yet any pummelo hybrid varieties produced in commercial volume. The current market for pummelos is small, estimated at 100,000 boxes, or 200,000 cartons. In comparison, the entire Florida citrus industry shipped over 6 million cartons of other fresh citrus commodities during the 2020–21 season.

The Order regulates shipments of fresh citrus leaving the State of Florida for grade and size. Intrastate shipments are covered by parallel State regulations. The Florida Department of Agriculture and Consumer Services inspects fresh citrus at packinghouses and provides shipment data to the Committee. The Committee then uses the data to bill for assessments and to issue industry reports. There are currently no quality requirements in effect for pummelos or pummelo hybrids under the Order, nor are there any State requirements. As a result, there is no inspection and therefore no established method of data collection for pummelos.

Since the Order was amended, Committee staff have been in contact with pummelo growers and handlers, working on a way to collect required information and assessments. Under the current Order requirements and industry practices, there is no uniform way to meet the requirements without creating a specific reporting requirement

for pummelos. In addition, pummelo growers and shippers have communicated to the Committee that they would like to be excluded from Order requirements.

During the November 30, 2021, Committee meeting, members discussed the issues related to pummelo shipments, including whether to develop a new system for collecting information and assessments on pummelo fruit. The Committee reports that there are only six pummelo producers and three shippers, most of whom are small grower-shippers not handling any other citrus covered under the Order.

Committee members indicated that with the volume for pummelo and pummelo hybrids remaining stagnant, there is currently no desire to establish grade and size requirements on pummelo at the State or Federal level. Therefore, there are no data from inspection. Consequently, if pummelo and pummelo hybrids remain subject to Order requirements for reporting and assessments, it would be necessary for the Committee to establish separate reporting procedures and documentation for pummelo movement.

The Committee expressed uncertainty that creating requirements specifically for pummelo would add value to the industry. Even if the shipment data were collected, because of confidentiality concerns, the Committee may not be able to report out the results due to the small number of handlers. Further, at the estimated volume shipped, additional assessments would total $3,000. This amount may not be sufficient to cover the cost of developing the necessary reports and ensuring compliance.

The Committee has previously recommended, and AMS approved, exemptions for gift packages, minimum shipments, and animal feed. These are shipping channels or volumes that would not affect overall demand for fresh fruit. Similarly, the Committee believes demand would not be harmed if pummelo shipments continued without being subject to the requirements of the Order.

This change exempts pummelos from all requirements under the Order, including registration, assessment, and reporting requirements. This exemption will be codified in a new § 905.130. If a handler ships pummelo as well as other regulated citrus, the handler will still have to meet all requirements related to the other citrus covered by the Order. Further, the Committee could consider removing this exemption if conditions change over time. Thus, the Committee unanimously recommended exempting pummelo fruit from all Order requirements.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information, AMS has determined that this rule is consistent with and will effectuate the purposes of the Act.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 500 producers of Florida citrus in the production area and about 15 handlers subject to regulation under the Order. The Committee reports there are six pummelo producers and three shippers. Small agricultural producers of orange groves are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of $3,500,000 or less, and small agricultural service firms are defined as those whose annual receipts are $30,000,000 or less (13 CFR 121.201).

According to data from the National Agricultural Statistics Service (NASS) and the Committee, the weighted average packing house door equivalent price for fresh Florida citrus for the 2020–21 season was approximately $6.52 per carton with total shipments of 6,022,426 cartons. Using the number of handlers, the majority of handlers have average annual receipts of less than $30,000,000 ($6.52 multiplied by 6,022,426 cartons equals $39,266,217.52 divided by 15 handlers equals $2,617,747.83 per handler).

In addition, based on the NASS data, the weighted average grower price for the 2020–21 season was estimated at $4.95 per carton of fresh citrus. Based on grower price, shipment data, and the total number of Florida citrus growers, the average annual grower revenue is below $3,500,000 ($4.95 multiplied by 6,022,426 million cartons equals $29,811,008.70 divided by 500 growers equals $59,622.02 per grower). Thus, the majority of Florida citrus handlers and growers may be classified as small entities.

This rule exempts pummelos from all requirements under the Order, including assessment and reporting requirements. Without this exemption, it would be necessary for the Committee to establish separate reporting procedures for pummelos. This rule creates § 905.130 to establish the pummelo exemption. Authority for this change is provided in §§ 905.7, 905.41, 905.70, 905.71, and 905.80.

This action is not expected to increase the costs associated with the Order's requirements. Rather, it is anticipated this action will have a beneficial impact by exempting pummelo handlers, primarily small entities, from regulation, assessment, and reporting requirements.

Exemption from assessments will create a minimal loss of revenue. Using the current assessment rate and pummelo shipments estimated by Committee members (200,000 cartons), there would be about $3,000 lost per year. Developing an alternative reporting process and maintaining compliance would likely cost the Committee more than that amount in staff time. Pummelo growers and handlers should benefit from this change regardless of their size.

The Committee discussed an alternative to this action. It considered whether there was a need to establish grade and size requirements for pummelo and track the shipments as they do for other citrus fruits. Committee members indicated the pummelo market is not experiencing quality concerns, and there is no industry interest in creating such requirements. Therefore, the Committee rejected this alternative.

Committee meetings were widely publicized throughout the citrus industry. All interested persons were invited to attend Committee meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the November 30, 2021, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581–0189, Fruit Crops. No changes in those requirements are necessary because of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large citrus handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the Initial Regulatory Flexibility Analysis, AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

A proposed rule concerning this action was published in the **Federal Register** on October 19, 2022 (87 FR 63431). Copies of the proposed rule were also mailed or sent via email to all Florida citrus handlers. The proposal was made available through the internet by AMS and the Office of the Federal Register. A 30-day comment period ending November 18, 2022, was provided for interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Pummelos, Reporting and recordkeeping requirements, Tangelos, Tangerines.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 905 as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND PUMMELOS GROWN IN FLORIDA

■ 1. The authority citation for part 905 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Add § 905.130 under the undesignated center heading ''Non-Regulated Fruit'' to read as follows:

§ 905.130 Exemptions for Pummelo.

The handling of pummelo fruit or pummelo hybrids shall be exempt from the provisions of §§ 905.7, 905.41, 905.70, 905.71, and the regulations issued thereunder: Provided, That, if the handler ships other fruit subject to Order requirements, the handler must comply with all sections of the Order applicable to such fruit, including handler registration.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–04606 Filed 3–8–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 906

[Doc. No. AMS–SC–22–0048]

Decrease of Assessment Rate for Texas Oranges and Grapefruit

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This final rule implements a recommendation from the Texas Valley Citrus Committee to decrease the assessment rate established for the 2022–23 and subsequent fiscal periods. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective April 10, 2023.

FOR FURTHER INFORMATION CONTACT: Delaney Fuhrmeister, Marketing Specialist, or Christian D. Nissen, Branch Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Delaney.Fuhrmeister@usda.gov* or *Christian.Nissen@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 906 as amended (7 CFR part 906), regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas. Part 906 (referred to as ''the Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Texas Valley Citrus Committee (Committee) locally administers the Order and is comprised of producers and handlers of oranges and grapefruit operating within the area of production.

The Agricultural Marketing Service (AMS) is issuing this rule in conformance with Executive Orders 12866 and 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 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined that this rule is unlikely to 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, Texas citrus handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable oranges and grapefruit for the 2022–23 fiscal period, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Department of Agriculture (USDA) a petition stating that the order,

any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate for the 2022–23 and subsequent fiscal periods from $0.05 to $0.03 per 7/10-bushel carton or equivalent of oranges and grapefruit.

The Order authorizes the Committee, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are familiar with the Committee's needs and with the costs for goods and services in their local area and are able to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting, and all directly affected persons have an opportunity to participate and provide input.

For the 2021–22 and subsequent fiscal periods, the Committee recommended, and AMS approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other information available to AMS. That regulatory amendment raised the assessment rate from $0.01 per 7/10-bushel carton to its current level of $0.05 per 7/10-bushel carton.

The Committee met on May 24, 2022, and recommended 2022–23 expenditures of $134,970 and an assessment rate of $0.03 per 7/10-bushel carton or equivalent. In comparison, last year's budgeted expenditures were $43,900. The assessment rate of $0.03 is $0.02 lower than the rate currently in effect. The Committee voted to decrease the assessment rate due to an increase in production. The Committee estimates production for 2022–23 fiscal period to be approximately 4 million 7/10-bushel cartons or equivalent, an increase from the 1 million cartons estimated to be produced the previous year. At the current assessment rate, assessment income would equal $200,000, exceeding the Committee's anticipated expenditures of $134,970. By decreasing the assessment rate by $0.02, assessment income will be approximately $120,000. This amount, along with reserve funds and interest income, should provide sufficient funds to meet 2022–23 anticipated expenses.

Major expenditures recommended by the Committee for the 2022–23 year include $66,220 for management expenses, $50,000 for compliance, and $18,750 for administrative expenses. Budgeted expenses for these items in 2021–22 were $20,000, $10,000, and $13,900, respectively.

The assessment rate recommended by the Committee was derived by reviewing anticipated expenses, expected shipments of Texas oranges and grapefruit, and the level of funds in reserve. Orange and grapefruit shipments for the 2022–23 year are estimated at 4,000,000 7/10-bushel cartons or equivalent, which will provide approximately $120,000 in assessment income (4,000,000 cartons multiplied by $0.03). Income derived from handler assessments at the rate newly established by this rule, along with reserve funds and interest income, should be adequate to cover budgeted expenses. Funds in the reserve (currently about $89,126) are expected to be kept within the maximum permitted by the Order (approximately one fiscal period's expenses as authorized in § 906.35).

This assessment rate will continue in effect indefinitely unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. Dates and times of Committee meetings are available from the Committee or AMS. Committee meetings are open to the public and interested persons may express their views at these meetings. AMS evaluates Committee recommendations and other available information to determine whether modification of the assessment rate is needed, and further rulemaking would be undertaken as necessary. The Committee's 2022–23 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by AMS.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this final rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 120 producers of oranges and grapefruit in the production area and 14 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of $3,500,000 or less, and small agricultural service firms are defined as those whose annual receipts are $30,000,000 or less (13 CFR 121.201).

According to data from the National Agricultural Statistics Service (NASS), the weighted average free-on-board price for Texas citrus for the 2019–20 season was approximately $16.20 per 7/10-bushel carton or equivalent with total shipments of around 8.2 million cartons. Based on the number of handlers and the NASS data, handlers have average annual receipts of well below $30 million ($16.20 multiplied by 8.2 million cartons equals $132,840,000, divided by 14 equals $9.5 million).

In addition, based on NASS and Committee data the reported weighted average producer price for the 2020–21 season was around $9.82 per 7/10-bushel carton of Texas citrus with total shipments of around 4.45 million cartons. Based on producer price, shipment data, and the total number of Texas citrus producers, the average annual producer revenue is significantly below $3,500,0000 ($9.82 multiplied by 4.45 million cartons equals $43,699,000 divided by 119 producers equals $367,218). Thus, the majority of Texas citrus handlers and growers may be classified as small entities.

This final rule decreases the assessment rate established for the Committee and collected from handlers for the 2022–23 and subsequent fiscal periods from $0.05 to $0.03 per 7/10-bushel carton or equivalent of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas. The Committee recommended 2022–23 expenditures of $134,970 and an assessment rate of $0.03 per 7/10-bushel carton. The assessment rate of $0.03 is $0.02 less

than the previous rate. The quantity of assessable Texas citrus for the 2022–23 season is estimated at 4 million 7/10-bushel cartons. Thus, the $0.03 rate should provide $120,000 in assessment income. Income derived from handler assessments along with interest income and funds from the Committee's authorized reserve should be adequate to cover budgeted expenses.

Major expenditures recommended by the Committee for the 2022–23 fiscal period include $66,220 for management expenses, $50,000 for compliance, and $18,750 for administrative expenses. Budgeted expenses for these items in 2021–22 were $20,000, $10,000, and $13,900, respectively.

The Committee recommended decreasing the assessment rate based on the 2022–23 estimate of 4 million 7/10-bushel cartons or equivalent, 3 million more than estimated for the previous year. At the current assessment rate of $0.05 and with the 2022–23 crop estimated to be 4 million 7/10-bushel cartons, assessment income would equal $200,000 ($0.05 multiplied by 4 million cartons), an amount exceeding the Committee's anticipated expenditures of $134,970. By decreasing the assessment rate by $0.02, assessment income will be approximately $120,000 ($0.03 multiplied by 4 million cartons). This amount, along with interest income, and funds from the authorized reserve, should provide sufficient funds to meet 2022–23 anticipated expenses.

Prior to arriving at this budget and assessment rate, the Committee considered maintaining the current assessment rate of $0.05. However, leaving the assessment unchanged would generate excess revenue over the Committee's budgeted expenses for the 2022–23 and potentially cause reserve amounts to surpass the limits specified by the Order. Consequently, the Committee determined the assessment rate should be decreased to $0.03 per 7/10-bushel carton and the alternative rejected.

A review of historical information and preliminary information pertaining to the upcoming season indicates that the producer price for the 2022–23 season should be approximately $12.85 per 7/10-bushel carton or equivalent of oranges and grapefruit. The new assessment rate of $0.03 per 7/10-bushel carton or equivalent of oranges and grapefruit represents 0.23 percent of the $12.85 revenue for the 2022–23 fiscal period as a percentage of total producer revenue ($0.03 divided by $12.85 multiplied by 100).

This rule decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers and may also reduce the burden on producers.

The Committee's meeting was widely publicized throughout the Texas citrus industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the May 24, 2022, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons were invited to submit comments on this rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0189, Fruit Crops. No changes in those requirements are necessary as a result of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large Texas oranges and grapefruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

A proposed rule concerning this action was published in the **Federal Register** on November 18, 2022 (87 FR 69208). Copies of the proposed rule were also mailed or sent via email to all Texas citrus handlers. A copy of the proposed rule was made available through the internet by AMS and *https://www.regulations.gov.* A 30-day comment period ending December 19, 2022, was provided for interested persons to respond to the proposal.

One comment was received. The comment did not address the merits of this action. Accordingly, no changes have been made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 906

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 906 as follows:

PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

■ 1. The authority citation for part 906 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 906.235 is revised to read as follows:

§ 906.235 Assessment rate.

On and after August 1, 2022, an assessment rate of $0.03 per 7/10-bushel carton or equivalent is established for oranges and grapefruit grown in the Lower Rio Grande Valley in Texas.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–04809 Filed 3–8–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Doc. No. AMS–SC–22–0053]

Dried Prunes Produced in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Prune Marketing Committee (Committee) to increase the assessment rate established

for the 2022–23 crop year. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective April 10, 2023.

FOR FURTHER INFORMATION CONTACT: Jeremy Sasselli, Marketing Specialist, or Gary Olson, Chief, Western Region Field Office, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, or Email: *Jeremy.Sasselli@usda.gov* or *GaryD.Olson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Agreement No. 110 and Marketing Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes grown in California. Part 993 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of producers and handlers of dried prunes operating within the area of production, and one public member.

The Agricultural Marketing Service (AMS) is issuing this final rule in conformance with Executive Orders 12866 and 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 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This final rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined that this final rule is unlikely to 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 final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, California prune handlers are subject to assessments. Funds to administer the Order are derived from such assessments. The assessment rate is applicable to all assessable dried prunes for the 2022–23 crop year and will continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The Order provides authority for the Committee, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

This final rule increases the assessment rate from $0.28 per ton of assessed dried prunes, the rate that was established for the 2020–21 and subsequent crop years, to $0.33 per ton of assessed dried prunes for the 2022–23 and subsequent crop years.

The Committee met on June 28, 2022, and unanimously recommended 2022–23 crop year expenditures of $26,700 and an assessment rate of $0.33 per ton of assessed dried prunes to fund administrative expenses. In comparison, last year's budgeted expenditures were $26,212. The assessment rate of $0.33 per ton is $0.05 higher than the rate currently in effect. The Committee projects handler receipts of 75,000 tons of assessable dried prunes from the 2022–23 crop year, which is the same level that was projected for the 2021–22 crop year.

Dried prunes harvested in 2022 will be marketed over the course of the 2022–23 crop year, which begins on August 1, 2022. The expected 75,000 tons of assessable dried prunes from the 2022 crop should generate $24,750 in assessment revenue. The $1,950 balance of funds needed to cover budgeted expenditures will come from funds carried over from the previous crop year. The 2022–23 crop year assessment rate increase will be adequate, along with carryover funds, to cover 2022–23 crop year budgeted expenditures.

The crop year is a 12-month period that begins on August 1 of each year and ends on July 31 of the following year. The Committee expects that 2022–23 crop year production will be 75,000 tons of assessable fruit. The Committee used the projected 75,000-ton production estimate in determining its assessment rate recommendation for the 2022–23 crop year.

The major expenditures recommended by the Committee for the 2022–23 crop year include $14,935 for personnel costs, $11,125 for operating expenses, and $640 for reserve for contingencies. Budgeted expenditures for the 2021–22 crop year were $14,025, $12,000, and $187, respectively.

The Committee derived the recommended assessment rate by considering anticipated crop year expenses, actual prune tonnage received by handlers during the 2021–2022 crop year, and the anticipated funds that will be carried over into the new crop year. Income derived from handler assessments and the balance carried over from the previous crop year is expected to be adequate to cover budgeted expenses. The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings

are available from the Committee or AMS. Committee meetings are open to the public and interested persons may express their views at these meetings. AMS will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's budget for subsequent crop years would be reviewed and, as appropriate, approved by AMS.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of dried prunes in the production area and 27 handlers subject to regulation under the Order. The SBA threshold for producers and handlers changed after the publication of the proposed rule. Thus, AMS changed the thresholds to reflect the new SBA thresholds in this final rule. The changes do not impact AMS's ultimate determination regarding the impact of the rule on small entities. Small agricultural producers of prunes are defined by the Small Business Administration (SBA) as those having annual receipts less than $3,500,000, and small agricultural service firms are defined as those whose annual receipts are less than $34,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the average producer price for California dried prunes for the 2021 crop was $2,000 per ton. NASS further reported 2021 crop year production for California dried prunes was 74,000 tons. The estimated total 2021–22 crop year value of California dried punes is $148,000,000 (74,000 tons times $2,000 per ton equals $148,000,000). Dividing the estimated total crop value by the estimated number of producers (600) yields an estimated average receipt per producer of $246,667, which is considerably lower than the $3,500,000 SBA small agricultural producer threshold.

In addition, according to USDA Market News data, the reported average terminal market price for 2021 for California dried prunes was $38.93 per carton. Dividing the average carton price by the 28-pound carton size yields an estimated price per pound of $1.39 ($38.93 average price divided by 28 pounds). Multiplying $1.39 per pound by 2,000 pounds yields $2,780 per ton, which, when multiplied by total estimated 2021 production of 74,000 tons, yields estimated total handler receipts of $205,720,000. Dividing this figure by the 27 regulated handlers yields estimated average annual handler receipts of $7,619,259, well below the $34 million SBA threshold for small agricultural service firms. Therefore, using the above data, the majority of producers and handlers of California dried prunes may be classified as small entities.

This final rule increases the assessment rate collected from handlers for the 2022–23 and subsequent crop years from $0.28 to $0.33 per ton of assessable dried prunes. The Committee unanimously recommended 2022–23 crop year expenditures of $26,700 and an assessment rate of $0.33 per ton. The assessment rate of $0.33 is $.05 higher than the assessment rate currently established. The Committee expects the industry to handle 75,000 tons during the 2022–23 crop year. Income derived from the $0.33 per ton assessment rate, along with funds carried over from the previous crop year, should be adequate to meet the 2022–23 crop year's budgeted expenditures. The Committee expects $1,950 to be carried over into the 2022–23 crop year, which begins August 1, 2022.

The major expenditures recommended by the Committee for the 2022–23 crop year include $14,935 for personnel costs, $11,125 for operating expenses, and $640 for contingency reserve. Budgeted expenses for these items during the 2021–22 crop year were $14,025 for personnel costs, $12,000 for operating expenses, and $187 for contingency reserve. The Committee deliberated the budget categories and decreased their budget for office supplies and expenses to account for the 2022–23 crop year being a non-election year, therefore requiring fewer office supplies. Overall, the 2022–23 crop year budget of $26,700 is $488 more than the $26,212 budgeted for the 2021–22 crop year.

Prior to arriving at this budget and assessment rate, the Committee considered information from various sources including the Committee's Executive, Marketing, Inspection, and Research subcommittees. Alternate expenditure levels were discussed by these groups, based upon the relative value of various projects to the dried prune industry and the expected dried prune production. The assessment rate of $0.33 per ton of assessable dried prunes was derived by considering anticipated expenses, the projected volume of assessable dried prunes, the current monetary balance expected to be carried into the upcoming crop year, and additional pertinent factors.

A review of NASS information indicates that the average producer price for the 2021–22 crop year was $2,000 per ton and the estimated quantity of assessable dried prunes harvested in the 2021–22 crop year is 74,000 tons, which yields a total estimated producer revenue of $148,000,000 ($2,000 multiplied by 74,000 tons). Therefore, utilizing the increased assessment rate of $.33 per ton, assessment revenue for the 2021–22 crop year, as a percentage of total producer revenue, will be approximately 1.65 percent ($0.33 multiplied by 74,000 tons divided by $148,000,000 multiplied by 100).

This final rule increases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs are expected to be offset by the benefits derived by the operation of the Order.

The Committee's meetings are widely publicized throughout the production area. The dried prune industry and all interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the June 28, 2022, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. In addition, interested persons were invited to submit comments on the proposed rule, including the regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178 Vegetable and Specialty Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule would not impose any additional reporting or recordkeeping requirements on either small or large

California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

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

A proposed rule concerning this action was published in the **Federal Register** on November 7, 2022 (87 FR 66958). Copies of the proposed rule were also mailed or sent via email to all handlers of prunes produced in California. The proposal was made available through the internet by AMS and *https://www.regulations.gov.* A 30-day comment period ending December 7, 2022, was provided for interested persons to respond to the proposal. One comment in favor of the proposal was received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plum, Prunes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 993 is amended as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

■ 1. The authority citation for part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 993.347 is revised to read as follows:

§ 993.347 Assessment rate.

On and after August 1, 2022, an assessment rate of $0.33 per ton of salable dried prunes is established for California dried prunes.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–04810 Filed 3–8–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1222

[Doc. No. AMS–SC–22–0050]

Harmonized Tariff Schedule Numbers for the Paper and Paper-Based Packaging Products

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This final rule updates the Harmonized Tariff Schedule (HTS) numbers for paper and paper-based packaging products in the Paper and Paper-Based Packaging Promotion, Research, and Information Order (Order). In addition, this action adds new language that allows assessment collection to continue even if HTS numbers change in the future. The Paper and Packaging Board (Board) administers the Order with oversight by the Agricultural Marketing Service (AMS).

DATES: Effective March 10, 2023.

FOR FURTHER INFORMATION CONTACT: Marlene Betts, Marketing Specialist, or Alexandra Caryl, Branch Chief, Mid-Atlantic Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Room 1406–S, Stop 0244, Washington, DC 20250–0244; Telephone: (202) 720–5057; or Email: *Marlene.Betts@usda.gov* or *Alexandra.Caryl@usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule is issued under the Order (7 CFR part 1222). The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

Executive Orders 12866 and 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 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

Executive Order 13175

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. AMS has assessed the impact of this final rule on Indian Tribes and determined that this rulemaking would not have Tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with Tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about the changes to the regulations will be shared during an upcoming quarterly call, and Tribal leaders will be informed about the revisions to the regulation. AMS will work with the Office of Tribal Relations to ensure meaningful consultation is provided as needed with regards to this change to the Order.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act (7 U.S.C. 7418), a person subject to an order may file a written petition with U.S. Department of Agriculture (USDA) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which

the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

Background

The Paper and Paper-Based Packaging Promotion, Research, and Information Order (Order) took effect in January 2014 (79 FR 3696), and assessment collection began in March 2014 for paper and paper-based packaging. The program is funded by assessments on manufacturers and importers of 100,000 short tons or more of paper and paper-based packaging per year. The assessments are used for projects to promote paper and paper-based packaging. This final rule updates the Harmonized Tariff Schedule (HTS) numbers for paper and paper-based packaging products. This action also adds verbiage that allows the collection of assessments to continue even if HTS numbers change in the future. Updates to the HTS numbers and the additional verbiage are necessary to ensure that importers are being assessed appropriately.

These changes ensure that importers are being assessed on the same products as domestic manufacturers. These changes were recommended by the Board at its meeting on June 21, 2022. The Board was unanimously in favor of these recommendations. AMS agrees to update the HTS numbers.

Update HTS Numbers

Sections 1222.46(p) of the Order allows for the Board to recommend amendments to the Order as the Board considers appropriate. The Board reviewed the current HTS numbers after noting that several changes made by the U.S. International Trade Commission (USITC) are not reflected in the Order's current HTS numbers. Therefore, this action updates the Order's HTS numbers, bringing them in-line with the most current HTS numbers as provided by the USITC.[1] In addition, this action adds verbiage that allows the collection of assessments to continue even if HTS numbers change in the future.

Section 1222.52(e) is updated to include language that allows the Board to continue to collect assessments in the event the USITC makes future changes to any HTS number by merely replacing a previous number. In addition, the list of HTS numbers in the table for assessments on importers of paper and paper-based packaging are all updated in the Order to coincide with the most current HTS numbers as provided by USITC.

Final Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of the final rule on small entities. Accordingly, AMS has considered the economic impact of this action on such entities.

The purpose of the RFA is to fit regulatory action to scale of businesses subject to such action so that small businesses will not be disproportionately burdened. The Small Business Administration defines small agricultural service firms as those having annual receipts of no more than $30 million (13 CFR part 121). Manufacturers and importers would be considered agricultural service firms.

According to the Board, there are approximately 50 manufacturers in the United States that produce the types of paper and paper-based packaging covered under the Order. Using an average price of $1,165 per short ton,[2] a manufacturer who produces less than about 25,760 short tons of paper and paper-based packaging per year would be considered a small entity. The Board estimates that no manufacturers produced less than 25,760 short tons in 2021; thus, no domestic manufacturers would be considered small businesses.

Based on U.S. Customs and Border Protection (Customs) data, there were 3,020 importers of paper and paper-based packaging in 2021. Of these, 34 importers, or 1 percent, had annual receipts of more than $30 million of paper and paper-based packaging. Thus, most importers would be considered small entities.

The final rule updates the Order's HTS numbers, bringing them in-line with the most current HTS numbers as provided by the USITC. In addition, this action adds verbiage that allows the Board to continue to collect assessments even if HTS numbers change in the future.

This rulemaking does not impose additional recordkeeping requirements on manufacturers and importers of paper and paper-based packaging. There are no Federal rules that duplicate, overlap, or conflict with this final rule. In accordance with OMB regulations (5 CFR part 1320) that implements the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are imposed by the Order have been previously approved under OMB control number 0581–0093. This rulemaking does not result in a change to the information collection and recordkeeping requirements previously approved.

Regarding outreach efforts, the Board discussed this action during Board meetings in 2022. The Board members unanimously approved the changes to the HTS numbers to bring them in accordance with the USITC numbers and ensure that assessments on domestic manufacturers are the same as assessments on imports. In addition, all of the Board's meetings are open to the public and interested persons are invited to participate and express their views.

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

AMS has determined that this final rule is consistent with and would effectuate the purpose of the 1996 Act.

A proposed rule concerning this action was published in the **Federal Register** on November 7, 2022 (87 FR 66960). A 30-day comment period ending December 7, 2022, was provided to allow interested person to respond to the proposal. The proposal was made available through the internet by AMS and the Office of the Federal Register. No comments were received. Accordingly, no changes were made to the rule as proposed.

List of Subjects in 7 CFR Part 1222

Administrative practice and procedure, Advertising, Labeling, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 1222 as follows:

PART 1222—PAPER AND PAPER-BASED PACKAGING PROMOTION, RESEARCH, AND INFORMATION ORDER

■ 1. The authority citation for part 1222 continues to read as follows:

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

■ 2. In § 1222.52, revise paragraph (e) to read as follows:

§ 1222.52 Assessment.

* * * * *

[1] *https://hts.usitc.gov/current* Chapter 48.

[2] No domestic market pricing information for paper and paper-based packaging was publicly available; instead, average prices were estimated using export data from the U.S. Census Bureau.

(e) Each importer of paper and paper-based packaging shall pay through Customs to the Board an assessment on the paper and paper-based packaging imported into the United States identified in the Harmonized Tariff Schedule of the United States (HTSUS) number listed in the following table. In the event that any HTSUS number subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the description of the paper and paper-based packaging involved, assessments will continue to be collected based on the new number.

TABLE 1 TO § 1222.52(e)

Paper and paper-based packaging	Assessment $/kg
4802.54.1000	$0.000386
4802.54.3100	0.000386
4802.54.5000	0.000386
4802.54.6100	0.000386
4802.55.1000	0.000386
4802.55.2000	0.000386
4802.55.4000	0.000386
4802.55.6000	0.000386
4802.55.7020	0.000386
4802.55.7040	0.000386
4802.56.1000	0.000386
4802.56.2000	0.000386
4802.56.4000	0.000386
4802.56.6000	0.000386
4802.56.7020	0.000386
4802.56.7050	0.000386
4802.56.7090	0.000386
4802.57.1000	0.000386
4802.57.2000	0.000386
4802.57.4000	0.000386
4802.57.4020	0.000386
4802.57.4040	0.000386
4802.57.4090	0.000386
4802.58.1000	0.000386
4802.58.2020	0.000386
4802.58.2040	0.000386
4802.58.2080	0.000386
4802.58.5000	0.000386
4802.58.6020	0.000386
4802.58.6040	0.000386
4802.61.1000	0.000386
4802.61.2000	0.000386
4802.61.3110	0.000386
4802.61.3135	0.000386
4802.61.3191	0.000386
4802.61.5000	0.000386
4802.61.6020	0.000386
4802.61.6040	0.000386
4802.62.1000	0.000386
4802.62.2000	0.000386
4802.62.3000	0.000386
4802.62.5000	0.000386
4802.62.6120	0.000386
4802.62.6140	0.000386
4802.69.1000	0.000386
4802.69.2000	0.000386
4802.69.3000	0.000386
4804.11.0000	0.000386
4804.19.0000	0.000386
4804.21.0000	0.000386
4804.29.0000	0.000386
4804.31.4020	0.000386
4804.31.4040	0.000386
4804.31.6000	0.000386
4804.39.4020	0.000386
4804.39.4049	0.000386
4804.39.6020	0.000386
4804.39.6040	0.000386
4804.41.2000	0.000386
4804.41.4000	0.000386
4804.42.0010	0.000386
4804.42.0020	0.000386
4804.42.0030	0.000386
4804.42.0040	0.000386
4804.42.0050	0.000386
4804.49.0000	0.000386
4804.51.0000	0.000386
4804.52.0010	0.000386
4804.52.0020	0.000386
4804.52.0030	0.000386
4804.52.0040	0.000386
4804.52.0050	0.000386
4804.59.0000	0.000386
4805.11.0000	0.000386
4805.12.1000	0.000386
4805.12.2000	0.000386
4805.19.1000	0.000386
4805.19.2000	0.000386
4805.24.5000	0.000386
4805.24.7000	0.000386
4805.24.9000	0.000386
4805.25.0000	0.000386
4805.91.1010	0.000386
4805.91.9000	0.000386
4805.92.4010	0.000386
4805.92.4030	0.000386
4805.93.4010	0.000386
4805.93.4030	0.000386
4805.93.4050	0.000386
4805.93.4060	0.000386
4807.00.9100	0.000386
4807.00.9400	0.000386
4810.13.1120	0.000386
4810.13.1140	0.000386
4810.13.1900	0.000386
4810.13.2010	0.000386
4810.13.2090	0.000386
4810.13.5000	0.000386
4810.13.6000	0.000386
4810.13.7020	0.000386
4810.13.7040	0.000386
4810.14.1120	0.000386
4810.14.1140	0.000386
4810.14.1900	0.000386
4810.14.2010	0.000386
4810.14.2090	0.000386
4810.14.5000	0.000386
4810.14.6000	0.000386
4810.14.7020	0.000386
4810.14.7040	0.000386
4810.19.1100	0.000386
4810.19.1900	0.000386
4810.19.2010	0.000386
4810.19.2090	0.000386
4810.22.1000	0.000386
4810.22.5044	0.000386
4810.22.5080	0.000386
4810.22.6000	0.000386
4810.22.7020	0.000386
4810.22.7040	0.000386
4810.29.1025	0.000386
4810.29.1035	0.000386
4810.29.5000	0.000386
4810.29.6000	0.000386
4810.29.7020	0.000386
4810.29.7025	0.000386
4810.29.7035	0.000386
4810.31.1020	0.000386
4810.31.1040	0.000386
4810.31.3000	0.000386
4810.31.6500	0.000386
4810.32.1020	0.000386
4810.32.1040	0.000386
4810.32.1060	0.000386
4810.32.3000	0.000386
4810.32.6500	0.000386
4810.39.1200	0.000386
4810.39.1400	0.000386
4810.39.3000	0.000386
4810.39.6500	0.000386
4810.92.1225	0.000386
4810.92.1235	0.000386
4810.92.6525	0.000386
4810.92.6535	0.000386
4810.99.1050	0.000386
4810.99.6500	0.000386
4811.51.2010	0.000386
4811.51.2020	0.000386
4811.51.2030	0.000386
4811.59.4020	0.000386
4811.90.8030	0.000386

* * * * *

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–04610 Filed 3–8–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0245; Airspace Docket No. 19–AAL–49]

RIN 2120–AA66

Establishment of United States Area Navigation (RNAV) Route T–380; Emmonak, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, delay of effective date.

SUMMARY: This action delays the effective date of a final rule published in the **Federal Register** on November 28, 2022, establishing area navigation (RNAV) route T–380 in the vicinity of Emmonak, AK. The FAA is delaying the effective date to allow sufficient time for completion of the required flight inspection of the route.

DATES: The effective date of the final rule published on November 28, 2022

(87 FR 72871) is delayed until further notice. The FAA will publish a document in the **Federal Register** announcing the new effective date. The Director of the Federal Register approved this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

Background

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2022–0245 (87 FR 72871, November 28, 2022), establishing RNAV route T–380 in the vicinity of Emmonak, AK. The effective date for that final rule is April 20, 2023. Subsequent to the final rule, it was determined that the required flight inspection of T–380 was not completed due to weather conditions. The onset of winter weather conditions in Alaska will further impact the completion of flight inspections.

To facilitate the safe and continuous use of existing air traffic procedures and allow sufficient time for completion of the required flight inspection of route T–380, the effective date of this rule is delayed until further notice. The FAA will publish a document in the **Federal Register** announcing the new effective date.

Delay of Effective Date

Accordingly, pursuant to the authority delegated to me, the effective date of the final rule, Airspace Docket No. 19–AAL–49, as published in the **Federal Register** on November 28, 2022 (87 FR 72871), is hereby delayed until further notice.

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

* * * * *

Issued in Washington, DC, on March 3, 2023.

Brian Konie,

Acting Manager, Airspace Rules and Regulations.

[FR Doc. 2023–04769 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31474; Amdt. No. 4049]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPS) and associated Takeoff Minimums and Obstacle Departure procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective March 9, 2023. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 9, 2023.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30. 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg. 26, Room 217, Oklahoma City, OK 73099. Telephone (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, 8260–15B, when required by an entry on 8260–15A, and 8260–15C.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers or aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the typed of SIAPS, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff

Minimums and/or ODPs as identified in the amendatory language for Part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flights safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Lists of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on February 17, 2023.

Thomas J. Nichols,

Manager, Aviation Safety, Flight Standards Service, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 23 March 2023

Cape Girardeau, MO, KCGI, Takeoff Minimums and Obstacle DP, Amdt 10

Effective 20 April 2023

Colusa, CA, O08, Takeoff Minimums and Obstacle DP, Orig-B
Tampa, FL, KTPA, ILS OR LOC RWY 19L, ILS RWY 19L (SA CAT I), ILS RWY 19L (CAT II), Amdt 41
Blairsville, GA, KDZJ, RNAV (GPS) RWY 8, Amdt 1
Blairsville, GA, KDZJ, Takeoff Minimums and Obstacle DP, Amdt 1
Greensboro, GA, KCPP, LOC RWY 25, Amdt 3F
Greensboro, GA, KCPP, RNAV (GPS) RWY 7, Amdt 1G
Greensboro, GA, KCPP, RNAV (GPS) RWY 25, Amdt 2B
Greensboro, GA, KCPP, Takeoff Minimums and Obstacle DP, Amdt 3A
Greensboro, GA, KCPP, VOR–B, Amdt 3B
Portland, IN, KPLD, RNAV (GPS) RWY 9, Amdt 2A
Rochester, MN, KRST, RADAR–1, Amdt 9
Rochester, MN, KRST, RNAV (GPS) RWY 3, Amdt 3E
Rochester, MN, KRST, RNAV (GPS) RW 21, Amdt 2E
Rochester, MN, KRST, Takeoff Minimums and Obstacle DP, Orig–A
Fort Leonard Wood, MO, KTBN, RNAV (GPS) RWY 33, Amdt 2
Hazen, ND, KHZE, RNAV (GPS) RWY 15, Amdt 1B
Hazen, ND, KHZE, RNAV (GPS) RWY 33, Amdt 1B
Hazen, ND, KHZE, Takeoff Minimums and Obstacle DP, Amdt 1
Newark, NJ, KEWR, GLS RWY 22L, Amdt 1A
Rochester, NY, KROC, ILS OR LOC RWY 22, Amdt 9
Allentown, PA, KABE, VOR–A, Amdt 10A, CANCELED
Fort Worth, TX, KAFW, ILS OR LOC RWY 16L, ILS RWY 16L (CAT II), ILS RWY 16L (CAT III), Amdt 8
Fort Worth, TX, KAFW, ILS OR LOC RWY 34R, Amdt 8
Houston, TX, KIAH, GLS RWY 26R, Amdt 2A

[FR Doc. 2023–04803 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31475; Amdt. No. 4050]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective March 9, 2023. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 9, 2023.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South

MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg. 26, Room 217, Oklahoma City, OK 73099. Telephone: (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary. This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for Part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on February 17, 2023.

Thomas J. Nichols,

Manager, Aviation Safety, Flight Standards Service, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title CFR part 97, is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
23–Mar–23 ...	CT	Bridgeport	Bridgeport/Sikorsky	2/4101	2/6/23	RNAV (GPS) RWY 24, Amdt 1A.
23–Mar–23 ...	CT	Bridgeport	Bridgeport/Sikorsky	2/4102	2/6/23	RNAV (GPS) RWY 6, Amdt 1A.
23–Mar–23 ...	CT	Bridgeport	Bridgeport/Sikorsky	2/4103	2/6/23	ILS OR LOC RWY 6, Amdt 10A.
23–Mar–23 ...	CT	Bridgeport	Bridgeport/Sikorsky	2/4106	2/6/23	RNAV (GPS) RWY 29, Amdt 2A.
23–Mar–23 ...	IA	Iowa City	Iowa City Muni	2/9840	1/12/23	RNAV (GPS) RWY 30, Amdt 1A.
23–Mar–23 ...	IA	Iowa City	Iowa City Muni	2/9848	1/12/23	VOR–A, Orig-D.
23–Mar–23 ...	NE	Grant	Grant Muni	3/9556	2/6/23	NDB RWY 33, Amdt 3C.
23–Mar–23 ...	NE	Grant	Grant Muni	3/9557	2/6/23	VOR/DME RWY 15, Amdt 2B.
23–Mar–23 ...	NE	Grant	Grant Muni	3/9558	2/6/23	RNAV (GPS) RWY 33, Amdt 1A.
23–Mar–23 ...	NE	Grant	Grant Muni	3/9559	2/6/23	RNAV (GPS) RWY 15, Amdt 1A.
23–Mar–23 ...	NJ	Millville	Millville Muni	3/9570	2/6/23	RNAV (GPS) RWY 32, Orig-F.
23–Mar–23 ...	NJ	Millville	Millville Muni	3/9571	2/6/23	ILS OR LOC RWY 10, Amdt 2F.
23–Mar–23 ...	NJ	Millville	Millville Muni	3/9572	2/6/23	RNAV (GPS) RWY 10, Orig-C.
23–Mar–23 ...	NJ	Millville	Millville Muni	3/9573	2/6/23	RNAV (GPS) RWY 14, Orig-G.
23–Mar–23 ...	NJ	Millville	Millville Muni	3/9574	2/6/23	RNAV (GPS) RWY 28, Orig-C.
23–Mar–23 ...	NJ	Millville	Millville Muni	3/9575	2/6/23	VOR–A, Amdt 1C.

[FR Doc. 2023–04804 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9953]

RIN 1545–BQ09

Recapture of Excess Employment Tax Credits Under the American Relief Plan Act of 2021; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations; correcting amendments.

SUMMARY: This document contains corrections to a temporary regulation (TD 9953) that was published in the **Federal Register** on September 10, 2021. These temporary regulations authorize the assessment of any erroneous refund of the tax credits paid under sections 3131, 3132 (including any increases in those credits under section 3133), and 3134 of the Code.

DATES: These corrections are effective on March 9, 2023 and applicable on September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, NaLee Park, at (202) 317–6798 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations (TD 9953) that are the subject of these corrections are under sections 3131, 3132, and 3134 of the Internal Revenue Code.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Correction of Publication

Accordingly, 26 CFR part 31 is corrected by making the following correcting amendments:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

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

Authority: 26 U.S.C. 7805.

§ § 31.3131–1T(c), 31.3132–1T(c), 31.3134–1T(c) [Amended]

■ 2. Sections 31.3131–1T(c), 31.3132–1T(c), and 31.3134–1T(c) are amended by removing the language ''3121(a)'' and adding the language ''3221(a)'' in its place.

Oluwafunmilayo A. Taylor,

Branch Chief, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2023–04828 Filed 3–8–23; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2022–0785, FRL–10210–02–R2]

Approval and Promulgation of Implementation Plans; New Jersey; Motor Vehicle Enhanced Inspection and Maintenance Program; Diesel Opacity Cutpoints

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the State Implementation Plan (SIP) submitted by the New Jersey Department of Environmental Protection (NJDEP) in 2009 for New Jersey's motor vehicle inspection and maintenance (I/M) program. This final rule will maintain consistency between the State adopted rules and the federally approved New Jersey SIP. The EPA proposed to approve this rule on October 20, 2022, and received no comments.

DATES: This final rule is effective April 10, 2023.

ADDRESSES: The EPA has established a docket for this action identified by Docket ID Number EPA–R02–OAR–2022–0785 at *https://www.regulations.gov.* 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 electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Reema Loutan, Technology, Transportation, and Radiation Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3760, or by email at *Loutan.Reema@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What is the background for this action?
II. What comments were received in response to the EPA's proposed action?
III. What action is the EPA taking?
IV. Statutory and Executive Order Reviews

I. What is the background for this action?

The EPA is approving revisions to the New Jersey State Implementation Plan (SIP), submitted by New Jersey on July 20, 2009, pertaining to New Jersey's motor vehicle inspection and maintenance (I/M) program. The SIP revision consists of rules and rule amendments to the New Jersey Department of Environmental Protection's rules at N.J.A.C. Title 7, Chapter 27, Subchapter 14, titled ''Control and Prohibition of Air Pollution from Diesel-Powered Motor Vehicles (Diesel-Powered Motor Vehicle Inspection and Maintenance Program),'' at sections 14.2, 14.4 and 14.6, and related amendments to the ''Sampling and Analytical Procedures'' at N.J.A.C. Title 7, Chapter 27B, Subchapter 4, titled ''Air Test Method 4: Testing Procedures for Diesel-Powered Motor Vehicles,'' at section 4.5. The 2009 submittal consisted of rules and rule amendments regarding diesel opacity cutpoints, visible smoke standards for diesel-powered trucks and buses, and exemptions for emergency vehicles. A subsequent SIP revision for the diesel opacity program was approved by EPA and supersedes the July 20, 2009, SIP revision submittal. *See* 83 FR 21174 (May 9, 2018).

The specific details of New Jersey's SIP submittal and the rationale for the EPA's approval action are explained in the EPA's proposed rulemaking and are not restated in this final action. For this detailed information, the reader is referred to the EPA's October 20, 2022, proposed rulemaking. *See* 87 FR 63743 (October 20, 2022).

II. What comments were received in response to the EPA's proposed action?

The EPA provided a 30-day review and comment period for the October 20, 2022, proposed rule. The comment period ended on November 21, 2022. EPA received no comments on the proposed action.

III. What action is the EPA taking?

The EPA is taking final action to approve the rules and rule amendments to the New Jersey Department of Environmental Protection's rules submitted in the July 20, 2009, SIP revision for N.J.A.C. 7:27–14 and 7:27B–4, with the acknowledgement that this program is superseded by the current New Jersey diesel program that was approved by the EPA on May 9, 2018. *See* 83 FR 21174.

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 the 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 it 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).

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and the Comptroller General of the United States. 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 May 8, 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, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

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

Lisa Garcia,

Regional Administrator, Region 2.

[FR Doc. 2023–04816 Filed 3–8–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2022–0737; FRL–10688–01–OCSPP]

Diglycerol in Pesticide Formulations; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule and correction.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of diglycerol when used as an inert ingredient (plasticizer) on growing crops and raw agricultural commodities pre- and post-harvest. This regulation eliminates the need to establish a maximum permissible level for residues of diglycerol, when used in accordance with the terms of the exemption. This regulation also amends the tolerance

exemption 2,6-pyridinedicarboxylic acid by correcting the CAS Reg. No.

DATES: This regulation is effective March 9, 2023. Objections and requests for hearings must be received on or before May 8, 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–2022–0737, 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 Government Publishing Office's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How 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–2022–0737 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 May 8, 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–2022–0737, 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/dockets/where-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. Petition for Exemption

In the **Federal Register** of September 23, 2022 (87 FR 58047) (FRL–9410–05–OSCPP), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–11673) by RRStewart Consulting, LLC, on behalf of Aicello America Corporation, 182 Nassau Street, Princeton, NJ 08542. The petition requested that 40 CFR 180.910 be amended by establishing an exemption from the requirement of a tolerance for residues of diglycerol (CAS Reg. No. 59113–36–9) when used as an inert ingredient (plasticizer) in pesticide formulations applied to growing crops or raw agricultural commodities pre- and post-harvest. That document referenced a summary of the petition prepared by RRStewart Consulting, LLC, on behalf of Aicello America Corporation, which is available in the docket, *https://www.regulations.gov.* There were no comments received in response to the notice of filing.

On November 23, 2022, (87 FR 71523) (FRL–10400–01–OCSPP), the exemption from the requirement of a tolerance was published for 2,6-pyridinedicarboxylic acid; however, the rule inadvertently included an error in the CAS Reg. No. This document also corrects (CAS Reg. No. 449–83–2) to read (CAS Reg. No. 499–83–2) under 40 CFR 180.910.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

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 tolerance 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 in residential settings but does not include

occupational exposure. When making a safety determination for an exemption for the requirement of a tolerance, FFDCA section 408(c)(2)(B) directs EPA to take into account the considerations in section 408(b)(2)(C) and (D). Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or exemption 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. . . .'' Section 408(b)(2)(D) lists other factors for EPA's consideration in making safety determinations, *e.g.,* the validity, completeness, and reliability of available data, nature of toxic effects, available information concerning the cumulative effects of the pesticide chemical and other substances with a common mechanism of toxicity, and available information concerning aggregate exposure levels to the pesticide chemical and other related substances, among other factors.

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no harm 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(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for diglycerol, including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with diglycerol follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by diglycerol as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

The toxicological database of diglycerol is supported by data regarding glycerol and polyglycerol. EPA has determined that it is appropriate to bridge glycerol and polyglycerol data to assess diglycerol due to similarities in functional groups/structure.

Diglycerol exhibits low levels of acute toxicity via the oral and dermal routes of exposure, and it is anticipated to have low acute inhalation toxicity. Diglycerol is not an acute skin or eye irritant nor a skin sensitizer.

Portal-of-entry effects (squamous metaplasia of the epithelium lining the base of the epiglottis) were observed in the available subchronic inhalation toxicity study. There is no evidence of offspring susceptibility in the available developmental toxicity study or in the 2-generation reproductive toxicity study with the surrogate chemical glycerol. No effects on reproductive parameters were observed in the 2-generation reproductive toxicity study with glycerol. Concern for carcinogenicity is low, based on negative results in mutagenicity and genotoxicity studies and lack of treatment-related neoplastic effects in the available chronic toxicity study in rats. No evidence of neurotoxicity or immunotoxicity was seen in the available studies.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/overview-risk-assessment-pesticide-program.*

The hazard profile of diglycerol is adequately defined. No acute dietary, chronic dietary, incidental oral, or dermal endpoints were selected because no adverse effects were identified following dietary exposure to diglycerol or related compounds. The short-term inhalation endpoints are selected from the inhalation toxicity study in rats, with a no observed adverse effect concentration (NOAEC) of 0.165 mg/L and a lowest observed adverse effect concentration (LOAEC) of 0.66 mg/L, based on squamous metaplasia of the epithelium lining the base of the epiglottis.

C. Exposure Assessment

1. *Dietary exposure.* Dietary exposure (food and drinking water) may occur from consuming food treated with pesticide formulations containing this inert ingredient and from non-pesticidal uses (*e.g.,* personal care products). However, no dietary endpoints of concern were identified, and therefore, a quantitative dietary exposure assessment for diglycerol was not conducted.

Based on the lack of treatment-related tumors in the carcinogenicity study in rats and the lack of mutagenicity in the available *in vitro* studies, diglycerol is considered not likely to be carcinogenic. Therefore, a cancer dietary exposure assessment was not performed.

2. *Residential exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, etc.). Diglycerol may be used as an inert ingredient in pesticide products that are registered for specific uses that may result in residential exposure, such as pesticides used in and around the home. For residential handlers, the Agency assumed handlers may receive short-term dermal and inhalation exposure to diglycerol from formulations containing

the inert ingredient in outdoor and indoor scenarios. However, as dermal endpoints were not selected, margins of exposure (MOEs) were only calculated for inhalation exposure scenarios. For residential handler short-term outdoor and indoor exposure scenarios, inhalation MOEs ranged from 23,000 to 940,000 and are not of concern (*i.e.,* the level of concern (LOC) for inhalation exposure is for MOEs that are less than 100). Residential handler intermediate-term and long-term exposures are not calculated because applications are not expected to occur daily or for more than 30 days.

Residential post-application scenarios include short- and intermediate-term dermal (skin contact with treated surfaces) exposure for adults and children as well as short- and intermediate-term incidental oral exposure for children (hand-to-mouth exposure with treated surfaces). However, no dermal or dietary endpoints were selected for diglycerol and therefore, a post-application exposure assessment was not performed.

3. *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.''

Unlike pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to diglycerol and any other substances, and diglycerol does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance exemption, therefore, EPA has assumed that diglycerol 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.*

D. 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. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) safety factor. In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

Based on the evaluation of available toxicity studies, there is low concern for pre- and postnatal susceptibility for infants and children from exposure to diglycerol. The FQPA safety factor has been reduced to 1X because: (1) the toxicity database is adequate to characterize potential pre- and postnatal risk for infants and children; (2) no developmental or reproductive effects were observed in the available reproduction toxicity and developmental studies; (3) no evidence of neurotoxicity was observed in the database; and (4) the assumptions for the exposure assessment are unlikely to underestimate risk.

E. Aggregate Risks and Determination of Safety

In an aggregate assessment, exposures from relevant sources are added together and compared to quantitative estimates of hazard (*e.g.,* a NOAEL or PAD), or the risks themselves can be aggregated. When aggregating exposures and risks from various sources, EPA considers both the route and duration of exposure.

1. *Acute aggregate risk.* An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. However, there was no hazard attributable to a single exposure seen in the toxicity database for diglycerol. Therefore, diglycerol is not expected to pose an acute aggregate risk.

2. *Short-term aggregate risk.* Short-term aggregate exposure takes into account short-term residential (dermal and inhalation) exposure plus chronic dietary exposure (food and drinking water). However, there was no hazard attributable to chronic dietary or dermal exposure. Therefore, the short-term aggregate risk is equal to the inhalation exposure risk, which is not of concern.

3. *Chronic aggregate risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. However, there was no hazard attributable to chronic dietary exposure. Therefore, diglycerol is not expected to pose a chronic aggregate risk.

4. *Cancer aggregate risk.* EPA has not identified any concerns for carcinogenicity relating to diglycerol. Therefore, diglycerol is not expected to pose a cancer aggregate risk.

5. *Determination of safety.* Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to diglycerol residues. More detailed information on this action can be found in the ''Diglycerol. Human Health Risk Assessment and Ecological Effects Assessment to Support Inert Ingredient Approval for use in Pesticide Formulations'' in docket ID EPA–HQ–OPP–2022–0737.

V. 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.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established for residues of diglycerol (CAS Reg. No. 59113–36–9) when used as an inert ingredient (plasticizer) in pesticide formulations applied to growing crops and raw agricultural commodities pre- and post-harvest under 40 CFR 180.910.

VII. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance 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 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).

VIII. 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: March 3, 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 § 180.910, amend table 1 to 180.910 by:

■ a. Adding in alphabetical order an entry for ''diglycerol'' and

■ b. Revising the entry for ''2,6-Pyridinedicarboxylic acid''.

The addition and revision read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.910

Inert ingredients	Limits	Uses
* * * *	* *	*
Diglycerol (CAS Reg. No. 59113–36–9)		Plasticizer.
* * * *	* *	*
2,6-Pyridinedicarboxylic acid (CAS Reg. No. 499–83–2)	Not to exceed 2 ppm	Stabilizer.
* * * *	* *	*

[FR Doc. 2023–04806 Filed 3–8–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2022–0101; FRL–10739–01–OCSPP]

Mandestrobin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of mandestrobin in or on Vegetable, tuberous and corm, except potato, subgroup 1D. The Interregional Project Number 4 (IR–4) requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective March 9, 2023. Objections and requests for hearings must be received on or before May 8, 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–2022–0101, 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 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, Acting Director, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2022–0101 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 May 8, 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–2022–0101, 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/dockets/where-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. Summary of Petitioned-For Tolerance

In the **Federal Register** of February 25, 2022 (87 FR 10760) (FRL–9410–01–OCSPP), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1E8961) by IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606. The petition requested that 40 CFR 180.690 be amended by establishing tolerances for residues of mandestrobin, 2-[(2,5-dimethylphenoxy)methyl]-α-methoxy-N-methylbenzeneacetamide, in or on the raw agricultural commodity: Vegetable, tuberous and corm, except potato, subgroup 1D at 0.01 parts per million (ppm). That document referenced a summary of the petition prepared by IR–4, the petitioner, which is available in the docket, EPA–HQ–OPP–2022–0101, *https://www.regulations.gov.* One comment was received on the notice of filing. EPA's response to the comment is discussed in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for mandestrobin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with mandestrobin follows.

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections that repeat what has been previously published for tolerance rulemaking of the same pesticide chemical. Where scientific information concerning a particular chemical remains unchanged, the content of those sections would not vary between tolerance rulemaking and republishing the same sections is unnecessary. EPA considers referral back to those sections as sufficient to provide an explanation of the information EPA considered in making its safety determination for the new rulemaking.

EPA has previously published a tolerance rulemaking for mandestrobin in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to mandestrobin and established tolerances for residues of that chemical. EPA is incorporating previously published sections from this rulemaking as described further in this rulemaking, as they remain unchanged.

Toxicological profile. For a discussion of the Toxicological Profile of mandestrobin, see Unit III.A. of the October 11, 2016, final rulemaking (81 FR 70038) (FRL–9945–37).

Toxicological points of departure/Levels of concern. For a summary of the Toxicological Points of Departure/Levels of Concern for mandestrobin used for human risk assessment, please reference Unit III.B. of the October 11, 2016, final rulemaking.

Exposure assessment. Much of the exposure assessment remains the same although updates have occurred to accommodate the exposures from the petitioned-for tolerance. These updates are discussed in this section; for a description of the rest of the EPA approach to and assumptions for the

exposure assessment, please reference Unit III.C. of the October 11, 2016, final rulemaking.

EPA's dietary exposure assessments have been updated to include the additional exposures from the new use of mandestrobin on the commodities in vegetable, tuberous and corm, except potato, subgroup 1D. An unrefined chronic dietary (food and drinking water) exposure and risk assessment was conducted using the Dietary Exposure Evaluation Model software with the Food and Commodity Intake Database (DEEM–FCID) Version 4.02. The chronic assessment used tolerance level residues for all crops and assumed that 100% of the crops were treated with mandestrobin. Empirical processing factors and the Agency's default processing factors were used. An acute dietary exposure assessment was not conducted since there was no adverse effect observed for a single dose of mandestrobin.

Dietary water exposure. The new use does not result in an increase in the estimated residue levels in drinking water, so EPA used the same estimated drinking water concentrations in the chronic dietary assessments as identified in the October 11, 2016, rulemaking.

Non-occupational exposure. There are no residential (non-occupational) exposures expected from the proposed new use of mandestrobin on vegetable, tuberous and corm, except potato, subgroup 1D. However, there are registered uses of mandestrobin on turf grasses that cause non-occupational exposures. EPA's residential exposure assessment has changed since the October 11, 2016, rulemaking. Because all current mandestrobin labels require handlers to wear specific clothing and personal protective equipment, EPA now assumes that mandestrobin is applied by professional applicators, not residential (homeowner) applicators. Therefore, the current assessment does not consider exposure to residential handlers. For residential post-application exposure, only hand-to-mouth exposures for children 1 to less than 2 years old were assessed, as a dermal endpoint was not selected.

Cumulative exposure. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to mandestrobin and any other substances. For the purposes of this action, therefore, EPA has not assumed that mandestrobin has a common mechanism of toxicity with other substances.

Safety factor for infants and children. EPA continues to conclude that there are reliable data to support the reduction of the Food Quality Protection Act (FQPA) safety factor (SF) from 10X to 1X for all risk scenarios. See Unit III.D. of the October 11, 2016, final rulemaking for a discussion of the Agency's rationale for that determination.

Aggregate risks and determination of safety. EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing dietary exposure estimates to the acute population adjusted dose (aPAD) and the chronic population adjusted dose (cPAD). Short-, intermediate-, and chronic term aggregate risks are evaluated by comparing the estimated total food, water, and residential exposure to the appropriate points of departure to ensure that an adequate margin of exposure (MOE) exists.

An acute dietary exposure assessment was not conducted since there was no adverse effect observed for a single dose of mandestrobin. Chronic dietary risks are below the Agency's level of concern of 100% of the cPAD; they are 2.7% of the cPAD for children 1 to 2 years old, the most highly exposed population subgroup.

The short-term aggregate exposure assessment for children 1 to less than 2 years old includes dietary (food and drinking water) and incidental oral exposure from hand-to-mouth activities from post-application exposure to turf applications. The short-term aggregate risk estimate for children 1 to less than 2 years old is an MOE of 2,900, which is greater than the level of concern of 100 and is not of concern. An adult aggregate assessment was not conducted because there are no existing/proposed residential handler scenarios. Since the short- and intermediate-term points of departure (PODs) are the same and short-term exposure estimates are greater than their intermediate-term counterparts, the short-term aggregate risk assessment is protective of the intermediate-term aggregate exposure. An acute aggregate exposure assessment was not required due to no adverse effect observed for a single dose for mandestrobin; and chronic aggregate risks to adults and children are equivalent to the dietary (food and drinking water) risks for those respective assessments and are not of concern.

Mandestrobin is classified as ''not likely to be a human carcinogen'' based on the lack of treatment-related tumors in the combined chronic/oncogenicity rat study or in the carcinogenicity mouse study, and the lack of genotoxicity in an acceptable battery of mutagenicity studies. As a result, EPA concludes that mandestrobin is not likely to pose a cancer risk as a result of aggregate exposure to the pesticide chemical residue.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to mandestrobin residues. More detailed information on this action can be found in the document ''Mandestrobin. Human Health Risk Assessment in support of Proposed Use on Vegetable, Tuberous and Corm, except Potato, Subgroup 1D'' in docket ID EPA–HQ–OPP–2022–0101.

IV. Other Considerations

A. Analytical Enforcement Methodology

For a discussion of the available analytical enforcement method for various crops, see Unit IV.A of the October 11, 2016, rulemaking.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The Codex has not established an MRL for mandestrobin in or on Vegetable, tuberous and corm, except potato, subgroup 1D.

C. Response to Comments

One comment was received in response to the Notice of Filing. The comment stated in part that the Agency should deny this petition because ''nobody is testing these toxic chemicals to see how they affect big eaters over 100 years of life so that we know how they can kil (sic) you.'' Although the Agency recognizes that some individuals believe that pesticides should be banned on agricultural crops, the existing legal framework provided by section 408 of the FFDCA authorizes EPA to establish tolerances when it determines that the tolerance is safe. Upon consideration of the validity, completeness, and reliability of the available data as well as other factors the FFDCA requires EPA to consider, EPA has determined that mandestrobin tolerances are safe. The commenter has provided no information indicating that a safety determination cannot be supported.

V. Conclusion

Therefore, tolerances are established for residues of mandestrobin, in or on Vegetable, tuberous and corm, except potato, subgroup 1D at 0.01 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: March 3, 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 § 180.690, amend table 1 to paragraph (a) by adding in alphabetical order an entry for ''Vegetable, tuberous and corm, except potato, subgroup 1D'' to read as follows:

§ 180.690 Mandestrobin; tolerances for residues.

(a) * * *

TABLE 1 TO PARAGRAPH (a)

Commodity	Parts per million
* * * * * * *	
Vegetable, tuberous and corm, except potato, subgroup 1D	0.01

* * * * *

[FR Doc. 2023–04807 Filed 3–8–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230301–0057]

RIN 0648–BL65

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Framework Adjustment 17 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, and Framework Adjustment 6 to the Bluefish Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This action implements Framework Adjustment 17 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan and Framework Adjustment 6 to the Bluefish Fishery Management Plan. This framework was developed by the Mid-Atlantic Fishery Management Council in conjunction with the Atlantic States Marine Fisheries Commission to revise the process for setting recreational management measures and recreational accountability measures for summer flounder, scup, black sea bass, and bluefish. Recreational management and accountability measures prevent overfishing while balancing recreational fishing opportunities.

DATES: Effective March 9, 2023.

ADDRESSES: Copies of Framework Adjustment 17 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan and Framework Adjustment 6 to the Bluefish Fishery Management Plan, including the Environmental Assessment, the Regulatory Impact Review, and the Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared in support of this action are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The supporting documents are also accessible via the internet at: *https://www.mafmc.org/actions/hcr-framework-addenda.*

FOR FURTHER INFORMATION CONTACT: Emily Keiley, Fishery Policy Analyst, (978) 281–9116, or *emily.keiley@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission) cooperatively manage the summer flounder, scup, black sea bass, and bluefish fisheries. The Council submitted Framework Adjustment 17 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) and Framework Adjustment 6 to the Bluefish FMP (collectively referred to as the Recreational Harvest Control Rule (HCR) Framework) to us for consideration of approval. This final rule approves and implements the Recreational HCR Framework, which establishes a new process for setting recreational measures (*i.e.,* bag, size, and season limits), and modifies the recreational accountability measures (AM). This Framework/Addenda establishes a process for setting recreational measures that: Prevents overfishing; is reflective of stock status; appropriately accounts for uncertainty in the recreational data; takes into consideration angler preferences; and provides an appropriate level of stability and predictability in changes from year to year.

Recreational Management Measure Setting Process: The Percent Change Approach

This action modifies the process for setting recreational management measures for summer flounder, scup, black sea bass, and bluefish, including how to determine when management measures need to be changed, the percent change required if changes are made, and the timing of the overall process. This process will apply to stocks not in a rebuilding plan; when a stock is in a rebuilding plan, recreational measures will be determined based on the requirements of that plan. Bluefish is in a rebuilding plan, so this approach is not currently applicable. The new process, referred to as the Percent Change Approach, uses two factors to determine if recreational management measures can remain status quo, can be liberalized, or must be restricted. These factors are:

1. Comparison of a confidence interval (CI) around an estimate of expected harvest under status quo measures to the average recreational harvest limit (RHL) for the upcoming 2 years; and,

2. Biomass compared to the target level, as defined by the most recent stock assessment.

Considered together, the harvest and biomass comparisons determine the appropriate degree of change, defined as a percentage change in expected harvest, as summarized in Table 1. For example, when the future 2-year average RHL is greater than the upper bound of the harvest estimate CI (*i.e.,* an RHL underage is expected under status quo measures) and biomass is below the target level, measures would be modified to achieve no more than a 10-percent liberalization in harvest. In this scenario, the liberalization is capped at 10 percent even if the difference between the RHL and expected harvest is greater than 10 percent. Note that this is a more conservative approach than the previous process, which would have allowed liberalization up to the full difference between the estimated harvest and the RHL, even for stocks in decline and below the target biomass. Additional information on the process is contained in the proposed rule and is not repeated here.

TABLE 1—MANAGEMENT RESPONSE TABLE

Factors to determine recommended change		Recommended change in harvest
(1) Future RHL vs harvest estimate	(2) Stock biomass compared to the target stock size (B/BMSY)	
Future 2-year average RHL is *greater than* the upper bound of the harvest estimate confidence interval (harvest is expected to be lower than the RHL).	*Very high* (at least 150% of the target stock size).	*Liberalization:* percent based on the difference between the harvest estimate and the 2-year average RHL, not to exceed 40 percent.
	High (between the target and 150% of the target stock size).	*Liberalization:* percent based on the difference between the harvest estimate and the 2-year average RHL, not to exceed 20 percent.
	Low (below the target stock size).	*Liberalization:* 10 percent.

TABLE 1—MANAGEMENT RESPONSE TABLE—Continued

Factors to determine recommended change		Recommended change in harvest
(1) Future RHL vs harvest estimate	(2) Stock biomass compared to the target stock size (B/BMSY)	
Future 2-year average RHL is *within* the confidence interval of the harvest estimate (harvest is expected to be close to the RHL).	*Very high* (at least 150% of the target stock size).	*Liberalization:* 10 percent.
	High (between the target and 150% of the target stock size).	*No change:* 0 percent.
	Low (below the target stock size).	*Reduction:* 10 percent.
Future 2-year average RHL is *less than* the lower bound of the harvest estimate confidence interval (harvest is expected to exceed the RHL).	*Very high* (at least 150% of the target stock size).	*Reduction:* 10 percent.
	High (between the target and 150% of the target stock size).	*Reduction:* percent based on the difference between the harvest estimate and the 2-year average RHL, not to exceed 20 percent.
	Low (below the target stock size).	*Reduction:* percent based on the difference between the harvest estimate and the 2-year average RHL, not to exceed 40 percent.

Key Terms

- *Biomass (B):* The size of a stock of fish measured in weight. For summer flounder, scup, black sea bass, and bluefish, the biomass levels and biomass targets used in management are based on spawning stock biomass.
- *Biomass target (B_{MSY}):* The stock size (B) associated with maximum sustainable yield (MSY), as defined by a stock assessment. MSY is the largest average catch that can be taken from a stock at B_{MSY} over time under existing environmental conditions without negatively impacting the reproductive capacity of the stock.
- *Confidence Interval:* the upper and lower bound around a point estimate to indicate the range of probable values given the uncertainties around the estimate.
- *Recreational Harvest Limit (RHL):* The total allowable annual recreational fishery harvest; set based on information from the stock assessment, considerations about scientific and management uncertainty, allocations between the commercial and recreational sectors, and assumptions about dead discards.

Timing

The previous process considered adjustments to recreational management measures annually. This presented a number of associated challenges, given the timing of Marine Recreational Information Program (MRIP) data availability and the fishing seasons. The Percent Change Approach shifts the timing to a 2-year cycle, adjusting measures in sync with the setting of catch and landings limits in response to updated stock assessment information. Updated stock assessments will be available every other year for all four species. In the interim year, measures will be reviewed, and may be modified if new data suggest a major change in the expected impacts of those measures on the stock or the fishery.

Sunset Provision

The Percent Change Approach to setting recreational management measures is an improvement over the status quo process because it allows for management measures to be set for 2 years, includes the explicit consideration of the best estimate of the current biomass of the stock compared to the target level, and requires the consideration of the variability in harvest estimates. However, the Council and Commission's Policy Board intend for the Percent Change Approach to be an interim process, which will sunset no later than December 31, 2025, with the goal of implementing additional improvements to recreational fisheries management by fishing year 2026. These improvements will be developed through a separate, future management action. In the absence of additional action to revise the recreational management measure-setting process or continue the Percent Change Approach by the sunset date, the process for establishing recreational measures will revert to the methodology previously used by the Council, which is part of the FMP but not set forth in regulatory text.

Recreational Accountability Measures

When a reactive AM has been triggered by a recreational Annual Catch Limit (ACL) overage and the most recent biomass estimate is between the target and the threshold, consideration would also be given to the most recent estimate of fishing mortality (F) relative to the fishing mortality associated with MSY (F_{MSY}) in the year(s) when the overage(s) occurred. The AM response would be more restrictive if F_{MSY} was exceeded in addition to the ACL (*e.g.,* a payback would be required). If only the recreational ACL was exceeded but not F_{MSY}, the AM response would be less strict (*e.g.,* measures would be revised but a payback would not be required).

Estimates of fishing mortality during the years relevant to the evaluation may not always be available as these estimates are provided through the stock assessment, which is not updated every year. When the relevant fishing mortality estimates are not available, this comparison would default to a comparison of total catch relative to the ABC.

These recreational accountability measures will not sunset in 2025.

Comments and Responses

We received 10 comments on the proposed rule. Five individuals provided comments on specific State recreational regulations and how these regulations were too restrictive, have resulted in economic hardship, and have eroded trust in the fishery management process. One individual also suggested imposing more restrictions on the commercial fishery. These comments are not directly relevant to the rulemaking and are not discussed further. One comment letter from five organizations (the American Sportfishing Association, Center for Sportfishing Policy, Coastal Conservation Association, Congressional Sportsmen's Foundation, and the National Marine Manufacturers Association) supported the implementation of the framework. One individual and four conservation organizations (Conservation Law Foundation, Natural Resources Defense Council, Ocean Conservancy, and the Marine Fish Conservation Network), through three comment letters, opposed the implementation of the framework. These letters primarily asserted that the

Percent Change Approach violated National Standards 1, 2, and 4; responses to the specific issues raised in these comments are provided below.

One of the major themes of the comments in opposition to the implementation of the framework was that the Percent Change Approach is an attempt to circumvent the system of Annual Catch Limits (ACL), increasing the risk of overfishing, and creating a *de facto* reallocation of quota to the recreational sector. The nature of these comments suggest there is a misunderstanding of the purpose and intent of this rule. The framework, and the Percent Change Approach as currently configured, is intended to be an interim approach to setting recreational management measures (*i.e.,* bag, size, and season) while the Council and Board continue to work on a number of recreational management issues, including a continued evaluation of how to set recreational management measures, recreational accountability and reporting, and how best to manage the private and for-hire components of the fishery. The Percent Change Approach implemented by this final rule will sunset no later than December 31, 2025, and will either be replaced by a new process or the previous approach to setting recreational management measures will be reinstated.

The Percent Change Approach is not intended to, and does not, eliminate the system of ACLs. We will, through the Council process, continue to set an Allowable Biological Catch (ABC), ACLs, and an RHL for all four species. The Percent Change Approach does not eliminate the use of the RHL. In fact, the evaluation of projected harvest compared to the upcoming RHLs remains a critical component of the process. The intent of the Percent Change Approach is to iteratively adjust measures as necessary to prevent overfishing and more closely monitor the impact that recreational harvest has on a stock. The potential annual adjustments are constrained within certain percentages in order to minimize the social and economic impact of the large adjustments sometimes implemented under the previous system that were driven by large statistical fluctuations in the data used to estimate catch. Recreational data are highly variable and uncertain due, in part, to the sampling protocols used to separately collect effort and catch data. Catch estimates, even under consistent management measures, vary substantially from year to year. An effective system of managing the recreational fishery needs to acknowledge and address this variability and uncertainty. From 2018 to 2021, recreational management measures for summer flounder, scup, and black sea bass remained unchanged, yet the estimated harvest varied by as much as 45 percent from year to year. For example, estimated black sea bass recreational catch ranged from 10.20 million lb to 16.17 million lb (4,626 to 7,335 metric tons) from 2018 to 2021 despite nearly all management measures remaining the same. Such significant differences in estimated catch under the same management measures (input controls) has made setting management measures in a manner that will precisely reach, but not exceed, a specific catch limit in any given year extremely challenging. Reacting to these large, uncertain swings in estimated harvest, by liberalizing or reducing those management controls in the subsequent year in an attempt to achieve a specific harvest target, has been unsuccessful by all standards. This has been particularly difficult with robust stocks, such as scup and black sea bass, which continue to grow even in situations where harvest has exceeded previously set limits. Such stocks that are readily and widely available to the recreational fishery because of their high abundance will continue to be harvested, even with very restrictive management measures, and the current recreational measures-setting process will continue to chase a target that becomes ever more difficult to reach. The Percent Change Approach allows managers to consider additional scientific information when setting recreational measures beyond simply an uncertain catch estimate, to achieve optimum yield. Based on an evaluation of the current harvest levels compared to the upcoming RHLs, and the biomass relative to the target, the Percent Change Approach prescribes the degree of change necessary to be achieved by the recreational management measures. When a stock is at a low biomass (below the biomass target) the management responses are more precautionary. For example, even when harvest is expected to be close to the upcoming RHL, a 10-percent reduction is required for a stock in the low biomass category. For stocks with a very high biomass (at least 150 percent of the biomass target), a liberalization of no more than 10 percent would be allowed when harvest is close to the RHL. When harvest is expected to be higher than the RHL, a reduction is required regardless of stock size, but it may be more significant for stocks at lower stock sizes (a 10-percent reduction is required for stocks at very high biomass, and stocks at a high and low biomass are required to take a reduction based on the difference between the harvest estimate and RHL). This is because the conservation risk associated with overages is greater for stocks that are less abundant, whereas stocks that are well above their target biomass are more robust to higher levels of fishing mortality. The overall goal of the Percent Change Approach is to iteratively adjust management measures to achieve the RHL, while minimizing potential overreaction (overcorrection) to annual variability in the harvest estimates.

National Standard 1

National Standard 1 states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

Comment 1: Three comments expressed concern about the ''disconnect'' between the process for setting recreational management measures, the recreational ACL, and RHL. One comment suggested that the framework, ''. . . seeks to circumvent the well-established framework for annual catch limits that Congress mandated for all Federal fisheries in the 2006 reauthorization of the Magnuson-Stevens Act''.

Response: As stated above, the Percent Change Approach does not eliminate the recreational ACL or RHL, and continues to use both in the process of setting measures, and evaluating accountability measures. The approach in this rule attempts to balance the need to constrain harvest in order to prevent overfishing while acknowledging that recreational catch estimates are uncertain and often highly variable. The Percent Change Approach makes incremental adjustments and reduces the tendency of management measures to ''chase'' after the highs and lows, by either liberalizing or restricting measures too much in any given year in reaction to swings in catch estimates. The rule's approach also builds in more precaution for stocks at lower biomass levels (biomass levels and the target are taken directly from the approved and peer-reviewed stock assessment that occur every other year for all four species). Consider that when a stock biomass is in decline, it often becomes less available to the recreational fishery and, therefore, catch estimates may decline relative to the RHL; prior to this rule, management measures would be liberalized, sometimes significantly, while catch fell due to a declining biomass, increasing fishing pressure on a declining stock. Conversely, as healthy stocks increase, sometimes far above the

target biomass level, such as with black sea bass and scup, the fish become more available to the fishery, even under restrictive measures, resulting in catch estimates that exceed the RHL. However, what appear to be overages often have no negative impact on abundant stocks as we continue to see increases in biomass through a subsequent stock assessment.

The comment letters focused on the scenario where a stock is at a very high biomass (150 percent or more above the biomass target) and the harvest is projected to be greater than the upcoming RHL. This is the ''bin'' that black sea bass falls into for 2023—and it therefore requires more conservative measures to achieve a 10-percent reduction in harvest. The conservation risk of this temporary approach, which reduces the magnitude of a needed reduction compared to what would occur with the current approach, on a stock that is over 150 percent of its biomass target is negligible. The Magnuson-Stevens Act defines overfishing as the ''rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield *on a continuing basis* (emphasis added).'' This scenario, where a stock continues to maintain a biomass significantly above the target, does not constitute overfishing.

The system the Percent Change Approach is replacing utilized the same criteria, and allowed for the same degree of changes to management measures, whether a stock biomass was considered overfished (less than 50 percent of its maximum sustainable yield target) or over 200 percent of its target level. The Percent Change Approach also considers the estimated harvest compared to the RHL, but, in contrast to the previous approach, also incorporates information about stock status to determine whether, and how much, to either liberalize or restrict management measures, ensuring more conservative responses for stocks in low biomass conditions while allowing potentially more liberal responses only for stocks at very high biomass levels.

Another scenario that the comments did not address relates to summer flounder in 2023. Because summer flounder is at a ''low'' stock size (approximately 80 percent of its biomass target), the Percent Change Approach calls for a 10-percent reduction in harvest, even though such harvest is projected to be below the RHL. The approaches in these two instances were designed to require more precaution in developing recreational measures when a stock is at lower levels of biomass, and more measured, stepwise reductions in recreational measures when a stock is at very high levels of biomass. In either scenario, if the reduction taken does not result in harvest that is expected to achieve upcoming RHLs, additional reductions will follow in subsequent years—with this cycle continuing until the management measures result in catch that is expected to achieve, but not exceed, the RHL. Using a more gradual, iterative approach to constraining harvest for stocks at very high levels of abundance is a reasonable balance given the significant socioeconomic impacts of the reductions on the recreational sector in a situation involving increasing stocks with low risk of overfishing. This is also not an unprecedented approach. When rebuilding plans are implemented, they sometimes have a tiered or multi-year phase-in to needed reductions.

The comment letters focused on the Percent Change Approach for setting the management measures, but that is only one component of the management system. Accountability Measures (AM) remain a critical part of management, which, while slightly modified through this rule, are not being eliminated or relaxed. The revised AMs incorporate the explicit consideration of fishing mortality to determine if overfishing occurred, which has the effect of more accurately reflecting when more stringent adjustments to management measures are needed.

Comment 2: One of the comment letters stated that, ''while recreational harvest may be projected to exceed an RHL, this does not always, and often has not, resulted in overfishing. Given that the OFL is fully allocated, one of the few ways this statement can be true is if commercial under harvest exists and is relied upon to offset recreational exceedances.''

Response: It is true that the impact from recreational overages may be ''balanced'' by a commercial underage or vice versa in the evaluation of overfishing. This is not a new feature of this approach, nor is it unique to these fisheries. This approach does not take away quota from the commercial fishery or prevent commercial vessels from harvesting their entire allocated quota, and thus does not represent a *de facto* reallocation of quota. It is simply the reality of overfishing and overfished statuses being determined based on all mortality and not sector-specific considerations. To the extent that there is overfishing as a result of a recreational overage, AMs would be applied to the recreational fishery, not the commercial fishery.

Another reason that the OFL may be exceeded, despite the fact that overfishing is not occurring, could be that the catch limits (OFL, ABC, ACLs) were not set at the correct level. When a stock assessment is rerun and updated, it is often the case that our perception of the stock size has changed. Black sea bass has recently experienced a retrospective pattern that has revealed that stock assessments have routinely underestimated stock size and overestimated fishing mortality, resulting in the stock size subsequently being higher than originally estimated, and fishing mortality lower, when a new/updated assessment is conducted. The outcome of this pattern is catch limits that are set lower than what is actually available to the fishery and years where even restrictive management measures result in higher than anticipated harvest, often with increasing levels of discards, even without overfishing occurring.

Comment 3: One commenter stated that, ''Under the new system, the ACL would only be relevant to recreational management in an indirect manner, through post-hoc comparisons of rolling average ACLs to average recreational catches. In short, the ACL no longer would be a meaningful forward-looking limit.''

Response: This statement is inaccurate. Recreational and commercial ACLs will be set for all four species annually. The specifications process will also set RHLs for each species. The RHL, which is derived from the OFL, ABC, and recreational ACL, will then be used in conjunction with stock size, to determine the required percent change in recreational harvest.

Comment 4: Two commenters stated that the framework does not provide a ''reasonably high level of confidence'' that measures will not result in overfishing.

Response: The Percent Change Approach is a new, temporary approach that will improve the process for setting recreational management measures (*i.e.,* bag, size, and season) for stocks that are not under a rebuilding plan. The approach uses the stock size compared to the target stock size, and the projected harvest compared to the harvest target, to determine the management response. Depending on the stock size (*i.e.,* very high, high, or low), the possible outcomes are limited. For example, because summer flounder is in the ''low'' stock size bin, a 10-percent reduction in harvest must be implemented, even when harvest is expected to be close to the RHL (within the CI). The only scenario where a

liberalization can be implemented for a stock in the ''low'' biomass bin is when the RHL is greater than the upper bound of the harvest estimate. This is a more conservative approach than the prior approach for setting recreational fishing measures, which only compared the estimated catch to the new RHL, and did not incorporate stock status into the decision-making process. For 2023, the application of the Percent Change Approach to summer flounder resulted in a harvest target below the RHL. When stocks are very healthy (*i.e.,* ''very high''), the Percent Change Approach creates more opportunities to liberalize management measures, or allows for a lesser reduction, due to the very large stock size and minimized risk to the stock.

The Magnuson-Stevens Act defines the terms ''overfishing'' and ''overfished'' as a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis. Scup and black sea bass are stocks in the ''very high'' bin, meaning the biomass is over 150 percent of their respective biomass targets—the level of biomass associated with maximum sustainable yield. In plain language, stocks in this bin are at least 1.5 times larger than is ideal for maximizing long-term benefits. In theory, for such stocks, fishing at F_{MSY} should gradually fish the stock back down to the biomass target. Fishing above F_{MSY} for a year may increase the rate at which this is achieved, but would not jeopardize the long-term sustainability of the stock. Adding to the complexity of this is the retrospective pattern observed in the black sea bass stock assessment, as described above. Essentially, when the stock assessment is updated and compared to previous assessments, the stock biomass is higher than previously estimated, and the fishing mortality is lower. This bias results in biomass-based targets (OFL, ABC, ACL, RHL) being set lower than, in retrospect, they should have been.

Comment 5: Two commenters referenced the actions taken at the December 13, 2022, meeting of the Council and Board, where the proposed framework was applied to set recreational management measures for 2023. These comments suggest that the measures adopted for 2023 provide evidence that the framework does not provide adequate assurance that overfishing will not occur, and the very first application of the approach could result in overfishing of scup and black sea bass.

Response: The specific 2023 management measures set for summer flounder, scup, and black sea bass will be discussed and evaluated in a subsequent rulemaking and are not discussed in detail here. However, it is worth noting that the Percent Change Approach, when applied to black sea bass, called for a 10-percent harvest reduction compared to status quo measures, resulting in a harvest target of 7.14 million lb (3,238 mt). The 2023 RHL is 6.57 million lb (2,980 mt), and the ACL is 9.16 million lb (4,155 mt). A harvest target of 7.14 million lb (3,238 mt) allows for more than 2 million lb (907 mt) of dead discards before exceeding the recreational ACL. Even if the recreational ACL was exceeded, the commercial fisheries catch would also factor into the overall fishing mortality on the stock. In 2021, the commercial black sea bass fishery caught 59 percent of the commercial ACL, an underage of 3.9 million lb (1,782 mt). Given recent commercial underages, and how close the Percent Change Approach estimated harvest is to the actual RHL, it is very unlikely that the OFL would be exceeded or, more importantly, that overfishing would occur. Recreational catches have been significantly above the ACL for many years and, despite this, the black sea bass stock is over 150 percent of its biomass target, and overfishing is not occurring according to the most recent stock assessment. The most recent 2021 management track stock assessment-estimated fishing mortality was estimated to be 0.39 compared to the target ($F_{40\%}$) of 0.46, meaning that fishing mortality has actually been lower than the optimal level. The biomass of black sea bass was estimated to be 29,769 mt; 2.1 times the biomass target.

Comment 6: One commenter stated that the Environmental Assessment (EA) ''badly understated the severity of the problem'' and how often the annual landings targets mandated by the Percent Change Approach would diverge from the RHLs, the landings limits generated by use of the best scientific information available.

Response: We do not yet know by how much, and how often, the harvest target will be different from the RHL. For a stock like summer flounder that has a low stock size (below the target), the 2023 harvest target is lower than the RHL. This is a precautionary approach purposely built into the Percent Change Approach when stocks are below their target biomass levels. The 2023 targets for scup and black sea bass are higher than the 2023 RHLs but, in both cases, reductions to harvest are being required. When the 2023 stock assessments and 2024 ACLs and RHLs are available, everything will be reanalyzed and additional reductions or liberalizations will be implemented, as appropriate. This iterative process allows managers to make incremental changes, and evaluate the impacts of those changes on the stock, using the best scientific information available (*i.e.,* the stock assessment) and then make necessary adjustments moving forward. For species such as scup and black sea bass, where subsequent assessments have revealed that prior stock sizes had been underestimated and projected fishing mortality overestimated, the approach implemented in this rule can help avoid drastic changes to recreational measures that later prove to have been unnecessary.

During the development of the Percent Change Approach, the Plan Development Team/Fishery Management Action Team (PDT/FMAT) evaluated what changes would have been required for summer flounder and black sea bass in the past, if the Percent Change Approach had been applied. This analysis was part of the process for determining the appropriate percentages for each bin (additional details on this analysis can be found in the response to Comment 13). The percent changes that were selected were based on the historical reductions and liberalizations that have been required.

This commenter seems to imply that the implementation of the Percent Change Approach constitutes a serious conservation concern; yet this approach will only be in place for a maximum of 3 years, does not apply to stocks in rebuilding plans, and requires more precautionary measures when stocks are below their target biomass. As noted under Comment 1, the Percent Change Approach requires more restrictive recreational management measures for summer flounder in 2023, where the prior approach would have allowed for liberalization of management measures.

Comment 7: One commenter cited a statement made by the Regional Administrator about the requirements specific to ACLs. Specifically, that ''neither an RHL nor a recreational sector-specific ACL are requirements of the Magnuson-Stevens Act. While an overall ACL as well as AMs are required, these are designed to prevent overfishing at the stock level.'' The comments suggested that such statements imply an intent to create a *de facto* reallocation between the recreational and commercial fishing sectors, because the only way that the recreational sector can exceed its ACL, without also causing the overall ACL to be exceeded, is if the commercial sector does not achieve its ACL. Thus, if the Percent Change Approach is designed to

allow the recreational sector to exceed its ACL under certain circumstances, it is also designed to shift the allocation in favor of the recreational sector, and to do so without the need for any allocation-specific management document, or the opportunity for meaningful public input.

Response: The statements made by the Regional Administrator are factual—sector-specific ACLs and the RHL are not required by the Magnuson-Stevens Act or the National Standard Guidelines. As discussed in response to comment 14 below, the Percent Change Approach is not designed to, and does not, shift allocation to the recreational sector. The Magnuson-Stevens Act requirements are designed to prevent and evaluate overfishing at a stock level. Thus, a sector-specific (recreational or commercial) ACL overage may not be a conservation issue, if overall fishing mortality does not exceed the target. The summer flounder, scup, and black sea bass commercial accountability measures include a provision, when the stock biomass is very high, that reduces the severity of the response to a potential overage, so as not to unduly restrict a fishery because the catch limits are not necessarily reflective of the biological status of the stock. Likewise, there could be, in this scenario, a commercial fishery overage and a recreational fishery underage, but this does not mean we are ''reallocating'' fish from one sector to another. These types of allowances and flexibilities, when the stock size is very high, help to balance the needs of the fisheries in an effort to achieve optimal yield, without causing unnecessarily severe social and economic disruptions that do not address a corresponding biological need.

Comment 8: One commenter suggested that the Percent Change Approach would cause the AMs to be unable to effectively prevent ACLs, including sector ACLs, from being exceeded, and would be unable to correct the problems that caused the overage in as short a time as possible.

Response: The role of AMs is to mitigate the overages and correct the problem that caused them as soon as possible. This rule does not eliminate the AMs, or change their structure or function. The current recreational AMs for these four species are structured such that the AM response is different depending on the stock biomass, and the degree of the overage, and this remains the case with the approach of this rule. If the stock biomass is low (*i.e.,* below the threshold, in a rebuilding plan, or reference points are unknown) a pound-for-pound payback is required for overages. Moreover, stocks in this category (*e.g.,* a stock in a rebuilding plan such as bluefish) are not eligible for the Percent Change Approach, thus this element of the framework has no impact on the function of the AMs for such stocks. If a stock is above the threshold, but below the target, such as summer flounder, the AM depends on if there was a recreational ACL overage, or if the overall fishing mortality is above the target, with the response being more severe if overfishing was occurring. In that scenario, a payback is required for overages. When a stock is above the biomass target, such as scup and black sea bass, the current AMs call for ''adjustments to the recreational management measures, taking into account the performance of the measures and conditions that precipitated the overage.'' This rule does not eliminate or change this requirement. If AMs are triggered, the Council and Board will be required to satisfy those AMs and, if they fail to do so, NMFS will adjust measures as needed. There is no evidence provided in the comment that explains how the use of a new method to set the recreational management measures makes the AMs ineffective.

Comment 9: One commenter pointed out that the application of the Percent Change Approach can direct the Council to set an annual landings target that exceeds the sector ACL, and might even ensure that AMs will have to be invoked in a subsequent season. The letter goes on to point out that ''. . . it occurred at the December 13 Meeting, the very first time the [Percent Change Approach] was used to set an annual landings target, when it set the 2023 annual landings target for scup at 12.88 million pounds (5,842 mt), approximately 20 percent above the sector ACL. Even if 2023 recreational landings merely approach, but do not exceed, such a landings target, AMs will inevitably be invoked . . .'' The comment suggests that under such circumstances, there is no meaningful chance that AMs will not have to be invoked after the 2023 scup season.

Response: This is not a result of the Percent Change Approach. The previous overages that occurred under the previously applied approach were so large that, even if the recreational harvest in 2023 was set to the RHL, the AM would be triggered. In fact, even if there was no scup harvest in 2023, the AM would be triggered. Thus, it is not logical to suggest that the AM being triggered in 2024 was due to the Percent Change Approach.

National Standard 2

Comment 10: Two commenters made statements about continuing to use the previously applied ''science-based'' approach to setting recreational management measures, suggesting that this approach was better than the process proposed in the framework.

Response: The previous approach to setting recreational management measures was based on reacting to the highly variable and uncertain annual catch estimates of recreational harvest in a given year. Often, the approach relied on *ad hoc* approaches developed by the Monitoring/Technical Committee to smooth out the data across multiple years to achieve the RHL. This approach was regularly unsuccessful at accurately predicting harvest that would not exceed the RHL, particularly for black sea bass and other stocks with very large stock sizes. Using that approach, the black sea bass RHL was exceeded every year from 2012 through 2021, except 2017. During that time, estimated recreational harvest ranged from 97 to 241 percent of the RHL. The previous approach was also unsuccessful with respect to social and economic objectives. There has been widespread angler dissatisfaction as continuously more-restrictive measures were implemented, despite increasing stock size and therefore increasing availability to the fishery. The black sea bass stock is more than 150 percent of the biomass target, yet management measures are the most restrictive they have ever been. The same scenario has been occurring for scup in recent years, and in 2022, we proposed (April 18, 2022, 87 FR 22863) a closure of the Federal scup fishery despite the high stock levels. The previous regulations required that we take that drastic action, not because the stock was at risk, but because the measures proposed by the Council would not fully constrain harvest to the RHL. For context, the scup biomass is about two times larger than the biomass target. Ultimately, given the biological, social, and economic considerations, we did not implement the closure. Additional details can be found in the final rule (87 FR 35112, June 9, 2022) for the 2022 recreational management measures. The fact that the previous process and regulations often resulted in a required restrictive action that was not based on an actual risk of overfishing highlights the necessity for change. The Percent Change Approach implemented by this action is part of an iterative process to build a management system that recognizes the limitations of recreational data, while ensuring long-term sustainability of the stock. The

sunset provision will require the Council and Board to examine the efficacy of the Percent Change Approach over three years, and to develop changes or improvements to the recreational measure-setting process as needed.

Comment 11: Three commenters stated that the framework was not based on the best available science because recreational management measures would not be set based on the RHL.

Response: The Percent Change Approach incorporates the best scientific information available, including fishing mortality estimates and stock size from approved stock assessments, in conjunction with estimates of annual harvest, to better understand the impacts of recreational harvest on stocks. This approach allows managers to make more informed decisions, constrains those decisions to minimize the biological risk to stocks at lower stock levels, and reduces the socioeconomic impact to fisheries that depend on stocks at higher stock levels.

Comment 12: Two commenters cited excerpts from an SSC peer review that was conducted during the development of the range of alternatives in the framework.

Response: Two comments quoted the SSC report, specifically the comments of one individual, and staff commentary at the working meetings, which were part of the deliberative process. It is important to note that these reviews occurred during the development of the framework, and were more broadly considering the full range of alternatives in this action, including those that were not selected by the Council and Board. At the time the reviews were completed, the EA had not been drafted, nor had the alternatives been fully developed. Further refinement to the approaches considered in this action and additional analyses occurred after these meetings, in response to many of the SSC's comments.

Comment 13: Two commenters questioned the rationale behind the selection of the percentages used in the percent change approach, claiming that they were completely arbitrary.

Response: The PDT/FMAT conducted a number of analyses of the Percent Change Approach including an evaluation of the percentages, and a post-hoc evaluation of what changes would have been needed in the past compared to the changes that were implemented. The percentages ultimately selected were not random or arbitrary; these percentages were selected based on an FMAT/PDT analysis that evaluated past differences between the RHL and estimated harvest values (*i.e.,* derived from MRIP). These percent differences represent historically required reductions or liberalizations to achieve, but not exceed, the next year's RHL. A percentile approach was applied to the distribution of these required liberalizations and reductions over the history of each fishery. The percent change was set equal to the average of the absolute values of the 40th and 60th percentiles, 25th and 75th percentiles, and the 10th and 90th percentiles of the ''required'' liberalizations or reductions. Summer flounder and black sea bass behave similarly in these analyses, scup was excluded from the analysis because the majority of the scup measures over the last decade could have been liberalized to a greater degree but were mostly held status quo causing a continued high degree of difference between RHL and MRIP landing estimates. Using the 25th, 50th, and 75th percentiles for summer flounder and black sea bass were roughly equivalent to the 10-, 20-, and 40-percent changes used in the approach.

National Standard 4

Comment 14: Three commenters were concerned that the Percent Change Approach, constitutes an illegal *de facto* reallocation between sectors. One letter specifically stated that ''Although NMFS just recently approved revised allocations that increase the recreational share of the summer flounder, scup, and black sea bass fisheries, NMFS appears to be tacitly increasing again the recreational allocation through the Proposed Rule. By allowing the recreational fishery to exceed its RHL and ACL, the agency would create a further reallocation of summer flounder, scup, and black sea bass (and potentially bluefish) from the commercial sector to the recreational sector.''

Response: As stated in National Standard 4, an ''allocation'' or ''assignment'' of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) may have incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of National Standard 4. Unlike the commercial/recreational allocation amendment referenced in the comment, this action does not constitute a direct distribution of fishing privileges.

This action will not constrain or otherwise penalize or hold the commercial fishery accountable for the recreational sector's catch. If recreational overages occur, as they have under the previous process, the recreational fishery would be held accountable as prescribed by the AMs.

As noted, the Council and Board recently reviewed, and ultimately revised, the commercial and recreational allocations for summer flounder, scup, and black sea bass. Throughout the allocation process, we encouraged the Council and Board to consider options that excluded recreational overages from determining revisions to allocations, as using those overages as the basis for an increase in recreational allocation would be inappropriate. If this process, like the previous method to setting recreational management measures, results in ACL overages, those overages should likewise not be used as a justification for increased recreational quota in future consideration of allocations.

Other

Comment 15: Two commenters stated that a framework adjustment is not the appropriate vehicle for such significant changes, and suggested that a ''more inclusive and thorough fishery management plan (FMP) amendment process'' should have been used to consider the changes proposed. One comment stated that the ''fast-tracked'' nature of the framework did not allow for public scoping or public comments.

Response: The Percent Change Approach considered through this framework has been a part of an extensive effort (*i.e.,* the Recreational Reform Initiative) to address many of the challenges associated with recreational fisheries management. The initiative began in March 2019, when a steering committee was established to develop strategies to increase management flexibility and stability for jointly managed recreational fisheries. The Council and Board spent several years planning and developing ideas, and then ultimately prioritized the Harvest Control Rule action February 2021. Throughout 2021 and 2022, the Council and Board met jointly six times to discuss the framework (and discussed the Recreational Reform Initiative an additional six times). The Commission hosted a series of public hearings and collected comments in March and April 2022. A subset of the Council's SSC conducted two reviews of the process/models. While a framework can be a more abbreviated process than an amendment, this framework was not. The development of the Harvest Control Rule was a multi-year process with numerous opportunities for public participation, through the Council and

Board meetings, public hearings, SSC reviews, and PDT/FMAT meetings. Moreover, this action is limited to a 3-year implementation, after which it will be replaced or rescinded, or modified and extended

Comment 16: One commenter suggested that implementing the framework would not be ''an effective or appropriate response'' to any of the challenges managing recreational fisheries. This letter instead suggests that we should ''continue to apply established principles of fisheries management, including managing stocks for sustainability and abundance, using ecosystem-based approaches, addressing climate impacts directly, making improvements to data systems, and managing to achieve the greatest benefit to the nation.''

Response: Use of ecosystem-based approaches, addressing climate impacts, and making improvements to data systems are all important considerations for the management, both commercial and recreational, of these species moving forward. In fact, the Recreational Demand Model, being used in conjunction with the Percent Change Approach, was developed as part of the Council's Ecosystem Approach to Fishery Management's Management Strategy Evaluation. The stock assessment for black sea bass is currently undergoing a research track assessment to further improve the stock assessment model for this species. While these are some steps that are already being taken, they are not short-term solutions, as they require significant time and resources. Given the number of challenges managing recreational fisheries, and the need for additional time to work on longer-term solutions, this framework is being implemented to respond to those challenges in a timely manner. The sunset of the Percent Change Approach also requires the Council and Board to explicitly review this action and is intended to allow for further improvements to recreational management.

Comment 17: Two commenters suggested that the current challenges faced by managers of these recreational fisheries have been caused by the Council's failure to follow the guidelines on management uncertainty. The comment suggests that incorporation of management uncertainty would have solved an array of problems, *i.e.,* ''better prevented overfishing, addressed uncertainty and variability in recreational data, and provided more stable and predictable regulations, without the need to abandon the current data-based management process . . .''

Response: Including management uncertainty into the process for setting recreational management measures would result in setting a recreational harvest target below the RHL, and even more restrictive recreational management measures. This would exacerbate the disconnect between what anglers are observing (*e.g.,* high levels of abundance of black sea bass and scup) and the increasingly restrictive management measures. Implementing a larger buffer, and further reducing the quota, does not recognize that uncertainty applies in both directions—catch and biomass may be higher or lower than estimated. Simply restricting recreational fisheries more is not solving the fundamental problem, particularly when considering the lack of success in continually attempting to constrain harvest to a specific limit that, in retrospect, was lower than needed.

Comment 18: One commenter stated that when asked to evaluate whether the best available data required a 10-percent increase or a 10-percent decrease in summer flounder landings, the Council made the arbitrary decision not to employ the Percent Change Approach at all.

Response: The discussions referenced in this comment were specific to the 2023 recreational management measures, which will be addressed in a separate, forthcoming action. In addition, at the joint December 2022 meeting, the Council and Board were evaluating various models used in support of the development of management measures, and not the fundamentals of the approach being implemented through this action.

Comment 19: One commenter asked about the information that was used during the development of the proposed approach, specifically concerning the input from fishermen that was received and utilized as this action was being formulated.

Response: This action is part of the broader Recreational Reform Initiative, which is an effort of the Council and Commission to improve management of the recreational fisheries for summer flounder, scup, black sea bass, and bluefish. This initiative aims to address a range of challenges in recreational fisheries management. These challenges include widespread angler dissatisfaction with some recreational management measures, stakeholder perceptions that measures are not reflective of stock status, and concerns about how MRIP data are used to manage these fisheries.

The overarching Harvest Control Rule approach was originally brought forward as a proposal from six recreational fishing organizations through scoping comments on the Summer Flounder, Scup, and Black Sea Bass Commercial/Recreational Allocation Amendment. While it was not pursued through that action, the Council and Board expressed interest in further pursuing the ideas relative to setting recreational management measures, which they did, through this framework. After initiation of this action in February 2021, a series of public meetings and hearings were held to solicit comments and information from the public, including the fishing industry. A complete history of the action, the data used, and analyses conducted can be found in the EA (see **ADDRESSES**).

Comment 20: One comment letter from five organizations (the American Sportfishing Association, Center for Sportfishing Policy, Coastal Conservation Association, Congressional Sportsmen's Foundation, and the National Marine Manufacturers Association) supported the implementation of the framework. Specifically, the comment letter stated that the framework ''. . . aims to address numerous challenges currently facing recreational fishery management, including limitations of the MRIP data, the need to change measures (sometimes annually) based on those data, and recreational measures (bag, size and season) not reflecting stock status. Most recently, the 2022 fisheries specification process exemplified these challenges and demonstrates the need to implement alternative approaches to setting bag, size, and season limits in 2023, and beyond''.

Response: We agree, and have approved the framework as proposed.

Changes From the Proposed Rule

There are no changes to the measures in this final rule from the proposed rule.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this final rule is consistent with the Summer Flounder, Scup, and Black Sea Bass, and Bluefish FMPs, other provisions of the Magnuson Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay of effectiveness period for this rule, to ensure that the final management measures are in place as soon as possible.

The Council and Board adopted this Framework/Addendum in June 2022, and indicated their intention that this new process would be used for development of the 2023 recreational management measures. In December of 2022, they used the new process to recommend recreational management measures for summer flounder, scup, and black sea bass. We cannot implement the recommended 2023 recreational management measures until the process implemented through this rule is effective. A delay in the effectiveness in this rule would create additional challenges and confusion about the 2023 recreational management measures. The summer flounder, scup, and black sea bass fishing year began on January 1, 2023. This is the earliest this rule could be completed. The Council submitted the revised framework document on November 21, 2022, and the proposed rule was published on December 15, 2022, this final rule is being issued as soon as possible.

The Federal coastwide regulatory measures for recreational summer flounder and black sea bass fishing that were codified last year (87 FR 35112, June 9, 2022) remain in effect until the decision to waive Federal measures for 2023 is made. Because the Council and Board-recommended measures are based on the approach implemented in this rule, the states have already developed and have begun implementing their conservationally equivalent 2023 measures. Inconsistencies between the states' measures and the Federal measures could lead to misunderstanding of the applicable regulations and could increase the likelihood of noncompliant landings. Additionally, the Federal summer flounder measures currently in place are more restrictive than many of the measures in State waters, which unnecessarily disadvantage federally permitted vessels who are subject to these more restrictive measures until the 2023 recreational measures are put in place.

The measures currently in place for scup and black sea bass are more liberal than the measures that will be implemented for 2023. A delay in effectiveness of this rule, and a resulting delay of the implementation of the 2023 measures, will increase the likelihood that the 2023 RHLs and recreational ACLs will be exceeded. We are required to implement measures to constrain recreational harvest to prevent overfishing.

In response to this action, unlike actions that require an adjustment period to comply with new rules, recreational and charter/party operators will not have to purchase new equipment or otherwise expend time or money to comply with the new management process. Additionally the Council and Board already took action, in December 2022, to recommend recreational management measures based on the new process.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification, and to our knowledge, there are no changed circumstances. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 1, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 648.100, revise paragraphs (a) introductory text, (b) introductory text, and (b)(1) to read as follows:

§ 648.100 Summer flounder Annual Catch Limit (ACL).

(a) *Annual catch limits.* The Monitoring Committee shall recommend to the MAFMC separate ACLs for the commercial and recreational summer flounder fisheries, the sum total of which shall be equal to the ABC recommended by the SSC.

* * * * *

(b) *Performance review.* The Monitoring Committee shall conduct a detailed review of fishery performance relative to the sector ACLs at least every 5 years.

(1) If one or both of the sector-specific ACLs is exceeded with a frequency greater than 25 percent (*i.e.,* more than once in 4 years or any 2 consecutive years), the Monitoring Committee will review fishery performance information and consider whether changes in measures are needed.

* * * * *

■ 3. In § 648.101, revise paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 648.101 Summer flounder Annual Catch Target (ACT).

(a) *Annual catch target.* The Monitoring Committee shall identify and review the relevant sources of management uncertainty to recommend ACTs for the commercial and recreational fishing sectors as part of the summer flounder specification process. The Monitoring Committee recommendations shall identify the specific sources of management uncertainty that were considered, technical approaches to mitigating these sources of uncertainty, and any additional relevant information considered in the ACT recommendation process.

(1) *Sectors.* Commercial and recreational specific ACTs shall be less than or equal to the sector-specific ACLs. The Monitoring Committee shall recommend any reduction in catch necessary to address sector-specific management uncertainty, consistent with this paragraph (a).

* * * * *

(b) *Performance review.* The Monitoring Committee shall conduct a detailed review of fishery performance relative to ACTs in conjunction with any ACL performance review, as outlined in § 648.100(b)(1) through (3).

■ 4. In § 648.102, revise paragraphs (a) introductory text, (a)(6) and (11), (b), and (d) to read as follows:

§ 648.102 Summer flounder specifications.

(a) *Commercial quota, recreational landing limits, research set-asides, and other specification measures.* The Monitoring Committee shall recommend to the MAFMC, through the specifications process, for use in conjunction with each ACL and ACT, a sector-specific research set-aside, estimates of sector-related discards, a recreational harvest limit, and a commercial quota, along with other measures, as needed to prevent overages of the applicable specified limits or targets for each sector, as prescribed in

the FMP. The measures to be considered by the Monitoring Committee are:

* * * * *

(6) Recreational possession limit set from a range of 0 to 15 summer flounder.

* * * * *

(11) Modification of existing accountability measures and ACT control rules utilized by the Monitoring Committee.

(b) *Specification fishing measures.* The MAFMC shall review the recommendations of the Monitoring Committee and, based on the recommendations and any public comment, recommend to the Regional Administrator measures that are projected to constrain the sectors to the applicable limit or target as prescribed in the FMP. The MAFMC's recommendations must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the ASMFC.

* * * * *

(d) *Recreational specification measures.* The MAFMC shall review the recommendations of the Monitoring Committee and, based on the recommendations and any public comment, recommend to the Regional Administrator measures that are projected to prevent overages of the applicable recreational target, as prescribed in the FMP, for an upcoming fishing year or years. The MAFMC's recommendations must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the recommendations. The MAFMC and the ASMFC will recommend that the Regional Administrator implement either:

(1) *Coastwide measures.* Annual, or multi-year, coastwide management measures projected to achieve the applicable recreational target as prescribed in the FMP, or

(2) *Conservation equivalent measures.* Individual states, or regions formed voluntarily by adjacent states (*i.e.,* multi-State conservation equivalency regions), may implement different combinations of minimum and/or maximum fish sizes, possession limits, and closed seasons that achieve equivalent conservation as the coastwide measures established under paragraph (e)(1) of this section. Each State or multi-State conservation equivalency region may implement measures by mode or area only if the proportional standard error of recreational landing estimates by mode or area for that State is less than 30 percent.

(i) After review of the recommendations, the Regional Administrator will publish a proposed rule in the **Federal Register** as soon as possible to implement the overall recreational target for the fishing year(s), and the ASMFC's recommendation concerning conservation equivalency, the precautionary default measures, and coastwide measures.

(ii) The ASMFC will review conservation equivalency proposals and determine whether or not they achieve the necessary adjustment to recreational landings. The ASMFC will provide the Regional Administrator with the individual State and/or multi-State region conservation measures for the approved State and/or multi-State region proposals and, in the case of disapproved State and/or multi-State region proposals, the precautionary default measures that should be applied to a State or region. At the request of the ASMFC, precautionary default measures would apply to federally permitted party/charter vessels and other recreational fishing vessels harvesting summer flounder in or from the EEZ when landing in a State that implements measures not approved by the ASMFC.

(iii) After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement either the State or regional conservation equivalency measures or coastwide measures to ensure that the applicable specified target is not exceeded.

(iv) The ASMFC may allow states or regions assigned the precautionary default measures to resubmit revised management measures. The ASMFC will detail the procedures by which the State or region can develop alternate measures. The ASMFC will notify the Regional Administrator of any resubmitted State or regional proposals approved subsequent to publication of the final rule and the Regional Administrator will publish a document in the **Federal Register** to notify the public.

* * * * *

■ 5. In § 648.103, revise paragraphs (c), (d)(1), and (d)(2)(ii) to read as follows:

§ 648.103 Summer flounder accountability measures.

* * * * *

(c) *Recreational ACL Evaluation.* The recreational sector ACL will be evaluated based on a 3-year moving average comparison of total catch (landings and dead discards). Both landings and dead discards will be evaluated in determining if the 3-year average recreational sector ACL has been exceeded.

(d) * * *

(1) *If biomass is below the threshold, the stock is under rebuilding, or biological reference points are unknown.* If the most recent estimate of biomass is below the BMSY threshold (*i.e.,* B/BMSY is less than 0.5),), the stock is under a rebuilding plan, or the biological reference points (B or BMSY) are unknown, and the recreational ACL has been exceeded, then the exact amount, in pounds, by which the most recent 3-year average recreational catch estimate exceeded the most recent 3-year average recreational ACL will be deducted, in the following fishing year, or as soon as possible, thereafter, once catch data are available, from the recreational ACT. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(2) * * *

(ii) *If the fishing mortality (F) has exceeded FMSY (or the proxy).* If the most recent estimate of total fishing mortality exceeds FMSY (or the proxy), then an adjustment to the recreational ACT will be made as soon as possible, once catch data are available, as described in paragraph (d)(2)(ii)(A) of this section. If an estimate of total fishing mortality is not available for the most recent complete year of catch data, then a comparison of total catch relative to the ABC will be used.

(A) *Adjustment to Recreational ACT.* If an adjustment to the following year's Recreational ACT is required, then the ACT will be reduced by the exact amount, in pounds, of the product of the overage, defined as the difference between the most recent 3-year average recreational catch and the most recent 3-year recreational ACL, and the payback coefficient, as specified in paragraph (d)(2)(ii)(B) of this section. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(B) *Payback coefficient.* The payback coefficient is the difference between the most recent estimate of biomass and B_{MSY} (*i.e.,* $B_{MSY} - B$) divided by one-half of B_{MSY}.

* * * * *

■ 6. In § 648.120, revise paragraphs (a) introductory text, (b) introductory text, and (b)(1) to read as follows:

§ 648.120 Scup Annual Catch Limit (ACL).

(a) *Annual catch limits.* The Monitoring Committee shall recommend

to the MAFMC separate ACLs for the commercial and recreational scup fisheries, the sum total of which shall be equal to the ABC recommended by the SSC.

* * * * *

(b) *Performance review.* The Monitoring Committee shall conduct a detailed review of fishery performance relative to the sector ACLs at least every 5 years.

(1) If one or both of the sector-specific ACLs is exceeded with a frequency greater than 25 percent (*i.e.,* more than once in 4 years or any 2 consecutive years), the Monitoring Committee will review fishery performance information and consider whether changes to measures are needed.

* * * * *

■ 7. In § 648.121, revise paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 648.121 Scup Annual Catch Target (ACT).

(a) *Annual catch targets.* The Monitoring Committee shall identify and review the relevant sources of management uncertainty to recommend ACTs for the commercial and recreational fishing sectors as part of the scup specification process. The Monitoring Committee recommendations shall identify the specific sources of management uncertainty that were considered, technical approaches to mitigating these sources of uncertainty, and any additional relevant information considered in the ACT recommendation process.

(1) *Sectors.* Commercial and recreational specific ACTs shall be less than or equal to the sector-specific ACLs. The Monitoring Committee shall recommend any reduction in catch necessary to address sector-specific management uncertainty, consistent with this paragraph (a).

* * * * *

(b) *Performance review.* The Monitoring Committee shall conduct a detailed review of fishery performance relative to ACTs in conjunction with any ACL performance review, as outlined in § 648.120(b)(1) through (3).

■ 8. In § 648.122, revise paragraphs (a) introductory text, (a)(7) and (14), and (b) to read as follows:

§ 648.122 Scup Specifications.

(a) *Commercial quota, recreational landing limits, research set-asides, and other specification measures.* The Monitoring Committee shall recommend to the MAFMC and the ASMFC through the specifications process, for use in conjunction with each ACL and ACT, a sector-specific research set-aside, estimates of sector-related discards, a recreational harvest limit, and a commercial quota, along with other measures, as needed, to prevent overages of the applicable specified limits or targets for each sector, as prescribed in the FMP. The measures to be considered by the Monitoring Committee are as follows:

* * * * *

(7) Recreational possession limit set from a range of 0 to 50 scup.

* * * * *

(14) Modification of existing AM measures and ACT control rules utilized by the Monitoring Committee.

(b) *Specification of fishing measures.* The MAFMC shall review the recommendations of the Monitoring Committee. Based on these recommendations and any public comment, the MAFMC shall recommend to the Regional Administrator measures necessary to prevent overages of the appropriate specified limits or targets for each sector, as prescribed in the FMP. The MAFMC's recommendation must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the ASMFC. After such review, NMFS will publish a proposed rule in the **Federal Register** to implement a commercial quota, specifying the amount of quota allocated to each of the three periods, possession limits for the Winter I and Winter II periods, including possession limits that result from potential rollover of quota from Winter I to Winter II, the percentage of landings attained during the Winter I fishery at which the possession limits will be reduced, a recreational harvest limit, and additional management measures for the commercial and recreational fisheries.

* * * * *

■ 9. In § 648.123, revise paragraphs (c), (d) introductory text, (d)(1), (d)(2)(ii) introductory text, and (d)(2)(ii)(A) to read as follows:

§ 648.123 Scup accountability measures.

* * * * *

(c) *Recreational ACL.* The recreational sector ACL will be evaluated based on a 3-year moving average comparison of total catch (landings and dead discards). Both landings and dead discards will be evaluated in determining if the 3-year average recreational sector ACL has been exceeded.

(d) *Recreational AMs.* If the recreational ACL is exceeded, then the following procedure will be followed:

(1) *If biomass is below the threshold, the stock is under rebuilding, or biological reference points are unknown.* If the most recent estimate of biomass is below the BMSY threshold (*i.e.,* B/BMSY is less than 0.5), the stock is under a rebuilding plan, or the biological reference points (B or BMSY) are unknown, and the recreational ACL has been exceeded, then the exact amount, in pounds, by which the most recent 3-year average recreational catch estimate exceeded the most recent 3-year average recreational ACL will be deducted in the following fishing year, or as soon as possible, thereafter, once catch data are available, from the recreational ACT. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(2) * * *

(ii) *If the fishing mortality (F) has exceeded FMSY (or the proxy).* If the most recent estimate of total fishing mortality exceeds FMSY (or the proxy), then an adjustment to the recreational ACT will be made as soon as possible once catch data are available, as described in paragraph (d)(2)(ii)(A) of this section. If an estimate of total fishing mortality for the most recent complete year of catch data is not available, then a comparison of total catch relative to the ABC will be used.

(A) *Adjustment to Recreational ACT.* If an adjustment to the following year's Recreational ACT is required, then the ACT will be reduced by the exact amount, in pounds, of the product of the overage, defined as the difference between the most recent 3-year average recreational catch and the most recent 3-year average recreational ACL, and the payback coefficient, as specified in paragraph (d)(2)(ii)(B) of this section. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

* * * * *

■ 10. In § 648.140, revise paragraphs (a) introductory text, (b) introductory text, and (b)(1) to read as follows:

§ 648.140 Black sea bass Annual Catch Limit (ACL).

(a) *Annual Catch Limits.* The Monitoring Committee shall recommend to the MAFMC separate ACLs for the commercial and recreational scup fisheries, the sum total of which shall be equal to the ABC recommended by the SSC.

* * * * *

(b) *Performance review.* The Monitoring Committee shall conduct a detailed review of fishery performance relative to the sector ACLs at least every 5 years.

(1) If one or both of the sector-specific ACLs is exceeded with a frequency greater than 25 percent (*i.e.,* more than once in 4 years or any 2 consecutive years), the Monitoring Committee will review fishery performance information and consider whether changes to measures are needed.

* * * * *

■ 11. In § 648.141, revise paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 648.141 Black sea bass Annual Catch Target (ACT).

(a) *Annual Catch Targets.* The Monitoring Committee shall identify and review the relevant sources of management uncertainty to recommend ACTs for the commercial and recreational fishing sectors as part of the black sea bass specification process. The Monitoring Committee recommendations shall identify the specific sources of management uncertainty that were considered, technical approaches to mitigating these sources of uncertainty, and any additional relevant information considered in the ACT recommendation process.

(1) *Sectors.* Commercial and recreational specific ACTs shall be less than or equal to the sector-specific ACLs. The Monitoring Committee shall recommend any reduction in catch necessary to address sector-specific management uncertainty, consistent with this paragraph (a).

* * * * *

(b) *Performance review.* The Monitoring Committee shall conduct a detailed review of fishery performance relative to ACTs in conjunction with any ACL performance review, as outlined in § 648.140(b)(1) through (3).

■ 12. In § 648.142, revise paragraphs (a) introductory text, (a)(7) and (10), (b), (d) introductory text, (d)(1), and (d)(2)(i) through (iv) to read as follows:

§ 648.142 Black sea bass specifications.

(a) *Specifications.* Commercial quota, recreational landing limit, research set-aside, and other specification measures. The Monitoring Committee will recommend to the MAFMC and the ASMFC, through the specification process, for use in conjunction with the ACL and ACT, sector-specific research set-asides, estimates of the sector-related discards, a recreational harvest limit, a commercial quota, along with other measures, as needed, that are projected to prevent overages of the applicable specified limits or targets for each sector as prescribed in the FMP. The following measures are to be considered by the Monitoring Committee:

* * * * *

(7) A recreational possession limit.

* * * * *

(10) Recreational State conservation equivalent and precautionary default measures utilizing possession limits, minimum fish sizes, and/or seasons.

* * * * *

(b) *Specification fishing measures.* The MAFMC shall review the Monitoring Committee recommendations and, based on the recommendations and public comment, make recommendations to the Regional Administrator on measures projected to constrain the sectors to the applicable limit or target as prescribed in the FMP. Included in the recommendation will be supporting documents, as appropriate, concerning the environmental and economic impacts of the final rule. The Regional Administrator will review these recommendations and any recommendations of the ASMFC. After such review, the Regional Administrator will publish a proposed rule in the **Federal Register** to implement a commercial quota, a recreational harvest limit, and additional management measures for the commercial fishery.

* * * * *

(d) *Recreational specification measures.* The Monitoring Committee shall recommend to the MAFMC and ASMFC measures that are projected to prevent overages of the applicable recreational target as prescribed in the FMP. The MAFMC shall review these recommendations and, based on the recommendations and any public comment, recommend recreational management measures to the Regional Administrator. The MAFMC's recommendations must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the recommendations. The MAFMC and the ASMFC will recommend that the Regional Administrator implement either:

(1) *Coastwide measures.* Annual coastwide management measures that constrain the recreational black sea bass fishery to the recreational target as specified in the fishery management plan, or

(2) * * *

(i) After review of the recommendations, the Regional Administrator will publish a proposed rule in the **Federal Register** as soon as possible to implement the overall recreational target required for the fishing year(s), and the ASMFC's recommendation concerning conservation equivalency, the precautionary default measures, and coastwide measures.

(ii) The ASMFC will review conservation equivalency proposals and determine whether or not they achieve the necessary recreational target. The ASMFC will provide the Regional Administrator with the individual State and/or multi-State region conservation measures for the approved State and/or multi-State region proposals and, in the case of disapproved State and/or multi-State region proposals, the precautionary default measures that should be applied to a State or region. At the request of the ASMFC, precautionary default measures would apply to federally permitted party/charter vessels and other recreational fishing vessels harvesting black sea bass in or from the EEZ when landing in a State that implements measures not approved by the ASMFC.

(iii) After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement either the State or regional conservation equivalency measures or coastwide measures to ensure that the applicable specified target is not exceeded.

(iv) The ASMFC may allow states or regions assigned the precautionary default measures to resubmit revised management measures. The ASMFC will detail the procedures by which the State or region can develop alternate measures. The ASMFC will notify the Regional Administrator of any resubmitted State or regional proposals approved subsequent to publication of the final rule and the Regional Administrator will publish a document in the **Federal Register** to notify the public.

* * * * *

■ 13. In § 648.143, revise paragraphs (c) and (d) to read as follows:

§ 648.143 Black sea bass accountability measures.

* * * * *

(c) *Recreational ACL Evaluation.* The recreational sector ACL will be evaluated based on a 3-year moving average comparison of total catch (landings and dead discards). Both landings and dead discards will be evaluated in determining if the 3-year average recreational sector ACL has been exceeded.

(d) *Recreational AMs.* If the recreational ACL is exceeded, then the following procedure will be followed:

(1) *If biomass is below the threshold, the stock is under rebuilding, or biological reference points are unknown.* If the most recent estimate of biomass is below the BMSY threshold (*i.e.,* B/BMSY is less than 0.5), the stock is under a rebuilding plan, or the biological reference points (B or BMSY) are unknown, and the recreational ACL has been exceeded, then the exact amount, in pounds, by which the most recent 3-year average recreational catch estimate exceeded the most recent 3-year average recreational ACL will be deducted in the following fishing year, or as soon as possible thereafter, once catch data are available, from the recreational ACT. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(2) *If biomass is above the threshold, but below the target, and the stock is not under rebuilding.* If the most recent estimate of biomass is above the biomass threshold (B/B_{MSY} is greater than 0.5), but below the biomass target (B/B_{MSY} is less than 1.0), and the stock is not under a rebuilding plan, then the following AMs will apply:

(i) *If the Recreational ACL has been exceeded.* If the Recreational ACL has been exceeded, then adjustments to the recreational management measures, taking into account the performance of the measures and conditions that precipitated the overage, will be made in the following fishing year, or as soon as possible thereafter, once catch data are available, as a single-year adjustment.

(ii) *If the fishing mortality (F) has exceeded FMSY (or the proxy).* If the most recent estimate of total fishing mortality exceeds FMSY (or the proxy) then an adjustment to the recreational ACT will be made as soon as possible once catch data are available, as described in paragraph (d)(2)(ii)(A) of this section. If an estimate of total fishing mortality for the most recent complete year of catch data is not available, then a comparison of total catch relative to the ABC will be used.

(A) *Adjustment to Recreational ACT.* If an adjustment to the following year's Recreational ACT is required, then the ACT will be reduced by the exact amount, in pounds, of the product of the overage, defined as the difference between the most recent 3-year average recreational catch and the most recent 3-year average recreational ACL, and the payback coefficient, as specified in paragraph (d)(2)(ii)(B) of this section. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(B) *Payback coefficient.* The payback coefficient is the difference between the most recent estimate of biomass and B_{MSY} (*i.e.,* $B_{MSY} - B$) divided by one-half of B_{MSY}.

(3) *If biomass is above B_{MSY}.* If the most recent estimate of biomass is above B_{MSY} (*i.e.,* B/B_{MSY} is greater than 1.0), then adjustments to the recreational management measures, taking into account the performance of the measures and conditions that precipitated the overage, will be made in the following fishing year, or as soon as possible thereafter, once catch data are available, as a single-year adjustment.

* * * * *

■ 14. In § 648.160, revise paragraph (b) to read as follows:

§ 648.160 Bluefish Annual Catch Limit (ACL).

* * * * *

(b) *Performance review.* The Bluefish Monitoring Committee shall conduct a detailed review of fishery performance relative to the ACL at least every 5 years.

(1) If the ACL is exceeded with a frequency greater than 25 percent (*i.e.,* more than once in 4 years or any 2 consecutive years), the Bluefish Monitoring Committee will review fishery performance information and consider whether changes to measures are needed.

(2) The MAFMC may specify more frequent or more specific ACL performance review criteria as part of a stock rebuilding plan following the determination that the bluefish stock has become overfished.

(3) Performance reviews shall not substitute for annual reviews that occur to ascertain if prior year ACLs have been exceeded, but may be conducted in conjunction with such reviews.

■ 15. In § 648.162, revise paragraphs (a) introductory text and (c) to read as follows:

§ 648.162 Bluefish specifications.

(a) *Recommended measures.* Based on the annual review and requests for research quota as described in paragraph (h) of this section, the Bluefish Monitoring Committee shall recommend to the MAFMC and the ASMFC the following measures to ensure that the ACL specified by the process outlined in § 648.160(a) will not be exceeded:

* * * * *

(c) *Annual fishing measures.* The MAFMC shall review the recommendations of the Bluefish Monitoring Committee. Based on these recommendations and any public comment, the MAFMC shall recommend to the Regional Administrator by September 1 measures necessary to prevent overages of the applicable specified limits or targets for each sector as prescribed in the FMP. The MAFMC's recommendations must include supporting documentation, as appropriate, concerning the environmental, economic, and social impacts of the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the ASMFC. After such review, NMFS will publish a proposed rule in the **Federal Register** as soon as practicable to implement ACLs, ACTs, research quota, a coastwide commercial quota, individual State commercial quotas, a recreational harvest limit, and additional management measures for the commercial and recreational fisheries to prevent overages of the applicable specified limits or targets for each sector as prescribed in the FMP. After considering public comment, NMFS will publish a final rule in the **Federal Register**.

* * * * *

■ 16. In § 648.163 revise paragraphs (a), (d), and (f) to read as follows:

§ 648.163 Bluefish Accountability Measures (AMs).

(a) *ACL overage evaluation.* The ACLs will be evaluated based on a single-year examination of total catch (landings and dead discards). Both landings and dead discards will be evaluated in determining if the ACLs have been exceeded.

* * * * *

(d) *Recreational landings AM when the recreational ACL is exceeded and no sector-to-sector transfer of allowable landings has occurred.* If the recreational ACL is exceeded and no transfer between the commercial and recreational sector was made for the fishing year, as outlined in § 648.162(b)(2), then the following procedure will be followed:

(1) *If biomass is below the threshold, the stock is under rebuilding, or biological reference points are unknown.* If the most recent estimate of biomass is below the B_{MSY} threshold (*i.e.,* B/B_{MSY} is less than 0.5), the stock is under a rebuilding plan, or the biological reference points (B or B_{MSY}) are unknown, and the recreational ACL has been exceeded, then the exact amount, in pounds, by which the most recent year's recreational catch estimate

exceeded the most recent year's recreational ACL will be deducted from the following year's recreational ACT, or as soon as possible thereafter, once catch data are available. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(2) *If biomass is above the threshold, but below the target, and the stock is not under rebuilding.* If the most recent estimate of biomass is above the biomass threshold (B/B_{MSY} is greater than 0.5), but below the biomass target (B/B_{MSY} is less than 1.0), and the stock is not under a rebuilding plan, then the following AMs will apply:

(i) *If the recreational ACL has been exceeded.* If the recreational ACL has been exceeded, then adjustments to the recreational management measures, taking into account the performance of the measures and conditions that precipitated the overage, will be made in the following fishing year, or as soon as possible thereafter, once catch data are available, as a single-year adjustment.

(ii) *If the fishing mortality (F) has exceeded FMSY (or the proxy).* If the most recent estimate of total fishing mortality exceeds FMSY (or the proxy) then an adjustment to the recreational ACT will be made as soon as possible once catch data are available. If an estimate of total fishing mortality for the most recent complete year of catch data is not available, then a comparison of total catch relative to the ABC will be used.

(A) *Adjustment to Recreational ACT.* If an adjustment to the following year's Recreational ACT is required, then the ACT will be reduced by the exact amount, in pounds, of the product of the recreational ACL overage and the payback coefficient, as specified in paragraph (d)(2)(ii)(B) of this section. This payback may be evenly spread over 2 years if doing so allows for use of identical recreational management measures across the upcoming 2 years.

(B) *Payback coefficient.* The payback coefficient is the difference between the most recent estimates of B_{MSY} and biomass (*i.e.,* $B_{MSY} - B$) divided by one-half of B_{MSY}.

(3) *If biomass is above BMSY.* If the most recent estimate of biomass is above BMSY (*i.e.,* B/BMSY is greater than 1.0), then adjustments to the recreational management measures, taking into account the performance of the measures and conditions that precipitated the overage, will be made in the following fishing year, or as soon as possible thereafter, once catch data are available, as a single-year adjustment.

* * * * *

(f) *Non-landing AMs.* In the event that the fishery-level ACL has been exceeded and the overage has not been accommodated through the AM measures in paragraphs (a) through (d) of this section, then the exact amount, in pounds, by which the fishery-level ACL was exceeded shall be deducted, as soon as possible, from subsequent, single fishing year ACTs. The payback will be applied to each sector's ACT in proportion to each sector's contribution to the overage.

* * * * *

[FR Doc. 2023–04588 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053 and 230306–0065; RTID 0648–XC767]

Fisheries of the Exclusive Economic Zone Off Alaska; Sablefish Managed Under the Individual Fishing Quota Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; opening.

SUMMARY: NMFS is opening directed fishing for sablefish with fixed gear managed under the Individual Fishing Quota (IFQ) Program and the Community Development Quota (CDQ) Program. The season will open 1200 hours, Alaska local time (A.l.t.), March 10, 2023, and will close 1200 hours, A.l.t., December 7, 2023. This period is the same as the 2023 commercial halibut fishery opening dates adopted by the International Pacific Halibut Commission. The IFQ and CDQ halibut season is specified by a separate publication in the **Federal Register** of annual management measures.

DATES: Effective 1200 hours, A.l.t., March 10, 2023, until 1200 hours, A.l.t., December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: Beginning in 1995, fishing for Pacific halibut and sablefish with fixed gear in the IFQ regulatory areas defined in 50 CFR 679.2 has been managed under the IFQ Program. The IFQ Program is a regulatory regime designed to promote the conservation and management of these fisheries and to further the objectives of the Magnuson-Stevens Fishery Conservation and Management Act and the Northern Pacific Halibut Act. Persons holding quota share receive an annual allocation of IFQ. Persons receiving an annual allocation of IFQ are authorized to harvest IFQ species within specified limitations. Further information on the implementation of the IFQ Program, and the rationale supporting it, are contained in the preamble to the final rule implementing the IFQ Program published in the **Federal Register**, November 9, 1993 (58 FR 59375) and subsequent amendments.

This announcement is consistent with § 679.23(g)(1), which requires that the directed fishing season for sablefish managed under the IFQ Program be specified by the Administrator, Alaska Region, and announced by publication in the **Federal Register**. This method of season announcement was selected to facilitate coordination between the sablefish season, chosen by the Administrator, Alaska Region, and the halibut season, adopted by the International Pacific Halibut Commission (IPHC). The directed fishing season for sablefish with fixed gear managed under the IFQ Program will open 1200 hours, A.l.t., March 10, 2023, and will close 1200 hours, A.l.t., December 7, 2023. This period runs concurrently with the IFQ season for Pacific halibut announced by the IPHC. The IFQ and CDQ halibut season will be specified by a separate publication in the **Federal Register** of annual management measures pursuant to 50 CFR 300.62.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would delay the opening of the sablefish fishery thereby increasing bycatch and regulatory discards between the sablefish fishery and the halibut fishery, and preventing the accomplishment of the management objective for simultaneous opening of these two fisheries. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 6, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 7, 2023.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–04926 Filed 3–7–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 46
Thursday, March 9, 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.

OFFICE OF MANAGEMENT AND BUDGET

[Docket No. OMB–2023–0004]

2 CFR Parts 184 and 200

Guidance for Grants and Agreements

AGENCY: Office of Federal Financial Management, Office of Management and Budget.

ACTION: Notification of proposed guidance; correction.

SUMMARY: This document corrects the Action caption to a notification of proposed guidance published in the **Federal Register** of February 9, 2023. The proposed revisions to the OMB Guidance for Grants and Agreements were limited in scope to support implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act; and to clarify existing requirements. The notification was incorrectly categorized in the Action caption as a proposed rule. This correction clarifies that the notification of proposed guidance is not a proposed rule.

DATES: March 3, 2023.

FOR FURTHER INFORMATION CONTACT: Please contact Dede Rutberg, Office of Management and Budget, 202–881–7359, or via email (preferred) at *Diana.s.rutberg@omb.eop.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In FR Doc. 2023–02617, appearing on page 8374 in the **Federal Register** issue of Thursday, February 9, 2023, 88 FR 8374, make the following correction to the Action caption. On page 8374, correct the Action caption in the first column to read: ''**ACTION:** Notification of proposed guidance.'' The Action caption in the notice published on February 9, 2023 incorrectly included the term ''Proposed rule'' before ''notification of proposed guidance.'' The Office of Management and Budget (OMB) guidance ''published in subtitle A [of 2 CFR],'' which OMB proposes to modify, ''is guidance and not regulation.'' 2 CFR 1.105(b). The publication ''of the OMB guidance in the CFR does not change its nature — it is guidance and not regulation.'' *Id.*

Deidre A. Harrison,

Deputy Controller, Office of Federal Financial Management.

[FR Doc. 2023–04746 Filed 3–8–23; 8:45 am]

BILLING CODE 3110–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0090; Airspace Docket No. 23–AEA–03]

RIN 2120–AA66

Amendment of Class D and Class E Airspace, and Proposed Establishment of Class E Airspace, Poughkeepsie, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace and Class E surface airspace and establish Class E airspace designated as an extension to a Class D surface area for Hudson Valley Regional Airport, Poughkeepsie, NY, as an airspace evaluation determined an update is necessary.

DATES: Comments must be received on or before April 24, 2023.

ADDRESSES: Send comments on this proposal to: the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: (800) 647–5527, or (202) 366–9826. You must identify Docket No. FAA–2023–0090; Airspace Docket No. 23–AEA–03 at the beginning of your comments. You may also submit comments through the internet at *www.regulations.gov.*

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* For further information, contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class D airspace and Class E surface airspace and establish Class E airspace designated as an extension to a Class D surface area for Hudson Valley Regional Airport, Poughkeepsie, NY, to support IFR operations in the area.

Comments Invited

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

Communications should identify both docket numbers (Docket No. FAA–2023–0090; Airspace Docket No. 23–AEA–03) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for the address and phone number). You may also submit comments through the internet at *www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped

postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2023–0090; Airspace Docket No. 23–AEA–03.'' The postcard will be dated/time-stamped and returned to the commenter.

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

Availability of NPRMs

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except for Federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except for federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

Class D airspace designations are published in Paragraph 5000 and Class E airspace designations in Paragraphs 6002 and 6004 of FAA Order JO 7400.11. This document proposes to amend FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points. These updates would be published subsequently in the next update to FAA Order JO 7400.11.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class D airspace and Class E surface airspace by increasing the radius to 4.4 miles (previously 4.0 miles). Also, this action would establish Class E airspace designated as an extension to a Class D surface area of 6.5 miles to the northeast and the southwest of Hudson Valley Regional Airport. An airspace evaluation determined this update is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AEA NY D Poughkeepsie, NY [Amended]

Hudson Valley Regional Airport, NY
(Lat. 41°37′36″ N, long. 73°53′03″ W)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 4.4-mile radius of Hudson Valley Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6002 Class E Surface Airspace.

* * * * *

AEA NY E2 Poughkeepsie, NY [Amended]

Hudson Valley Regional Airport, NY
(Lat. 41°37′36″ N, long. 73°53′03″ W)

That airspace extending upward from the surface within a 4.4-mile radius of Hudson Valley Regional Airport. This Class E airspace is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6004 Class E Airspace Is Designated as an Extension to Class D or Class E Surface Area.

* * * * *

AEA NY E4 Poughkeepsie, NY [Established]

Hudson Valley Regional Airport, NY
(Lat. 41°37′36″ N, long. 73°53′03″ W)

That airspace extending upward from the surface within 1.8-miles each side of the 051° bearing of Hudson Valley Regional Airport, extending from the 4.4-mile radius to 6.5 miles northeast of the airport, and within 1.0-miles each side of the 231° bearing of the airport, extending from the 4.4-mile radius to 6.5-miles southwest of the airport.

Issued in College Park, Georgia, on March 1, 2023.

Lisa E. Burrows,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–04602 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0512; Airspace Docket No. 22–AAL–59

RIN 2120–AA66

Revocation of Very High Frequency (VHF) Omnidirectional Range (VOR) Federal Airway V–489; Galena, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to revoke Alaskan VOR Federal Airway V–489. The FAA is taking this action due to automated flight plan conflicts between New York Air Route Traffic Control Center (ARTCC) and Anchorage ARTCC when pilots file V–489 in flight plans.

DATES: Comments must be received on or before April 24, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–0512 and Airspace Docket No. 22–AAL–59 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *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, 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 *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

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

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.*

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it proposes to revoke Alaskan VOR Airway V–489.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Western Service Center, Federal Aviation, 2200 South 216th St., Des Moines, WA 98198.

Incorporation by Reference

Alaskan VOR Federal airways are published in paragraph 6010(b) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The VOR Federal airway V–489 identifier is used in Alaska and in the New Jersey/New York area. The Alaskan V–489 is a short segment that extends between the Galena, AK, VOR/Distance Measuring Equipment (VOR/DME) and Tanana, AK, VOR/DME navigational aids (NAVAID). The Domestic V–489 extends between the Sparta, NJ, VOR/Tactical Air Navigation (VORTAC) and Albany, NY, VORTAC NAVAIDs. Automated flight plans that include the Domestic V–489 routinely appear in the Anchorage ARTCC computer system when they are intended for New York ARTCC. As a result, pilots are unable to activate their flight plan. Correcting the flight plan conflicts within the computers is not feasible due to the Anchorage and New York ARTCCs utilizing different computer systems and flight data processors.

The Proposal

The FAA proposes to amend 14 CFR part 71 by revoking Alaskan VOR Federal airway V–489 in its entirety. Revoking the Alaskan V–489 would eliminate the confusion between the Alaskan V–489 and the Domestic V–489 and resolve the automated flight plan conflicts the confusion causes with the Anchorage and New York ARTCCs. The FAA is proposing to revoke Alaskan VOR Federal airway V–489 in its entirety. The Domestic VOR Federal airway V–489 would remain unchanged.

Other existing routes would mitigate the loss of the Alaskan V–489. Currently, Alaskan the V–489 offers indirect routing between the Galena, AK, VOR/DME and the Tanana, AK, VOR/DME NAVAIDs; however, two other routes—Alaskan VOR Federal airway V–488 and Area Navigation (RNAV) route T–225—offer direct routing between these two NAVAIDs.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6010(b) Alaskan VOR Federal Airways.

* * * * *

V–489 [Remove]

* * * * *

Issued in Washington, DC.

Brian Konie,

Acting Manager, Airspace Rules and Regulations.

[FR Doc. 2023–04780 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AD35

Land Uses; Special Uses; Cost Recovery, Strict Liability Limit, and Insurance

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Proposed rule; request for public comment.

SUMMARY: The Forest Service (Forest Service or Agency), United States Department of Agriculture, is proposing to amend its special use regulations to update the processing and monitoring fee schedules based on current Agency costs; to provide for recovery of costs associated with processing special use proposals, as well as applications; and to remove the exemption for commercial recreation special use applications and authorizations that involve 50 hours or less to process or monitor. In addition, the Forest Service is proposing to amend its special use regulations to increase the strict liability limit consistent with the strict liability limit established by the United States Department of the Interior, Bureau of Land Management, and to expressly provide for requiring holders of a special use authorization to obtain insurance, as needed.

DATES: Comments on this proposed rule must be received in writing by May 8, 2023.

ADDRESSES: Comments, identified by RIN 0596–AD35, should be sent via one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for sending comments;

2. *Email: SM.FS.WO_LandStaff@usda.gov;*

3. *Mail:* Director, Lands and Realty Management Staff, 201 14th Street SW, Washington, DC 20250–1124; or

4. *Hand Delivery/Courier:* Director, Lands and Realty Management Staff, 1st Floor Southeast, 201 14th Street SW, Washington, DC 20250–1124.

Comments should be confined to issues pertinent to the proposed rule, should explain the reasons for any recommended changes, and should reference the specific section and wording being addressed, where possible. All comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received on this proposed rule at the Office of the Director, Lands and Realty Management Staff, 201 14th Street SW, 1st Floor Southeast, Sidney R. Yates Federal Building, Washington, DC 20024, on business days between 8:30 a.m. and 4 p.m. Visitors are encouraged to call ahead at 202–205–1680 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Reginal Woodruff, Acting Assistant Director, Washington Office Lands and Realty Management Staff, 202–644–5974 or *reginal.woodruff@usda.gov.* Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service at 800–877–8339 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

1. Background and Need

The Forest Service administers approximately 74,000 special use authorizations for use and occupancy of National Forest System (NFS) lands for a wide variety of purposes, including powerline facilities, communications facilities, outfitting and guiding, campground concessions, and four-season resorts. The activities and facilities authorized by special use authorizations contribute significantly to the national economy and the social

and economic foundation of rural communities and towns.

To obtain a special use authorization for a new use or activity, a proponent must submit a special use proposal which meets two sets of screening criteria outlined in the Agency's existing special uses regulations at 36 CFR 251.54(e)(1) and (5). If the proposal passes the screening, the proponent may submit a special use application for evaluation by the Forest Service. Per existing 36 CFR 251.54(e)(6), environmental analysis and documentation are required for special use applications, but not for special use proposals. Under the Forest Service's existing special use regulations at 36 CFR 251.58(c), the Agency may charge a processing fee for evaluating applications, but not for screening proposals. Under existing 36 CFR 251.58(d), the Agency may charge a monitoring fee for ensuring compliance with the terms of a special use authorization. Per existing 36 CFR 251.58(g)(4), minor category recreation special uses (requiring 50 hours or less to process or monitor) are exempt from cost recovery fees.

Ensuring that the Forest Service's Special Uses Program is delivered efficiently and effectively is critical to its ongoing success. The Forest Service's special uses cost recovery fees, which are expressly authorized by several Federal statutes and existing Forest Service regulations and directives, are a critical tool for achieving those goals because they cover the Agency's costs to process special use applications and monitor compliance with special use authorizations. In addition, the Agency has the statutory authority to retain and spend the cost recovery fees it collects to cover those costs.

The Forest Service based its cost recovery regulations on the United States Department of the Interior, Bureau of Land Management (BLM)'s preexisting regulations and adopted the BLM's cost recovery fee schedules, since both agencies use title V of the Federal Land Policy and Management Act (FLPMA) and section 28(l) of the Mineral Leasing Act of 1920 as a cost recovery authority and have comparable land use programs. Both agencies charge flat fees from processing and monitoring fee schedules for special use applications and authorizations that take 50 hours or less to process or monitor. The rates in the cost recovery fee schedules are based on the hourly cost of a Forest Service or BLM employee to process an application or monitor an authorization and are indexed annually based on the Implicit Price Deflator-Gross Domestic Product.

The Forest Service's existing cost recovery regulations at 36 CFR 251.58(i)(2) state that within 5 years of their effective date of March 23, 2006, the Agency must review the rates in the Agency's cost recovery fee schedules to determine whether they are commensurate with the actual costs incurred by the Agency in processing special use applications and monitoring compliance with special use authorizations and to assess consistency with the BLM's cost recovery fee schedules. However, the rates in the Forest Service's cost recovery fee schedules have not been updated other than for inflation since the Forest Service's cost recovery rule was promulgated in 2006, and the rates in the schedules no longer reflect current Agency costs.

In addition, current Forest Service cost recovery regulations do not provide for recovery of Agency processing costs for a special use application that are incurred before it is accepted, including but not limited to costs incurred in meeting with the proponent (36 CFR 251.54(a)) and screening the proponent's proposal (36 CFR 251.54(e)(1) and (5)). These costs are incurred by the Agency in performing work that is a prerequisite to submission of an application, and they are therefore properly covered by processing fees charged by the Agency. The connectivity between special use proposals and applications is further demonstrated by the fact that the same form, SF–299, is used for both special use proposals and applications. Processing costs incurred for a special use application before it is submitted can be significant, especially for complex infrastructure projects such as large-scale powerline facilities or oil and gas pipelines.

Although existing Federal statutes authorize cost recovery fees for commercial recreation special use applications and authorizations that require 50 hours or less to process or monitor, these applications and authorizations are exempt from processing and monitoring fees under current Forest Service regulations. The Agency incurs significant costs in processing and monitoring these applications and authorizations, and non-recreation special use applications and authorizations requiring 50 hours or less to process or monitor are not exempt from cost recovery fees. Without cost recovery fees for commercial recreation special use applications requiring 50 hours or less to process, the processing of some applications for these uses has been deferred. Removal of the exemption would help the Agency collect fees to support a modernized special uses authorization program to more efficiently processes increasing applications triggered by the accelerated recent growth in the outdoor recreation economy; further reduce the backlog of applications for new uses and expired authorizations for existing uses; and facilitate increased access to NFS lands. The updated cost recovery fee schedules and removal of the exemption for minor category commercial recreation special use applications would provide the Agency with sufficient resources to ensure parity in timely processing of all special use applications. The exemption from minor category cost recovery fees would remain in place for proposals, applications, and authorizations for a recreation residence for reasons explained below. The Agency's special uses budget and staff have not kept up with the increasing demand for use and occupancy of NFS lands. There were 168 million visits to NFS lands in 2020, an increase of 18 million visits from 2019. All these factors affect the Agency's ability to process special use applications and monitor compliance with special use authorizations in a manner that meets the needs and customer service expectations of applicants and authorization holders.

Under title V of FLPMA, both the Forest Service and the BLM have authority to impose strict liability in tort up to a limit specified by regulation on holders of right-of-way authorizations for high-risk uses, such as powerline facilities, oil and gas pipelines, and dams with a high hazard assessment classification. However, the strict liability limit for high-risk special uses in the Forest Service's regulations no longer aligns with the strict liability limit for right-of-way authorizations in the BLM's regulations. In 2005, the BLM raised the strict liability limit in its regulations from $1 million to $2 million and provided for adjustments of the increased limit based on inflation. The BLM's strict liability limit is currently $2,884,000 (*https://www.bl.gov/policy/im-2022-005*). The Forest Service's strict liability limit is still $1 million. In addition, the Forest Service's regulations do not expressly provide for requiring holders of a special use authorization to obtain insurance, as needed.

2. Proposed Regulatory Revisions

Updates to the Rates in the Forest Service's and BLM's Cost Recovery Fee Schedules

The Forest Service is proposing to update the rates in its cost recovery fee

schedules to reflect the Agency's current costs to process applications and monitor compliance with land use authorizations. These changes are consistent with the Agency's existing regulations at 36 CFR 251.58(i)(2)(i). There are minor discrepancies between the rates in the Forest Service's proposed cost recovery fee schedule and the rates in the BLM's proposed cost recovery fee schedule, which was published for public comment November 7th, 2022. These discrepancies will be reconciled when the two rules are finalized. Like the Forest Service's current fee schedules, the updated fee schedules would be maintained in the Agency's directive system (36 CFR 200.4, 251.58(i)(1)).

The table below displays the current and proposed rates in the processing and monitoring fee schedules for the Forest Service, which the Forest Service has coordinated with the BLM's national linear right-of-way program manager. To determine the proposed cost recovery fees for categories 1 through 4 and minor cases in category 5, an average hourly wage of $63.71 was calculated (including additions to pay and indirect costs) for processing and monitoring activities during fiscal year (FY) 2019. The average hourly wage of $63.71 was calculated by:

- Dividing the annual salary for a Federal employee at General Schedule grade 11, step 5 (the average General Schedule grade and step for a Federal employee who works on land use applications and authorizations), which is $70,537, by 2,087 hours per year (the divisor on the Office of Personnel Management's website used to compute Federal employees' hourly rates), or $33.80 per hour; and
- Multiplying $33.80 by a surcharge of 1.55 for leave (27% of annual salary) and benefits (28% of annual salary) and by a surcharge of 1.216 for indirect costs (21.6% of annual salary) and rounding to the nearest dollar.

For categories 1 through 4, the average hourly wage of $63.71 was multiplied by the midpoint of the range of hours in each category and rounded to the nearest dollar to determine the fee in that category. Thus, the proposed fee for category 1 is $63.71 × 4 = $255; the proposed fee for category 2 is $63.71 × 16 = $1,019; the proposed fee for category 3 is $63.71 × 32 = $2,039; and the proposed fee for category 4 is $63.71 × 52 = $3,313.

Cost recovery fees in category 5 (master agreements) would continue to vary based on the applicable category (the fee for category 1, 2, 3, or 4 for minor cases or full costs for major cases). Cost recovery fees in category 6 would continue to be based on full costs.

Current category 1, more than 1 hour to 8 hours, would be increased to more than 0 hours to 8 hours to reflect costs incurred by the agencies for less than an hour of work. In addition, current category 3, more than 24 hours to 36 hours, would be increased to more than 24 hours to 40 hours; current category 4, more than 36 hours to 50 hours, would be increased to more than 40 hours to 64 hours; and current category 6, more than 50 hours, would be increased to more than 64 hours. As a result, fewer cases would be subject to full cost recovery.

In addition to the request for public comment on the entire proposed rule, the Forest Service requests specific public comment on alternatives for mitigating impacts on small entities as a result of the updated cost recovery fee schedules and removal of the exemption from cost recovery fees for commercial recreation special uses.

Current cost recovery fee schedules (CY 2020)			Proposed cost recovery fee schedules			
Category	Estimated hours	Fee	Category	Estimated hours	Midpoint	Fee
1	>1 to 8	$130	1	>0 to 8	4	$255.
2	>8 to 24	$459	2	>8 to 24	16	$1,019.
3	>24 to 36	$864	3	>24 to 40	32	$2,039.
4	>36 to 50	$1,239	4	>40 to 64	N/A	$3,313.
5	varies depending on whether master agreement covers minor or major category uses.	varies depending on whether master agreement covers minor or major category uses.	5	varies depending on whether master agreement covers minor or major category uses.		varies depending on whether master agreement covers minor or major category uses.
6	>50	full costs	6	>64		full costs.

Cost Recovery Fees for Proposals

To align the Agency's cost recovery program more closely with the BLM's program, the Forest Service is proposing to expand the scope of processing fees under its existing cost recovery regulations to include costs for a special use proposal that are incurred before a special use application is submitted, including but not limited to costs incurred in meeting with the proponent (36 CFR 251.54(a)) and screening the proponent's proposal (36 CFR 251.54(e)(1) and (e)(5)). To effect this change, the Forest Service would add a reference to proposals wherever applications are mentioned in the Agency's cost recovery regulations at 36 CFR 251.58 and would revise § 251.58(c)(1)(i) to provide that separate processing fees will be charged for processing special use proposals and for processing special use applications.

Under the proposed processing fee schedule based on the updated hourly Agency employee rate, special use proponents would pay $255 to $3,313, depending on the applicable cost recovery fee category, for special use proposals requiring 64 hours or less to process. Special use proposals requiring more than 64 hours to process would be subject to cost recovery fees based on full costs. Special use applicants would pay a separate processing fee of $255 to $3,313, depending on the applicable cost recovery fee category, for special use applications requiring 64 hours or less to process. Special use applications requiring more than 64 hours to process would be subject to cost recovery fees based on full costs.

Removal of the Exemption for Minor Category Commercial Recreation Special Use

The Forest Service is proposing to remove the exemption in the Agency's existing cost recovery regulations at 36 CFR 251.58(g)(4) for commercial recreation special use applications and authorizations that require 50 hours or less to process or monitor. Under the proposed cost recovery fee schedules, processing and monitoring fees for commercial recreation special use proposals, applications, and authorizations requiring 64 hours or less to process or monitor would be $255 to $3,313, depending on the applicable cost recovery fee category. Commercial recreation special use proposals, applications, and authorizations requiring more than 64 hours to process,

or monitor would be subject to cost recovery fees based on full costs.

All applicants for special use permits, regardless of size, will receive the same level of attention and service on a first-come, first-served basis. Removing the exemption for minor category commercial recreation special use applications and authorizations in the existing rule would provide for parity by treating minor category commercial recreation special use applications and authorizations commensurate with minor category non-recreation special use applications and authorizations. In practice, the existing 50-hour exemption for recreation special use applications and authorizations results in Agency staff prioritizing non-recreation special use applications and authorizations, since costs incurred in connection with this work are covered by cost recovery fees and funding for the work is more predictable. By not implementing its cost recovery authority consistently across different types of uses, the Agency has inadvertently reduced its capacity to support a modernized special uses authorization program to more efficiently processes increasing applications triggered by the accelerated growth in the outdoor recreation economy.

Applying cost recovery fees to minor category commercial recreation special use proposals and applications would subject them to the customer service standard in the Forest Service's existing cost recovery regulations at 36 CFR 251.58(c)(7). In addition, proposals are required only for new uses. The categorical exclusions from documentation in an environmental assessment or environmental impact statement in the Forest Service's regulations implementing the National Environmental Policy Act streamline the processing of commercial recreation special use applications for new uses and modifications of existing uses, thereby further reducing processing fees for commercial recreation special uses such as outfitting and guiding and recreation events (36 CFR 220.6(d)(11) and (12)). Without cost recovery fees for minor category commercial recreation special uses, the processing of some applications for these uses has been deferred. Charging processing fees for these applications would help reduce backlogs.

Under the proposed rule, proposals, applications, and authorizations for a recreation residence requiring 64 hours or less to process or monitor would still be exempt from processing and monitoring fees. Charging a processing fee for minor category recreation residence proposals and applications would be redundant because issuance of a recreation residence special use authorization is now subject to an administrative fee of $1,200 under the Cabin Fee Act (16 U.S.C. 6214). Since recreation residences have been in place for many years, and since experience in administering this type of use has shown that continuation of the use does not cause significant environmental impacts, a new special use authorization can typically be issued without incurring extensive processing costs, such as for supplemental environmental analysis. Likewise, monitoring compliance with recreation residence special use authorizations is typically not time-intensive.

Conforming and Clarifying Revisions to the Liability Provisions in the Forest Service's Special Use Regulations

To track the BLM's regulations, the Agency is further proposing to raise the strict liability limit in tort for high-risk special uses in the Forest Service's regulations at 36 CFR 251.56(d)(2) from $1 million to the BLM's current strict liability limit of $2,884,000 and to provide for adjustments of the increased limit based on inflation.

The Forest Service is also proposing to update and clarify the liability provisions at 36 CFR 251.56(d). These liability provisions were promulgated to implement title V of FLPMA, which was enacted in 1976. Since then, other statutes with different liability standards, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.,* have been enacted. Revisions to § 251.56(d) are needed to reflect the liability standards in those subsequent statutes. These revisions are consistent with current liability clauses in the Agency's special use authorization forms.

Specifically, to clarify the scope of existing § 251.56(d) and (d)(1), the Agency is proposing to add the heading ''Damages'' to existing § 251.56(d) and renumber it as § 251.56(d)(1); add the heading ''Indemnification'' in existing § 251.56(d)(1) and renumber it as § 251.56(d)(2); and add the heading ''Strict liability in tort'' to existing § 251.56(d)(2) and renumber it as § 251.56(d)(3). In addition, the Agency is proposing to revise the indemnification provision in existing § 251.56(d)(1) to clarify that it applies to strict liability under environmental laws such as CERCLA, as well as to negligence in tort, consistent with the current liability clauses in the Agency's special use authorization forms. The Agency is proposing to revise the strict liability provision in existing § 251.56(d)(2) to clarify that the strict liability limit applies only to liability in tort, consistent with section 504(h)(2) of FLMPA (43 U.S.C. 1764(h)(2)). The Agency is proposing to add a new paragraph at § 251.56(d)(4), entitled ''Other remedies,'' to clarify that the maximum strict liability limit in tort does not apply to environmental liability, including liability under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), or any other liability that is not subject to a strict liability limit under applicable law.

The Forest Service is also proposing to revise its regulations at 36 CFR 251.56(e) to change the heading to ''Bonding and insurance'' and to expressly provide for requiring holders of a special use authorization to obtain insurance, as needed.

The proposed rule would directly support USDA's strategic goals for FY 2022 through FY 2026 by expanding opportunities for economic development and improving the quality of life in Rural Tribal communities (USDA Strategic Plan, Goal 5). By updating the cost recovery fee schedules to reflect current Agency costs, expanding the scope of processing fees to include Agency costs incurred for applications before they are submitted, and removing the 50-hour exemption from cost recovery fees for commercial recreation special uses, the proposed rule would enable the Agency to respond in a more timely manner to requests for new uses, further reduce the backlog of expired special use authorizations, and avoid deferring action on minor category commercial recreation special use applications and authorizations based on limited funds.

Regulatory Certifications

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether a regulatory action is significant as defined by E.O. 12866 and will review significant regulatory actions. OIRA has determined that this proposed rule is significant as defined by E.O. 12866. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Agency has developed the proposed rule consistent with E.O. 13563. Comments

are invited on all methods, assumptions, and data used for the cost-benefit analysis completed for the proposed rule, consistent with E.O. 12866 and the invitation and directions for public comment provided in the summary at the beginning of this document.

An estimated 30,695 special use authorizations for which an application was accepted from FY 2015 through FY 2020 would potentially be subject to the proposed rule. The greatest number of authorizations were for recreation special uses, followed by industry and transportation special uses, collectively accounting for almost 80% of the authorizations. The most common types of authorizations were for outfitting and guiding (use code 153) and recreation events (use code 181), while commercial filming (use code 552) and FLPMA authorizations for road rights-of-way (use code 753) are the most common types of special uses in the industry and transportation series, respectively. Together, these four types of special uses account for almost two-thirds (67%) of all authorizations that would potentially be subject to the proposed rule. The next most common types of special uses are still photography (use code 551) and water pipelines of less than 12 inches in diameter (use code 915), which account for an additional 6% of the authorizations.

A total of 22,102 entities with unique names were identified in the Forest Service's Special Uses Data System as holders of the 30,695 authorizations for which an application was accepted from FY 2015 through FY 2020. An estimated 1,596 entities are identified as households. Of the remaining 20,506 business, governmental, and organizational entities that would be subject to the proposed rule per existing authorization data, 25 out of 13,736 business entities (0.2%), 962 out of 2,603 governmental entities, and no organizational entities are assumed to be large. All large governmental entities are associated with state, Federal, or foreign governmental agencies. As a result, the potential economic impacts of the proposed rule on small entities summarized by the initial RFA analysis (see Regulatory Flexibility Act Analysis section in this document) encompasses the vast majority of potential economic impacts of the proposed rule on all entities; economic impacts on large entities are expected to be negligible under the proposed rule.

The greatest number of authorizations are estimated to be held by businesses (62% of entities), followed by organizations (19%), governmental entities (12%), and households (7%). A total of 8,662 unique entities, most of which were businesses (5,587 or 65%), paid cost recovery fees under the current cost recovery rule. Most of the entities were engaged in industry special uses (36% in the 500 series), followed by transportation special uses (27% in the 700 series). The number of unique entities making cost recovery fee payments increases from 8,662 under the current rule to 22,102 under the proposed rule. The increase in the number of entities is due to the addition of entities with authorizations that were not subject to cost recovery fees under current conditions but would be subject to cost recovery fees under the proposed rule.

Annual cost recovery fees under the proposed rule are therefore estimated to range from $3.5 million to $5.4 million (2020). After accounting for annual cost recovery fees under baseline conditions ($780,000), increases in annual cost recovery fees under the proposed rule are projected to be $2.7 million to $4.7 million. The overall magnitude of this increase is a function of the large number of authorizations that would be subject to the proposed rule (*e.g.,* 30,695 special use authorizations for which applications were accepted between FY 2015 and FY 2020 have been identified as being potentially subject to the proposed rule) and relatively large increases in minor cost recovery category fee rates of 100% to 170%, depending on the cost recovery fee category. Each of the three drivers of change in costs associated with the proposed rule (*i.e.,* increases in fixed rates for minor category cost recovery fees; charging cost recovery fees for processing proposals; and removing the exemption from cost recovery fees for commercial recreation special use applications and authorizations requiring 50 hours or less to process or monitor) plays a significant role in the estimated increases in annual cost recovery fees collected. If the proposed processing fees for proposals were eliminated, annual cost increases under the proposed rule might decline by 38%. Annual cost increases might decline by a similar value of 40% if the cost recovery fee exemption for minor category commercial recreation special use applications and authorizations were retained. Annual cost increases are estimated to decline by about 66% if the existing cost recovery fee rates for minor categories were retained (*i.e.,* if the rates were not increased). These percentages do not sum to 100 because the drivers of change in cost recovery fees associated with the proposed rule are not exclusive. The present value of increases in annual cost recovery fees under the proposed rule over a 15-year period is projected to range from $26 million to $45 million, assuming annual cost savings remain constant over that time and a discount rate of 7%, and $33 million to $57 million using a discount rate of 3%. There is a small subset of applications in category 5 or 6 under baseline conditions that would be subject to processing fees for proposals under the proposed rule and that have not been accounted for in the quantified cost results. However, proposals associated with applications that would be assigned to cost recovery category 5 or 6 would account for only approximately 2% to 3% of the estimated costs of the proposed rule, a small fraction when compared to the range of quantified costs described above that vary by as much as 74%. The greatest number of entities would be engaged in recreation special uses (45% in the 100 series) under the proposed rule, compared to industry special uses under baseline conditions, due to new cost recovery fees for minor category commercial recreation special uses.

Most, if not all, of the increases in cost recovery fees resulting from compliance with new cost recovery fee requirements under the proposed rule are transfer payments from the Federal Government to authorization holders, and therefore are not analyzed as costs in the cost-benefit analysis. Given the nature of transfer effects, absent this rulemaking, the foregone fees would instead be paid by taxpayers through budget appropriations from general revenue, and the savings in cost recovery fees to industry would otherwise be used by industry.

By (i) updating the cost recovery fee schedules to reflect current Agency costs; (ii) expanding the scope of processing fees to include Agency costs incurred for applications before they are submitted; and (iii) removing the 50-hour exemption from cost recovery fees for commercial recreation special uses, the proposed rule would establish regulatory conditions for charging cost recovery fees and generating funds necessary to modernize the special uses program. A modernized program would enhance the Agency's ability to provide opportunities more expeditious and equitable opportunities for meeting public demand for goods and services from special use authorizations by:

- Improving customer service and facilitating rural prosperity and economic development (USDA's strategic goals for FY 2018 through FY 2022);
- Enabling the Agency to respond more quickly to requests for new uses;

- Reducing the backlog of expired special use authorizations; and
- Avoiding deferring action on commercial recreation special use applications and authorizations requiring 50 hours or less to process or monitor due to limited availability of appropriated funds and increasing demand for recreational services.

The benefits derived from revisions to the liability provisions (36 CFR 251.56(d) and (e)) under the proposed rule include greater programmatic transparency, consistency with the BLM, and making it easier for the United States government (the public) to recover damages for high-risk uses of NFS lands by raising the strict liability limit in tort from $1 million to $2,884,000. Revisions to § 251.56(e) providing for requiring holders of a special use authorization to obtain insurance, as needed, are consistent with current insurance clauses in the Agency's special use authorization forms. These revisions therefore constitute a codification of current Agency policy and practice regarding insurance requirements. Changes in costs and benefits are assumed to be negligible and are not evaluated in connection with these revisions.

The benefits of the proposed rule are expected to exceed its costs, given (i) most or all increases in cost recovery fees are transfer payments; (ii) the relatively low economic impacts of the proposed rule on most authorization proponents and holders; (iii) the proposed rule's potential to enhance the Agency's efficiency and consistency in processing special use proposals and applications as well as monitoring compliance with special use authorizations; and (iv) the proposed rule's potential to facilitate the Agency's ability to respond to increasing demand for all types of special uses in a more equitable and expeditious manner and to reduce the backlog of expired authorizations using cost recovery fee revenues generated under the proposed rule.

Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

This proposed rule would revise the Forest Service's cost recovery regulations to update the Forest Service's processing and monitoring fee schedules based on current BLM and Forest Service costs; to provide for charging cost recovery fees for processing special use proposals; to remove the exemption from cost recovery fees for commercial recreation special uses involving 50 hours or less to process or monitor; to increase the maximum strict liability limit in tort for high-risk special uses; and to provide expressly for requiring holders of a special use authorization to obtain insurance, as needed. Forest Service regulations at 36 CFR 220.6(d)(2) establish a categorical exclusion for ''rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions,'' which therefore do not require the preparation of an environmental assessment or impact statement. The Agency's preliminary assessment is that this proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Regulatory Flexibility Act Analysis

Consistent with the Regulatory Flexibility Act (RFA) and E.O. 13272, a threshold RFA analysis is conducted to determine if a proposed rule would have a significant economic impact on a substantial number of small entities. If the threshold RFA analysis supports a determination that a proposed rule would not have a significant economic impact on a substantial number of small entities, an RFA analysis is not needed. If such a determination cannot be supported, an initial RFA analysis is completed, followed by a final RFA analysis reflecting public comment, to be completed as part of the final rulemaking. Comments are invited on methods, assumptions, and data used to estimate the number of small entities potentially affected by the proposed rule, as well as potential economic impacts on small entities from the proposed rule, consistent with E.O. 13272 and the invitation and directions for public comment provided in the summary at the beginning of this document.

To measure the economic impacts of a proposed rule that would impose fees on small entities, annual projected changes in fees for those entities are divided by their estimated annual gross receipts or expenditures.

The RFA analysis results are presented separately for small governmental entities, small organizations, and small businesses.

Small Governmental Entities

An estimated 1,641 of the 2,603 governmental entities that held an authorization for which an application was accepted from FY 2015 through FY 2020 were identified as small based on the holder (Federal, State, and foreign governmental entities were assumed to be large and were excluded from the threshold RFA analysis). For context, the Forest Service has identified 2,116 counties located within economic impact areas or zones around National Forest units. An estimated 1,400 of the 2,116 counties were determined to have populations of less than 50,000 and therefore were classified as small. The 1,641 governmental entities determined to be small in this analysis could constitute a substantial number when considered in the context of the population of small counties, towns, or communities concentrated in local areas influenced by NFS lands.

Projected increases in cost recovery fees for small governmental entities, annualized at 3% over the term of each authorization, average $215 to $528 per year across small governmental entities and range as high as $1,432 to $1,782 per year for recreation special use authorizations. Annualized increases in cost recovery fees for small governmental entities under the proposed rule are projected to be less than 0.5% of annual salary and wage expenditures for small governmental entities, even assuming higher estimates of annualized cost recovery fee increases ($1,782) and lower estimates of annual governmental expenses (*e.g.,* $400,000). Although numbers of affected small governmental entities could constitute a substantial number of entities in local areas influenced by NFS lands, these results suggest that the proposed rule would not have a significant economic impact on small governmental entities.

Small Organizations

There are an estimated 4,167 unique small organizations with an authorization for which an application was accepted from FY 2015 through FY 2020 that could be subject to the proposed rule. A little more than half of these small organizations (2,199 or 53%) hold an authorization for a recreation special use.

Increases in annualized fees for small organizations average $160 to $497 per year across all types of small organizations and types of uses, and averages range as high as $449 to $1,265 per year for organizations that hold a recreation special use authorization. Annualized increases in cost recovery

fees for small organizations with a recreation special use authorization (53% or 2,199 out of 4,167 small organizations) average 1% to 2.5% of annual gross receipts. Average economic impacts range from less than 0.1% to 2.3% of annual gross receipts for small organizations with authorizations for other types of special uses (47% or 1,959 out of 4,167 organizations), with the exception of a small number of organizations (categorized as associations) (0.2% or 9 out of 4,167) with authorizations for multiple types of special uses where impacts are estimated to average 3.7%.

The estimated number of small organizations (4,167) potentially impacted (particularly in relation to recreation special uses) and the possibility that they might be concentrated in local areas influenced by NFS lands suggest that a substantial number of small organizations could be affected by the proposed rule. However, with the exception of economic impacts of 3.7% for a small number of associations (9 out of 4,167), low potential economic impacts, averaging 0.1% to 2.5% of annual gross receipts for small organizations of all types across all types of uses, suggest that the proposed rule would not have a significant economic impact on small organizations.

Small Businesses

A total of 13,711 small business entities had an authorization for which an application was accepted from FY 2015 through FY 2020 that could be impacted by the proposed rule.

Average annualized cost recovery fee increases are projected to range from $329 to $1,160 for small businesses across different types of special uses. Potential economic impact results indicate that average annualized changes in cost recovery fees under the proposed rule could range from 0.3% to 2.3% of annual gross receipts for small businesses earning $0 to $100,000 in gross receipts per year (with a median of $50,000) for 3,705 (27%) of 13,711 small businesses that could be affected by the proposed rule. The 3,705 small businesses are estimated to account for 0.1% of all U.S. small businesses in the relevant North American Industry Classification System (NAICS) industries. Average economic impacts are estimated to be 0.5% or less of annual gross receipts for the remaining 10,006 (73%) of the 13,711 potentially affected small businesses, which have annual gross receipts greater than $100,000.

The number of small businesses that would be subject to the proposed rule is projected to be less than 0.1% to 15% of all U.S. small businesses in the NAICS industries correlating to the types of special uses conducted by small businesses under their authorizations. On a regional level, in economic impact areas influenced by NFS lands, a substantial number of small businesses conducting recreation special uses could be affected by the proposed rule. Recreation and industry are the only use series in which the number or percentage of businesses as well as potential economic impacts are relatively high compared to those in the other use series. Projected economic impacts average 2.1% to 2.3% for small businesses in the smallest receipt category ($0 to $100,000 in gross receipts per year) with authorizations for recreation and industry special uses. The number of small businesses affected (620 to 1,000) is estimated to be 1.6% to 1.8% of U.S. small businesses in NAICS industries representing businesses with authorizations for those special uses.

The proposed rule could affect a substantial number of small businesses with a recreation special use authorization (6,473) concentrated in local areas influenced by NFS lands, particularly in the case of small businesses conducting outfitting and guiding. However, potential economic impacts are estimated to average less than 0.1% to 2.1% of annual gross receipts for small businesses with recreation special use authorizations. Economic impacts are estimated to range from 1% to 6% of annual gross receipts for small businesses conducting outfitting and guiding or recreation events in the 90th percentile (upper bound) estimates of increases in fees for authorizations for outfitting and guiding or recreational events, depending on the applicable annual receipt category. Impacts in the 90th percentile are projected to occur for 10% of small businesses conducting outfitting and guiding or recreation events (*i.e.,* 63 of 627 small business conducting outfitting and guiding and 25 of 252 small businesses conducting recreation events). For small businesses with an industry special use authorization (in the 500 series), there could be approximately 600 still photography and 2,500 commercial filming small businesses that would be subject to the proposed rule, and approximately 200 still photography small businesses and 800 commercial filming small businesses might fall in the smallest receipt category ($0 to $100,000 in gross receipts per year), where the potential for economic impacts would be highest. These small businesses would account for 5% to 6% of U.S. small businesses in the corresponding NAICS industries. However, average annualized changes in cost recovery fees are projected to be 2.4% of annual gross receipts for these small businesses, suggesting that the proposed rule would not have a significant economic impact on a substantial number of small businesses conducting still photography or commercial filming. Economic impacts are estimated to range from 1% to 6% of annual gross receipts for small businesses conducting still photography or commercial filming in the 90th percentile (upper bound), depending on the applicable annual receipt category. Impacts in the 90th percentile are projected to occur for 10% of affected small businesses conducting still photography or commercial filming or 20 of 200 small businesses conducting still photography and 80 of 800 small businesses conducting commercial filming, accounting for 0.5% to 0.6% of the U.S. population of small businesses in those industries.

Of the 553 small business that could be affected by the proposed rule with authorizations for communications special uses, 109 are projected to have annual gross receipts of $0 to $100,000 and economic impacts averaging 0.4% of annual gross receipts. Economic impacts are estimated to average 0.1% or less of annual gross receipts for the remaining 444 small businesses with communications special use authorizations. The Agency has published a separate proposed rule that would require an annual programmatic administrative fee for communications special use authorizations. Economic impacts for the proposed annual programmatic administrative fee are estimated to range from 3% to 7% of annual gross receipts for small businesses with annual receipts of $0 to $100,000. The cumulative economic impacts of the pending proposed programmatic administrative fee and the proposed special uses cost recovery fees are estimated to range from 3.4% to 7.4% of annual gross receipts for the 109 small businesses in the $0 to $100,000 annual gross receipt category with authorizations for communications special uses. Economic impacts of the proposed programmatic administrative fee are estimated to be 0.7% to 1.4% of annual gross receipts for small businesses with annual gross receipts of greater than $100,000 and to increase only marginally to 0.8% to 1.5% of annual gross receipts when taking into account the proposed special uses cost recovery fees.

Of the 449 small businesses with a research and culture special use authorization that would be subject to the proposed cost recovery rule, 132 are projected to be in the smallest annual gross receipt category (with annual gross receipts of $0 to $100,000), with economic impacts averaging 2.3% of annual gross receipts. The 132 small business are estimated to be 0.5% of U.S. small businesses in the corresponding NAICS industries. Economic impacts average 0.5% or less of annual gross receipts for the remaining 317 small businesses with research and culture special use authorizations. The proposed rule could affect a significant number of small businesses with an energy authorization (228 or 15% of total U.S. small firms in relevant NAICS industries). However, the proposed rule would not have a significant economic impact on these small businesses. Only 13 small businesses with energy special use authorizations are estimated to experience an economic impact of 0.4% of annual gross receipts, while economic impacts are projected to be 0.1% or less of annual gross receipts for the remaining 215 small businesses with energy authorizations. The initial RFA analysis results for small businesses with authorizations in other series (agriculture, community services, transportation, and water) indicate that the proposed rule would not have a significant economic impact on a substantial number of these small businesses.

Although the number of small businesses that could be affected by the proposed rule could be substantial in local areas influenced by NFS lands, particularly in the case of outfitting and guiding small businesses, the potential economic impacts of the proposed rule would be low or insignificant in most cases. Potential economic impacts could be high for small subsets of small businesses, ranging up to 6% of annual gross receipts for 63 businesses with outfitting and guiding permits, 25 businesses with recreation event permits, 20 businesses with still photography permits, and 80 businesses with commercial filming permits. Cumulative economic impacts are estimated to range as high as 3.4% to 7.4% of annual gross receipts for 109 small businesses with authorizations for communications special uses when accounting for the additional economic impacts of a pending proposed rule that would require a programmatic administrative fee for communications special use authorizations.

Based on this analysis of small entities, a substantial number of small governmental entities and small organizations and most small businesses are not expected to experience a significant economic impact from the proposed rule. As noted above, small subsets of small businesses might experience increases in annualized cost recovery fees that range up to 6% of annual gross receipts. In the case of small businesses seeking authorizations for commercial recreation special uses, the proposed rule is expected to generate additional revenue to improve processing of applications and issuance of authorizations for these special uses, thereby generating opportunities for small businesses to generate revenue to help offset, in whole or in part, increases in annualized cost recovery fees under the proposed rule.

For this proposed rule, the Agency could not conclude that costs to small subsets of small businesses are sufficiently low or that net benefits of the proposed rule are sufficiently high to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. Instead, the Agency has prepared an initial RFA analysis of the economic impacts of the proposed rule on small entities that seek or hold a special use authorization for use and occupancy of NFS lands. Comments are invited on methods, assumptions, and data used to estimate the number of small entities potentially affected by the proposed rule, as well as potential economic impacts on small entities from the proposed rule, consistent with E.O. 13272 and the invitation and directions for public comment provided in the summary at the beginning of this document.

Section 603(c) of the RFA lists the types of alternatives that must be considered for mitigating economic impacts on small entities. The Agency has considered and is accepting public comment on the following alternatives consistent with that requirement:

1. *Establishment of different compliance or reporting requirements for small entities or timetables that take into account the resources available to small entities.* Providing for a two-year phase-in of the proposed rule for small entities that could experience a significant economic impact has been identified as a legally and programmatically feasible option to mitigate impacts on small entities. This alternative would provide for phasing in the increased cost recovery fee rates, processing fees for proposals, and processing and monitoring fees for minor category commercial recreation special uses for particular types of uses (*e.g.,* outfitting and guiding) to mitigate impacts on types of small entities potentially subject to a significant economic impact from the proposed rule. In the first year, the increased costs would apply to actions in minor categories 1 and 2. In the second year, the increased costs would apply to actions in minor categories 1, 2, and 3. In the third year, the increased costs would apply to actions in all minor categories (1 through 4). Selection of this alternative could result in continued delay in processing or failure to process applications and issue authorizations for commercial recreation special uses during the phase-in period, in contrast to the more efficient processing of applications and issuance of authorizations for non-recreation special uses. While small entities seeking a commercial recreation special use authorization might avoid the cost of processing fees, those entities could experience losses in benefits (*e.g.,* revenue) resulting from processing delays.

2. *Clarification, consolidation, or simplification of compliance and reporting requirements for small entities.* This option is already addressed by the proposed rule to the extent it would clarify the rates in the cost recovery fee schedules and would expand the cases subject to a flat cost recovery fee, rather than full cost recovery under major cost recovery categories. The proposed revisions would provide for more current and effective cost recovery, which would translate into better customer service. Existing compliance and reporting requirements associated with processing proposals and applications and monitoring compliance with special use authorizations are necessary to meet the Agency's statutory mission and mandates. The proposed rule would not alter reporting requirements for special use authorizations. Cost recovery fees would not be routinely, much less annually, incurred under the proposed rule. Processing fees would be incurred only when a proposal and application are submitted; a proposal would be submitted only once for each use, and an application for an existing use would typically be subject to a CE, which would greatly minimize the Agency's costs and any associated processing fee. Monitoring fees would typically be charged only for construction, reconstruction, and site rehabilitation. Most of the monitoring activities conducted by the Agency would not be subject to cost recovery fees.

3. *Use of performance rather than design standards.* This option does not apply to this proposed rule, which involves recovery of Agency costs

incurred in providing benefits to identifiable recipients (*i.e.,* proponents and holders of a special use authorization). The proposed rule would revise the Agency's existing cost recovery regulations to provide for charging cost recovery fees commensurate with the Agency's current costs. To the extent performance is an issue, it is addressed in the Agency's existing cost recovery regulations, which establish a customer service standard in connection with processing fees.

4. *Exemption for some or all small entities from the proposed rule, in whole or in part.* Exempting some or all small entities from cost recovery fees in whole or in part is not expected to be feasible. These exemptions would be difficult to implement programmatically and would be inconsistent with the statutory authorities providing for recovery of the Agency's costs incurred in conferring discrete benefits to identifiable recipients, including small entities. Equally important, these exemptions would be inconsistent with the purposes of the proposed rule, which include revising the cost recovery rates commensurate with the Agency's current costs, charging processing fees for proposals, and removing the existing exemption from cost recovery fees for commercial recreation special use applications and authorizations in minor categories.

The public is invited to suggest other alternatives to mitigate economic impacts on small entities that the Agency has not considered that are consistent with the Agency's statutory cost recovery authority and the purposes of the proposed rule.

Federalism

The Agency has considered this proposed rule under the requirements of E.O. 13132, *Federalism.* The Agency has determined that the proposed rule conforms with the federalism principles set out in this executive order; would not impose any compliance costs on the States; and would not have substantial direct effects 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. Therefore, the Agency has concluded that this proposed rule would not have federalism implications.

Consultation and Coordination With Indian Tribal Governments

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

The Forest Service has determined that this proposed rule, if finalized, may have substantial direct effects on one or more Tribes and that affording Tribes an opportunity for consultation is therefore warranted. The Forest Service is committed to full compliance with the provisions of Executive Order 13175 and will undertake, through the USDA Office of Tribal Relations, Tribal consultation following publication of this proposed rule and before proceeding with a final rulemaking.

Environmental Justice

The Agency has considered the proposed rule under the requirements of E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.* The Forest Service has determined that the proposed rule is not expected to result in disproportionately high and adverse impacts on minority or low-income populations or the exclusion of minority and low-income populations from meaningful involvement in decision-making.

No Takings Implications

The Agency has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protect Property Rights.* The Agency has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Agency has reviewed this proposed rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* The Agency has determined that this proposed rule would not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Forest Service has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform.* After adoption of this proposed rule, (1) all State and local laws and regulations that conflict with this proposed rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to this proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Agency has assessed the effects of this proposed rule on State, Tribal, and local governments and the private sector. This proposed rule would not compel the expenditure of $100 million or more by any State, Tribal, or local government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

The proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 251

Electric power, Mineral resources, National forests, Rights-of-way, Water resources.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend part 251 of title 36 of the Code of Federal Regulations as follows:

PART 251—LAND USES

Subpart B—Special Uses

■ 1. The authority citation for part 251, subpart B, continues to read:

Authority: 16 U.S.C. 460*l*–6a, 460*l*–6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1772.

■ 2. In § 251.56, revise paragraphs (d) and (e) to read as follows.

§ 251.56 Terms and conditions.

* * * * *

(d) *Liability*—(1) *Damages.* Holders shall pay the United States in accordance with applicable Federal and State law for all injury, loss, or damage, including fire suppression costs or other

costs associated with rehabilitation or restoration of natural resources, the United States may incur in accordance with existing Federal and State law in connection with the holders' use or occupancy.

(2) *Indemnification.* Holders shall indemnify, defend, and hold harmless the United States for any judgments, liabilities, claims, damages, and costs, including fire suppression costs or other costs associated with rehabilitation or restoration of natural resources, arising from the holders' past, present, and future acts or omissions in connection with their use or occupancy.

(3) *Strict liability in tort.* Holders of a special use authorization for high-risk use and occupancy, including but not limited to powerline facilities, oil and gas pipelines, and dams with a high hazard assessment classification, shall be strictly liable in tort to the United States for all injury, loss, or damage, including fire suppression costs or other costs associated with rehabilitation or restoration of natural resources, arising from the holders' past, present, and future acts or omissions in connection with their use or occupancy, provided that the maximum strict liability in tort shall be specified in the special use authorization as determined by a risk assessment, prepared in accordance with established agency procedures, and shall not exceed $2,884,000 for any one occurrence, as adjusted annually as prescribed below. The Forest Service shall update the maximum $2,884,000 strict liability limit in tort annually by using the annual rate of change from July to July in the Consumer Price Index for All Urban Consumers, U.S. City Average (CPI–U), rounded to the nearest $1,000. The maximum strict liability limit in tort does not apply to environmental liability, including liability under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), or any other liability that is not subject to a strict liability limit under applicable law. Liability in tort for injury, loss, or damage, including fire suppression costs or other costs associated with rehabilitation or restoration of natural resources, exceeding the specified maximum strict liability in tort shall be determined by the laws governing ordinary negligence of the jurisdiction in which the injury, loss, or damage occurred.

(4) *Other remedies.* The provisions of paragraph (d) of this section do not limit or preclude other remedies that may be available to the United States under applicable law.

(e) *Bonding and insurance.* An authorized officer may require the holder of a special use authorization for other than a noncommercial group use to obtain insurance that includes the United States as an additional insured and to furnish a bond or other security acceptable to the authorized officer to secure any of the obligations to the United States imposed by the terms of the authorization or by any applicable law, regulation, or order.

* * * * *

■ 3. In § 251.58, revise paragraphs (a), (b) introductory text, (b)(1), (c), and (e) through (g) to read as follows:

§ 251.58 Cost recovery.

(a) *Assessment of fees to recover agency processing and monitoring costs.* The Forest Service shall assess separate fees to recover the agency's processing costs for special use proposals and special use applications and to recover the agency's monitoring costs for special use authorizations. Proponents, applicants, and holders shall submit sufficient information for the authorized officer to estimate the number of hours required to process their proposals or applications or monitor their authorizations. Cost recovery fees are separate from any fees charged for the use and occupancy of National Forest System lands.

(b) *Special use proposals, applications, and authorizations subject to cost recovery requirements.* Except as exempted in paragraphs (g)(1) through (4) of this section, the cost recovery requirements of this section apply in the following situations to the processing of special use proposals and applications and monitoring of special use authorizations issued pursuant to this subpart:

(1) *Proposals and applications for use and occupancy that require a new special use authorization.* Proposals and applications for a new special use authorization shall be subject to processing fees.

* * * * *

(c) *Processing fee requirements.* A processing fee is required for each proposal and application for or agency action to issue a special use authorization as identified in paragraphs (b)(1) through (3) of this section. Processing fees do not include costs incurred by the proponent or applicant in providing information, data, and documentation necessary for the authorized officer to make a decision on the proposed use or occupancy pursuant to the provisions in § 251.54.

(1) *Basis for processing fees.* The processing fee categories 1 through 6 set out in paragraphs (c)(2)(i) through (vi) of this section are based upon the costs that the Forest Service incurs in meeting with the proponent or applicant, reviewing the proposal or application, conducting initial and second-level screening for the proposal, conducting environmental analyses of the effects of the proposed use, reviewing any applicant-generated environmental documents and studies, conducting site visits, evaluating a proponent's or an applicant's technical and financial qualifications, making a decision on whether to issue the authorization, and preparing documentation of analyses, decisions, and authorizations for each application. The processing fee for a proposal or an application shall be based only on costs necessary for processing that proposal or application. ''Necessary for'' means that but for the proposal or application, the costs would not have been incurred and that the costs cover only those activities without which the proposal or application cannot be processed. The processing fee shall not include costs for studies for programmatic planning or analysis or other agency management objectives, unless they are necessary for the proposal or application being processed. For example, the processing fee shall not include costs for capacity studies, use allocation decisions, energy corridor or communications site planning, or biological studies that address species diversity, unless they are necessary for the proposal or application. Proportional costs for analyses, such as capacity studies, that are necessary for the proposal or application may be included in the processing fee. The costs incurred for processing a proposal or an application, and thus the processing fee, depend on the complexity of the proposed use and occupancy; the amount of information that is necessary for the authorized officer's decision in response to the proposed use and occupancy; and the degree to which the proponent or applicant can provide this information to the agency. Processing work conducted by the applicant or a third party contracted by the applicant minimizes the costs the Forest Service will incur to process the proposal or application, and thus reduces the processing fee. The total processing time is the total time estimated for all Forest Service personnel involved in processing a proposal or an application and is estimated case by case to determine the fee category for a proposal or an application.

(i) *Processing fee determinations.* Separate processing fees will be charged

for processing proposals and for processing applications. The applicable fee rate for processing proposals and applications in minor categories 1 through 4 (paragraphs (c)(2)(i) through (iv) of this section) shall be assessed from a schedule. The processing fee for proposals and applications in category 5, which may be either minor or major, shall be established in the master agreement (paragraph (c)(2)(v) of this section). For major category 5 (paragraph (c)(2)(v) of this section) and category 6 (paragraph (c)(2)(vi) of this section) cases, the authorized officer shall estimate the agency's full actual processing costs. The estimated processing costs for category 5 and category 6 cases shall be reconciled as provided in paragraphs (c)(5)(ii) and (iii) and (c)(6)(ii) and (iii) of this section.

(ii) *Reduction in processing fees for certain category 6 proposals and applications.* For category 6 proposals and applications submitted under authorities other than the Mineral Leasing Act, the proponent or applicant:

(A) May request a reduction of the processing fee based upon the proponent's or applicant's written analysis of actual costs, the monetary value of the rights and privileges sought, that portion of the costs incurred for the benefit of the general public interest, the public service provided, the efficiency of the agency processing involved, and other factors relevant to determining the reasonableness of the costs. The agency will determine whether the estimate of full actual costs should be reduced based upon this analysis and will notify the proponent or applicant in writing of this determination; or

(B) May agree in writing to waive payment of reasonable costs and pay the actual costs incurred in processing the proposal or application.

(2) *Processing fee categories*—(i) *Category 1: Minimal Impact: More than 0 and up to and including 8 hours.* The total estimated time in this minor category is more than 0 and up to and including 8 hours for Forest Service personnel to process a proposal or an application.

(ii) *Category 2: More than 8 and up to and including 24 hours.* The total estimated time in this minor category is more than 8 and up to and including 24 hours for Forest Service personnel to process a proposal or an application.

(iii) *Category 3: More than 24 and up to and including 40 hours.* The total estimated time in this minor category is more than 24 and up to and including 40 hours for Forest Service personnel to process a proposal or an application.

(iv) *Category 4: More than 40 and up to and including 64 hours.* The total estimated time in this minor category is more than 40 and up to and including 64 hours for Forest Service personnel to process a proposal or an application.

(v) *Category 5: Master agreements.* The Forest Service and the applicant may enter into master agreements for the agency to recover processing costs associated with a particular proposal or application, a group of proposals or applications, or similar proposals or applications for a specified geographic area. This category is minor if 64 hours or less are needed for Forest Service personnel to process a proposal or an application and major if more than 64 hours are needed. In signing a master agreement for a major category proposal or application submitted under authorities other than the Mineral Leasing Act, a proponent or an applicant waives the right to request a reduction of the processing fee based upon the reasonableness factors enumerated in paragraph (c)(1)(ii)(A) of this section. A master agreement shall at a minimum include:

(A) The fee category or estimated processing costs;

(B) A description of the method for periodic billing, payment, and auditing;

(C) A description of the geographic area covered by the agreement;

(D) A work plan and provisions for updating the work plan;

(E) Provisions for reconciling differences between estimated and final processing costs; and

(F) Provisions for terminating the agreement.

(vi) *Category 6: More than 64 hours.* In this major category more than 64 hours are needed for Forest Service personnel to process a proposal or an application. The authorized officer shall determine the issues to be addressed and shall develop preliminary work and financial plans for estimating recoverable costs.

(3) *Multiple proposals or applications other than those covered by master agreements (category 5)*—(i) *Unsolicited proposals or applications where there is no competitive interest.* Processing costs that are incurred in processing more than one of these proposals or applications (such as the cost of environmental analysis or printing an environmental impact statement that relates to all the applications) must be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by each proponent or applicant.

(ii) *Unsolicited proposals where competitive interest exists.* When one or more unsolicited proposals are submitted and the authorized officer determines that competitive interest exists, the agency shall issue a prospectus. All proposals submitted pursuant to that solicitation shall be processed as applications. The applicants are responsible for the costs of environmental analyses that are necessary for their applications and that are conducted prior to issuance of the prospectus. Processing fees for these cases shall be determined pursuant to the procedures for establishing a category 6 processing fee and shall include costs such as those incurred in printing and mailing the prospectus; having parties other than the Forest Service review and evaluate applications; establishing a case file; recording data; conducting financial reviews; and, for selected applicants, any additional environmental analysis required in connection with their applications. Processing fees shall be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by all parties who submitted proposals that were processed as applications pursuant to the solicitation.

(iii) *Solicited applications.* When the Forest Service solicits applications through the issuance of a prospectus on its own initiative, rather than in response to an unsolicited proposal or proposals, the agency is responsible for the cost of environmental analyses conducted prior to issuance of the prospectus. All proposals submitted pursuant to that solicitation shall be processed as applications. Processing fees for these cases shall be determined pursuant to the procedures for establishing a category 6 processing fee and shall include costs such as those incurred in printing and mailing the prospectus; having parties other than the Forest Service review and evaluate applications; establishing a case file; recording data; conducting financial reviews; and, for selected applicants, any additional environmental analysis required in connection with their applications. Processing fees shall be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by all parties who submitted proposals that were processed as applications pursuant to the solicitation.

(4) *Billing and revision of processing fees*—(i) *Billing.* The authorized officer shall provide written notice to a proponent or applicant when a proposal or application has been received. The authorized officer shall not bill the proponent or applicant a processing fee until the agency is prepared to process the proposal or application.

(ii) *Revision of processing fees.* Minor category processing fees shall not be

reclassified into a higher minor category once the processing fee category has been determined. However, if the authorized officer discovers previously undisclosed information that necessitates changing a minor category processing fee to a major category processing fee, the authorized officer shall notify the proponent or applicant in writing of the conditions prompting a change in the processing fee category before continuing with processing the proposal or application. The proponent or applicant may accept the revised processing fee category and pay the difference between the previous and revised processing fee categories; withdraw the proposal or application; revise the project to lower the processing costs; or request review of the disputed fee as provided in paragraphs (e)(1) through (4) of this section.

(5) *Payment of processing fees.* (i) Payment of a processing fee shall be due within 30 days of issuance of a bill for the fee, pursuant to paragraph (c)(4) of this section. The processing fee must be paid before the Forest Service can initiate or, in the case of a revised fee, continue with processing a proposal or an application. Payment of the processing fee by the proponent or applicant does not obligate the Forest Service to authorize the proponent's or applicant's proposed use and occupancy.

(ii) For category 5 cases, when the estimated processing costs are lower than the final processing costs for proposals or applications covered by a master agreement, the proponent or applicant shall pay the difference between the estimated and final processing costs.

(iii) For category 6 cases, when the estimated processing fee is lower than the full actual costs of processing a proposal or an application submitted under the Mineral Leasing Act, or lower than the full reasonable costs (when the proponent or applicant has not waived payment of reasonable costs) of processing a proposal or an application submitted under other authorities, the proponent or applicant shall pay the difference between the estimated and full actual or reasonable processing costs.

(6) *Refunds of processing fees.* (i) Processing fees in minor categories 1 through 4 are nonrefundable and shall not be reconciled.

(ii) For category 5 cases, if payment of the processing fee exceeds the agency's final processing costs for the proposals or applications covered by a master agreement, the authorized officer either shall refund the excess payment to the proponent or applicant or, at the proponent's or applicant's request, shall credit it towards monitoring fees due.

(iii) For category 6 cases, if payment of the processing fee exceeds the full actual costs of processing a proposal or an application submitted under the Mineral Leasing Act, or the full reasonable costs (when the proponent or applicant has not waived payment of reasonable costs) of processing a proposal or an application submitted under other authorities, the authorized officer either shall refund the excess payment to the proponent or applicant or, at the proponent's or applicant's request, shall credit it towards monitoring fees due.

(iv) For major category 5 and category 6 proposals and applications, a proponent or an applicant whose proposal or application is denied or withdrawn in writing is responsible for costs incurred by the Forest Service in processing the proposal or application up to and including the date the agency rejects the proposal, denies the application, or receives written notice of the proponent's or applicant's withdrawal. When a proponent or an applicant withdraws a major category 5 or category 6 proposal or application, the proponent or applicant also is responsible for any costs subsequently incurred by the Forest Service in terminating consideration of the proposal or application.

(7) *Customer service standards.* The Forest Service shall endeavor to make a decision on a proposal or an application that falls into minor processing category 1, 2, 3, or 4 and, in the case of an application, that is subject to a categorical exclusion pursuant to the National Environmental Policy Act, within 60 calendar days from the date of receipt of the processing fee. If the proposal or application cannot be processed within the 60-day period, then prior to the 30th calendar day of the 60-day period, the authorized officer shall notify the proponent or applicant in writing of the reason why the proposal or application cannot be processed within the 60-day period and shall provide the proponent or applicant with a projected date when the agency plans to complete processing the proposal or application. For all other proposals and applications, including all applications that require an environmental assessment or an environmental impact statement, the authorized officer shall, within 60 calendar days of acceptance of the proposal or application, notify the proponent or applicant in writing of the anticipated steps that will be needed to process the proposal or application. These customer service standards do not apply to proposals or applications that are subject to a waiver of or are exempt from cost recovery fees under (f) or (g) of this section.

* * * * *

(e) *Proponent, applicant, or holder disputes concerning processing or monitoring fee assessments; requests for changes in fee categories or estimated costs.* (1) If a proponent, an applicant, or a holder disagrees with the processing or monitoring fee category assigned by the authorized officer for a minor category or, in the case of a major processing or monitoring category, with the estimated dollar amount of the processing or monitoring costs, the proponent, applicant, or holder may submit a written request before the disputed fee is due for substitution of an alternative fee category or alternative estimated costs to the superior of the authorized officer who determined the fee category or estimated costs. The proponent, applicant, or holder must provide documentation that supports the alternative fee category or estimated costs.

(2) In the case of a disputed processing fee:

(i) If the proponent or applicant pays the full disputed processing fee, the authorized officer shall continue to process the proposal or application during the superior officer's review of the disputed fee, unless the proponent or applicant requests that the processing cease.

(ii) If the proponent or applicant fails to pay the full disputed processing fee, the authorized officer shall suspend further processing of the proposal or application pending the superior officer's determination of an appropriate processing fee and the proponent's or applicant's payment of that fee.

(3) In the case of a disputed monitoring fee:

(i) If the applicant or holder pays the full disputed monitoring fee, the authorized officer shall issue the authorization or allow the use and occupancy to continue during the superior officer's review of the disputed fee, unless the applicant or holder elects not to exercise the authorized use and occupancy of National Forest System lands during the review period.

(ii) If the applicant or holder fails to pay the full disputed monitoring fee, the authorized officer shall not issue the applicant a new authorization or shall suspend the holder's existing authorization in whole or in part pending the superior officer's determination of an appropriate monitoring fee and the applicant's or holder's payment of that fee.

(4) The superior officer shall render a decision on a disputed processing or monitoring fee within 30 calendar days of receipt of the written request from the proponent, applicant, or holder. The superior officer's decision is the final level of administrative review. The dispute shall be decided in favor of the proponent, applicant, or holder if the superior officer does not respond to the written request within 30 days of receipt.

(f) *Waivers of processing and monitoring fees.* (1) All or part of a processing or monitoring fee may be waived, at the sole discretion of the authorized officer, when one or more of the following criteria are met:

(i) The proponent, applicant, or holder is a local, State, or Federal governmental entity that does not or would not charge processing or monitoring fees for comparable services the proponent, applicant, or holder provides or would provide to the Forest Service;

(ii) A major portion of the processing costs results from issues not related to the proposed use or activity;

(iii) The proposal or application is for a proposed use or activity that is intended to prevent or mitigate damage to real property or to mitigate hazards or dangers to public health and safety resulting from an act of nature, an act of war, or negligence of the United States;

(iv) The application is for a new special use authorization to relocate facilities or activities to comply with public health and safety or environmental laws and regulations that were not in effect at the time the existing special use authorization was issued;

(v) The application is for a new special use authorization to relocate facilities or activities because the land is needed by a Federal agency or for a Federally funded project for an alternative public purpose; or

(vi) The proposed use or activity will provide, without user or customer charges, a valuable benefit to the general public or to the programs of the Secretary of Agriculture.

(2) A proponent's, an applicant's, or a holder's request for a full or partial waiver of a processing or monitoring fee must be in writing and must include an analysis that demonstrates how one or more of the criteria in paragraphs (f)(1)(i) through (vi) of this section apply.

(g) *Exemptions from processing or monitoring fees.* No processing or monitoring fees shall be charged when the proposal, application, or authorization is for a:

(1) Noncommercial group use as defined in § 251.51;

(2) Water system authorized by section 501(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761(c));

(3) Use or activity conducted by a Federal agency that is not authorized under title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761–1772); the Mineral Leasing Act of 1920 (30 U.S.C. 185); the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*); or the Act of May 26, 2000 (16 U.S.C. 460*l*–6d); or

(4) Recreation residence as defined in the Forest Service's directive system (36 CFR 200.4) and requires 64 hours or less for Forest Service personnel to process or monitor.

* * * * *

Dated: February 22, 2023.

Meryl Harrell,

Deputy Under Secretary, Natural Resources and Environment.

[FR Doc. 2023–04180 Filed 3–8–23; 8:45 am]

BILLING CODE 3411–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket Nos. 02–6, 96–45, 97–21; FCC 23–10; FR ID 128840]

In the Matter of Schools and Libraries Universal Support Mechanism, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on ways to further improve E-Rate program rules and encourage greater Tribal participation in the E-Rate program. The Commission also seeks comment on whether there are other small or rural non-Tribal applicants that face similar barriers that impact their equitable access to the E-Rate program.

DATES: Comments are due on or before April 24, 2023, and reply comments are due on or before May 23, 2023.

ADDRESSES: All filings should refer to CC Docket Nos. 02–6, 96–45, and 97–21. Comments may be filed by paper or by using the Federal Communications Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- Electronic Filers: Comments and replies may be filed electronically by using the internet by accessing ECFS: *https://www.fcc.gov/ecfs.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by commercial overnight courier or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L St, NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Federal Communications Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19.
- *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530.
- *Availability of Documents:* Comments, reply comments, and *ex parte* submissions will be publicly available online via ECFS.

FOR FURTHER INFORMATION CONTACT: Johnny Roddy, Wireline Competition Bureau, (202) 418–7400 or by email at *Johnny.Roddy@fcc.gov.* The Commission asks that requests for accommodations be made as soon as possible in order to allow the agency to satisfy such requests whenever possible. Send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in CC Docket Nos. 02–6, 96–45, and 97–21; FCC 23–10, adopted February 16, 2023 and released on February 17, 2023. Due to the COVID–19 pandemic, the Commission's headquarters will be closed to the

general public until further notice. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.* The full text of this document is available at the following internet address: *https://www.fcc.gov/document/fcc-encourages-greater-tribal-participation-e-rate-program-0.*

Ex Parte Rules—Permit but Disclose. Pursuant to § 1.1200(a) of the Commission's rules, this Notice shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule § 1.1206(b). In proceedings governed by rule § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

In light of the Commission's trust relationship with Tribal Nations and its commitment to engage in government-to-government consultation with them, it finds the public interest requires a limited modification of the *ex parte* rules in this proceeding. Tribal Nations, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act. However, at the option of the Tribe, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from the rules requiring disclosure in permit-but-disclose proceedings and exempt from the prohibitions during the Sunshine Agenda period. To be clear, while the Commission recognizes consultation is critically important, it emphasizes that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

I. Introduction

1. The E-Rate program provides support to ensure that schools and libraries can obtain affordable, high-speed broadband services and internet equipment to connect today's students and library patrons with next-generation learning opportunities and services. In January 2022, the Commission began an initiative to increase Tribal libraries' access to E-Rate support by first clarifying that Tribal libraries are eligible to participate in the program and later launching its Tribal Library Pilot Program to ensure Tribal library institutions have equitable access to the E-Rate program. To continue to address the underrepresentation of Tribal libraries in the E-Rate program, the Commission seeks comment on ways to further improve program rules and encourage greater Tribal participation in the program. The Commission also seeks comment on whether there are other small or rural non-Tribal applicants that face similar barriers that impede their equitable access to the E-Rate program.

II. Discussion

2. The Commission seeks comment on several ways to simplify the E-Rate program rules to make it easier for Tribal applicants to participate in the program without contravening congressional directives or increasing the risk of waste, fraud, or abuse. For example, through the Commission's outreach to Tribal libraries this past year, the Commission recognized that Tribal libraries still encounter barriers that limit access to the E-Rate program, and these barriers negatively impact the members of the Tribal communities that they serve. The Commission seeks comment on a number of these issues to determine whether changes or clarifications would help Tribal applicants access E-Rate support and better serve their communities. The Commission also seeks comment on any other ways that the Commission can help enable more Tribal applicants to participate in the E-Rate program. Finally, the Commission seeks comment on whether there are other small or rural non-Tribal schools and libraries that face similar barriers that impede their equitable access to the E-Rate program and whether similar reforms may be needed to encourage their participation.

3. The Commission anticipates that any revisions to its rules or procedures implementing the E-Rate program would benefit from Tribal consultation. The Commission therefore directs the Office of Native Affairs and Policy (ONAP), in coordination with the Wireline Competition Bureau (Bureau), to conduct government-to-government consultation as appropriate with Tribal Nations about the topics the Commission raises in this Notice of Proposed Rulemaking. Tribal Nations may also notify ONAP of their desire for consultation via email to *native@fcc.gov.*

A. Tribal College Libraries

4. In order to develop a complete record, the Commission seeks comment on whether to modify § 54.501(b)(2) of its rules to allow Tribal college libraries that serve a dual role by servicing the Tribal community as a public library to be eligible for E-Rate support. Under present rules, ''[o]nly libraries whose budgets are completely separate from any schools'' are eligible for E-Rate funding. The Commission adopted these safeguards in part to protect limited universal service funds from being diverted to institutions of higher education. However, there may be some instances where Tribal college libraries are also serving as the public library for their communities. In comments to the *2021 Tribal Libraries NPRM,* a commenter suggested making ''public serving librar[ies] of a Tribal College or University'' eligible for E-Rate support. According to the Department of Education, there are thirty-two accredited Tribal colleges in the United States. Of these thirty-two Tribal college libraries, at least nineteen have received Institute of Museum and Library

Services (IMLS) grants as direct recipients or subrecipients to provide services to their communities. Many of these Tribal college libraries may be the only library in the community and take on the public library role in addition to being academic libraries.

5. Section 254(h)(4) of the Communications Act of 1934, as amended (Act) excluded certain libraries from eligibility, but did not define libraries. In adopting the E-Rate program rules, the Commission barred college and university libraries from eligibility, finding this could result in otherwise ineligible institutions draining a substantial amount of universal service support from schools and libraries and is therefore inconsistent with section 254(h)(5), which limited support to elementary and secondary schools that meet certain criteria. The Commission seeks comment on whether the Commission should reconsider the Commission's bar on the eligibility of Tribal college libraries if they are also acting as a public library in their community, and whether doing so is consistent with section 254(h)(5) of the Act. Would making this eligibility change allow the E-Rate program to provide funding to more libraries serving and connecting Tribal patrons? What types of evidence, if any, should the Commission deem sufficient to demonstrate that a Tribal college library is serving a dual role: *i.e.,* acting both in an academic capacity (serving students in a college) and more broadly as a public library (serving all members of the local community)? Should the Commission deem IMLS grants to a Tribal college library as probative in this regard? Why or why not? Should the Commission consider whether there are other Tribal or public libraries in the community already? The Commission seeks additional data or examples from commenters to help us determine whether Tribal college libraries are serving this dual role, and if so, whether they are unique in this regard; and to understand what other roles Tribal college libraries might serve in their communities. Should any additional requirements be imposed on Tribal college affiliated libraries to qualify for E-Rate support, such as being open a certain number of hours to the public or permitting any member of the public to request and have materials made available to them?

6. The Commission notes that it seeks comment only on the needs of the Tribal college library that is also serving as a public library to its Tribal community, and does not propose to use the E-Rate program to fund the connectivity needs of the Tribal college or university. How can the Commission ensure the Tribal college library is supporting the Tribal community and that E-Rate support is not diverted for other higher education purposes contrary to congressional intent that funding flow to an institution of learning only if it is an elementary or secondary school? Should there be limits on the ability of a Tribal college to establish branch libraries? For example, the Commission in 1997 was concerned a college library could establish branches in dormitories in order to fund services to other college buildings. Here, would limits on branches make sense or could the Commission rely on other measures, like a requirement that the building be open and accessible to the public? Are there any other concerns (*e.g.,* procedural or budgetary) that might present challenges for Tribal college libraries to participate in the E-Rate program? Are there other rural non-Tribal college libraries, similar to the Tribal college libraries, that are also serving a dual role as the academic and public library for their rural community? The Commission also seeks data and information about these college libraries and comment on whether there are administrable ways to expand eligibility to Tribal college libraries providing public library services without reversing the Commission's 1997 decision to only make libraries eligible if their budgets were completely separate from colleges or universities. For example, do Tribal college libraries currently receive funding from sources other than the Tribal college or university because they are also serving the dual role as the Tribal community's public library?

B. Simplifying and Improving the E-Rate Application Process

7. The Commission next seeks comment on ways that it can streamline the application process and make the E-Rate forms simpler. The American Library Association (ALA) and the Association of Tribal Archives, Libraries, and Museums (ATALM) have previously observed in response to the *2021 Tribal Libraries NPRM* that only 12% of Tribal libraries had ever applied for E-Rate funding. Among the reasons cited by those that did not apply was the perceived complexity of the E-Rate application and funding process. The Commission agrees that further simplifying the E-Rate forms and processes could help to increase Tribal library participation in the program. Toward that end, the Commission notes that one of the goals of the Tribal Libraries E-Rate Pilot Program is to gain an understanding of the applicant experience and use the information to streamline the E-Rate program procedures and processes, particularly for Tribal applicants. The Commission expects the pilot program to be useful in determining how to improve the E-Rate program for Tribal libraries and will incorporate that feedback into this proceeding.

8. Here, the Commission seeks comment on how to streamline the FCC forms or change parts of the application process that may be burdensome for Tribal libraries and other small or rural applicants. How could the Commission simplify the language of the FCC forms, or provide guidance about what the terminology used on the forms means? Which terminology is the most challenging for a Tribal entity? To reduce the number of FCC forms for applicants submitting only a small E-Rate funding request that is less likely to attract competitive bids, should the Commission consider providing an additional exemption to the FCC's competitive bidding rules? For example, should the Commission exempt low-cost purchases if the applicant is seeking category two equipment that totals less than a pre-discount cost of $3,600, the level that currently exists for the commercially available high-speed internet access services exemption, or some other level? Does the existing exemption for commercially available high-speed internet access services reduce applicant burden? What would a reasonable pre-discount cost be that would not create an undue risk of waste, fraud, and abuse in the program? Should there be a maximum pre-discount price per entity for each category of service in a single funding year? How could the Commission still ensure that applicants are purchasing cost-effective equipment and services? Is there any publicly available, existing pricing data for frequently purchased equipment and services that the Bureau could use to set ''safe harbor'' price levels for comparable regions, below which competitive bidding would not be required? Would exempting these purchases from competitive bidding encourage additional small and often rural entities, like Tribal libraries and schools, to participate in the program?

9. Would Tribal libraries benefit from having extended or separate application filing windows because of the approval processes that may be needed for their E-Rate eligible procurements and purchases? The Commission understands from speaking with Tribal governments and libraries, for example, that the procurement processes for many Tribal schools are independent from the Tribal government's

procurement processes, but the Tribal library's purchases are often included with the Tribal government's procurements. The Commission seeks comment on whether the procurement processes for Tribal libraries are more complicated and protracted than Tribal schools' E-Rate procurements. Would a longer application filing window work better with the Tribal government or council's procurement requirements? How much additional time may be needed for Tribal libraries to complete their Tribal procurement processes and receive approval for their requested E-Rate eligible purchases and/or contracts? Are there any drawbacks that the Commission should consider in deciding whether to establish an extended or separate application filing window? Could a separate application window delay a Tribal library from timely obtaining broadband services during the funding year or limit the options available to an applicant?

C. Cost Allocation Rules and Procedures

10. The Commission seeks comment on whether and how to simplify the E-Rate program cost allocation rules and procedures. Libraries that share services, equipment, or space with ineligible entities, like an administrative office, are eligible for E-Rate support, but often are required to cost allocate the portion of the cost of the services used by the ineligible entity. Cost allocation is a part of the E-Rate process that can be confusing for all applicants, but especially for Tribal libraries. For instance, some Tribal libraries are located within another Tribal building (*e.g.,* the Tribal library only uses a portion of the building), share a building at different points in the week (*e.g.,* the Tribal library operates four days a week, and the building is used by the Tribal community for other purposes the other three days), and/or share their internet connections with ineligible entities (*e.g.,* the Tribal library obtains internet access as part of the Tribal nation's broader contract). For example, the Navajo Nation has chapter houses that, in addition to housing local government, contain a library that circulates materials and houses book collections for use by their communities. Tribal libraries in these kinds of circumstances may still receive E-Rate funding, but the Commission recognizes the burdens that potential cost allocation requirements may present and the possible deterrent effects of such requirements.

11. The Commission seeks comment on the cost allocation challenges that Tribal libraries may face. Under the current procedures, are there particular challenges for cost allocation that arise because the Tribal libraries are housed in multi-use buildings? For example, as long as a Tribal library meets the conditions set out in the *Sixth Report and Order,* 75 FR 75393 (December 3, 2020), for community use, the library should not need to cost allocate the use of the bandwidth when the library is closed (*e.g.,* from the parking lot), but are there other scenarios that are challenging for multi-use buildings? Are there ways the Commission could provide guidance on how or when Tribal libraries should or should not be required to perform cost allocations? If so, the Commission encourages commenters to provide specific examples of how their library building is used and questions about whether cost allocation would be required. The Commission also seeks comment on whether certain types of potentially ineligible use should be permitted without requiring Tribal libraries to cost allocate to simplify the E-Rate application and invoicing processes. Are there other groups affiliated with the Tribal library (*e.g.,* information technology (IT) departments or governing entities) for which Commission guidance is needed to make cost allocation requirements more manageable? Finally, what are the potential costs of addressing cost allocation challenges? How can the Commission prevent waste, fraud, and abuse in the E-Rate program while making changes in this area?

D. Category Two Discount Rates and Rule

12. While the Commission recognizes the issues of digital equity exist for other entities, in this item, it seeks comment on making changes to the category two discount rates and rules for Tribal entities. The maximum category two discount rate is set at 85%, lower than the 90% maximum discount rate for eligible category one services. While the Commission adopted this 85% discount rate to encourage applicants to find the most cost-effective options, should the maximum category two discount rate be raised to 90% for Tribal schools and libraries to encourage participation and lower costs for these applicants? Commenters are invited to comment on both the benefits and drawbacks of increasing the discount level from 85% to 90% for category two services. The Commission also seeks comment on whether to consider increasing the $25,000 funding floor for Tribal schools and libraries. If so, what funding floor would be appropriate to ensure Tribal schools and libraries have sufficient category two funding to meet their internal connections and Wi-Fi network needs? If the minimum funding floor is increased, should the Commission consider raising it for all applicants or solely for Tribal schools and libraries? What can the Commission do to prevent waste, fraud, and abuse in the program if it raises the minimum funding floor? Should there be any special considerations regarding the category two budgets of Tribal libraries located in multi-use buildings? Are there any other changes or enhancements that can be made to category two rules to help Tribal schools and libraries and encourage their participation in the E-Rate program?

E. Tribal Representation on Universal Service Administrative Company (USAC) Board of Directors

13. To increase Tribal input and representation in the federal universal service programs, the Commission seeks comment on a proposal to increase Tribal representation on the USAC Board of Directors (USAC Board) by adding a Tribal community representative director. In their joint comments to the *2021 Tribal Libraries NPRM,* ALA and ATALM suggested adding a director ''to the USAC board with purview of tribal libraries and other tribal organizations that are beneficiaries of Universal Service Fund programs.'' The Commission seeks comment on this proposal and on how to ensure Tribal entities are fairly represented on the USAC Board and its underlying committees. Should the Commission add a director to the USAC Board to represent Tribal interests pertaining to universal service support provided to low-income households, schools, libraries, health care providers, and Tribally owned telecommunications companies? Would the addition of another director result in a governance imbalance on the Board? If so, are there alternatives the Commission should consider? Should the Commission considers other changes to the Commission's rules regarding the USAC Board that would benefit Tribal entities? The Commission seeks comment on these questions and other ways to increase Tribal representation and leadership at USAC and in the federal universal service programs.

F. Other Program Improvements

14. In addition to the specific areas the Commission discussed, it also seeks comment on other measures the Commission should consider to make it easier for Tribal schools and libraries to participate in the E-Rate program. Are there other ways in which the Commission could increase

participation of Tribal schools and libraries or enhance the E-Rate program to help Tribal communities? What are the largest barriers for Tribal libraries that do not currently participate in the E-Rate program? The Commission seeks comment on examples of circumstances or considerations unique to Tribal schools or libraries that hinder or impede their participation in the E-Rate program. The Commission also seeks comment on whether there are other small or rural non-Tribal schools and libraries that face similar barriers that impede their equitable access to or participation in the E-Rate program. Please describe the barriers that these small or rural non-Tribal schools and libraries encounter that hinder or impede their ability to participate in the E-Rate program. Are there ways to leverage the Commission's relationships with other federal agencies to improve outreach and coordination to ensure Tribal entities are knowledgeable about federal options for schools and libraries?

15. Are there any specific issues that Tribal entities encounter using the E-Rate Productivity Center (EPC), the online account and application management system for the E-Rate program? Are there any other rule changes that could specifically help Tribal schools and libraries with the E-Rate application, invoicing, and other administrative processes? Are there types of guidance or clarifications that the Commission or the Bureau could provide to address areas of confusion? How can the Commission better target help to Tribal schools and libraries? As noted above, the Commission launched the Tribal Library E-Rate Pilot Program to provide assistance to Tribal libraries and to receive feedback on E-Rate. Should the Commission consider any additional methods of outreach (*e.g.,* in-person training, one-on-one assistance) to ensure that as many eligible Tribal schools and libraries as possible are aware of the program, understand how the program can help them meet their information technology and connectivity needs, and are prepared to be able to apply and receive support? If so, the Commission seeks comment on what these might be. Finally, should the Commission adopt a definition of ''Tribal'' in the E-Rate program rules? Currently, Tribal applicants are encouraged to self-identify as a Tribal school or a Tribal library by checking the Tribal box if ''the majority of students or library patrons served are Tribal members; if the building to receive service is located partially or entirely on Tribal land; if the applicant is a school operated by or receiving funding from the Bureau of Indian Education (BIE); or if the applicant is a school or library operated by a Tribal Nation.'' Would adopting a definition in the rules make it easier to measure Tribal progress toward program goals? Is this the appropriate definition of ''Tribal'' for the E-Rate program? Should the Commission modify it? Are there Tribal schools or libraries that are located off of Tribal land? If so, should the Commission also define ''Tribal lands'' or other terms to make the definition more inclusive of such entities? The Commission further notes that checking whether ''the majority of students or library patrons served are Tribal members'' may be fact-intensive and burdensome to administer. The Commission therefore seeks comment on whether it should remove that language from the existing Tribal definition and rely instead on other means to define ''Tribal.''

G. Digital Equity and Inclusion

16. Finally, the Commission, as part of its continuing effort to advance digital equity for all, including Indigenous and Native American persons, people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Commission seeks comment on how its proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

III. Procedural Matters

17. *Paperwork Reduction Act.* This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

18. *Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Schools and Libraries Universal Support Mechanism, et al., Notice of Proposed Rulemaking. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments in the Notice of Proposed rulemaking. The Commission will send a copy of the Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the Notice of Proposed Rulemaking and IRFA (or summaries thereof) will be published in the **Federal Register**.

19. The Commission's E-Rate program, formally known as the schools and libraries universal service support mechanism, provides support to schools and libraries allowing them to obtain affordable, high-speed broadband services and internal connections, which enables them to connect students and library patrons to critical next-generation learning opportunities and services. In the Notice of Proposed Rulemaking, the Commission's primary objectives are to address the underrepresentation of Tribal applicants and increase participation of Tribal libraries. To achieve these objectives, in the Notice of Proposed Rulemaking the Commission explore ways to further simplify the E-Rate program rules, reduce program barriers and burdens, and encourage greater Tribal participation and community representation.

20. The Commission's efforts to simplify the E-Rate program include a request for comment on ways to improve the E-Rate application process, such as by simplifying E-Rate forms, providing an additional exemption to the competitive bidding rules, and whether creating an extended or separate application filing window for Tribal libraries would be beneficial to align with the applicable Tribal procurement requirements and approval processes. The Commission also seeks comment on modifying section 54.501(b)(2) of the Commission's rules to allow Tribal college libraries to become eligible for E-Rate funding if they are serving a public library function in their Tribal community, and on whether and how to simply the E-Rate program cost allocation rules for

Tribal applicants. Additionally, the Commission seeks comment on increasing the category two minimum funding floor for Tribal applicants, and increasing the highest category two discount rate for Tribal applicants to 90 percent.

21. In the Notice of Proposed Rulemaking, the Commission discusses and seeks comment on a proposal to increase Tribal perspective and representation on federal universal service programs by creating a seat on the USAC Board of Directors for a Tribal community representative. The Commission also seeks comment on how to ensure the fair representation of Tribal entities on the USAC board and its underlying committees, and other ways to increase Tribal representation and leadership at USAC and in the federal universal service programs. In addition, the Commission seeks comment on other options the Commission should consider which would make it easier for Tribal schools and libraries to participate in the E-Rate program and other ways to improve the E-Rate program process for Tribal applicants.

22. The proposed action is authorized pursuant to sections 1 through 4, 201–202, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151 through 154, 201, 254, 303(r), and 403.

23. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

24. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.

25. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

26. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

27. Small entities potentially affected by the proposed rules herein include Schools, Libraries, Wired Telecommunications Carriers, All Other Telecommunications, Wireless Telecommunications Carriers (except Satellite), Wireless Telephony, Wired Broadband internet Access Service Providers (Wired ISPs), Wireless Broadband internet Access Service Providers (Wireless ISPs or WISPs), internet Service Providers (Non-Broadband), Vendors of Infrastructure Development or Network Buildout, Telephone Apparatus Manufacturing, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.

28. The potential rule changes discussed in the Notice of Proposed Rulemaking if adopted, could impose some new or modified reporting, recordkeeping or other compliance requirements on small entities. However, since the purpose of the Notice of Proposed Rulemaking is to streamline and simplify procedures, and improve the E-Rate program processes, the Commission anticipates that the rule modifications that may result from the matters upon which the Commission is seeking comment should reduce the economic impact of current compliance obligations on small entities. For example, the Commission seeks comment on a specific proposal to simplify the E-Rate program by reducing the number of required forms for entities making low-cost purchases, which would exempt such purchases from the E-Rate competitive bidding process. The Commission also seeks comment on whether to modify the application filing window for Tribal libraries providing a longer filing window in light of the approval processes that may be needed for their E-Rate eligible procurements and purchases. Additionally, in the Notice of Proposed Rulemaking the Commission inquires whether there are other rule changes to the application, invoicing, or other administrative processes in the E-Rate program that could be made to specifically help Tribal schools and libraries, and whether and how to simplify the E-Rate program cost-allocation rules and procedures for Tribal and non-Tribal applicants and seek comment. In response to comments, the Commission may simplify and change the forms that applicants use to apply for the E-Rate program as well as modify filing and other administrative requirements, which should ease reporting, recordkeeping, and other compliance requirements for small entities.

29. In assessing the cost of compliance for small entities, at this time the Commission cannot quantify the cost of compliance with any of the potential rule changes that may be adopted. Further, the Commission is not in a position to determine whether, if adopted, the proposals and matters upon which the Commission seeks comment in the Notice of Proposed Rulemaking will require small entities to hire professionals to comply. However, consistent with the Commission's objectives to streamline and simply the E-Rate program processes and procedures for Tribal schools and libraries, the Commission does not anticipate that small entities will be required to hire professionals to comply with any rule modifications it adopts. The Commission expects the information it received in comments

including where requested, cost information, to help the Commission identify and evaluate relevant compliance matters for small entities, including compliance costs and other burdens that may result from potential changes discussed in the Notice of Proposed Rulemaking.

30. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

31. In the Notice of Proposed Rulemaking, the Commission has taken steps to minimize the economic impact on small entities from the changes to the E-Rate program on which the Commission seeks comment. Based on outreach with Tribal applicants, the Commission has learned that there are areas that may create burdens for Tribal entities and it seeks comment on how to reduce or eliminate those burdens. The Commission seeks comment on creating a competitive bidding exemption for low-cost funding requests which has the potential to reduce the number of forms for small entities requiring smaller amounts of E-Rate support. Both the competitive bidding exemption and the reduction of the number of necessary forms would reduce the associated costs for these activities for small entities. The Commission seeks comment on these matters. The Commission also seeks to update program rules and administration processes for applicants and service providers that participate in the E-Rate program which may reduce costs for small entities. More specifically, the Commission explores whether and how the E-Rate program cost-allocation rules and procedures for Tribal libraries can be made simpler.

32. Further, the Commission inquired in the Notice of Proposed Rulemaking whether to increase the maximum category two discount rate from 85% to 90% for Tribal schools and libraries to increase participation and lower costs for these applicants, and whether the Commission should consider increasing the $25,000 funding floor for Tribal schools and libraries. If increased, the Commission asked what funding floor would be appropriate to ensure Tribal schools and libraries have sufficient category two funding to meet their internal connections and Wi-Fi network needs. The Commission also considered if the funding floor is increased, whether the Commission should raise it for all rural applicants or just for Tribal schools and libraries; whether there should be any special considerations involving category two budgets of Tribal libraries located in multi-use buildings; whether there are any other changes or enhancements that can be made to category two rules to help Tribal schools and libraries and increase their participation in the E-Rate program and invited commenters to submit comments on both the benefits and drawbacks of increasing the discount level from 85% to 90% for category two services.

33. Additionally, the Commission invited commenters to suggest other measures the Commission should consider to make it easier for Tribal schools and libraries to participate in the E-Rate program. This may result in proposals from small entities that lessen the economic impact of, and increase their participation. The Commission expects the information it receives in comments to allow it to more fully consider ways to minimize the economic impact, and explore additional alternatives to improve and simplify opportunities for small entities to participate in the E-Rate program.

IV. Ordering Clauses

34. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1 through 4, 201–202, 254, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151 through 154, 201 through 202, 254, 303(r), and 403, this Notice of Proposed Rulemaking *is adopted.*

List of Subjects in 47 CFR Part 54

Communications common carriers, Internet, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

Proposed Regulations

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend part 54 of title 47 of the Code of Federal Regulations as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, 1601–1609, and 1752, unless otherwise noted.

■ 2. Amend § 54.500 by adding in alphabetical order the definition for ''Tribal'' to read as follows:

§ 54.500 Terms and definitions.

* * * * *

Tribal. An applicant is considered ''Tribal'' if the building to receive service is located partially or entirely on Tribal land, if the applicant is a school operated by or receiving funding from the Bureau of Indian Education (BIE), or if the applicant is a school or library operated by a Tribal Nation.

* * * * *

■ 3. Amend § 54.501 by revising paragraph (b)(2) and adding paragraph (b)(4) to read as follows:

§ 54.501 Eligible recipients.

* * * * *

(b) * * *

(2) Except as provided in paragraph (b)(4) of this section, a library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under this subpart.

* * * * *

(4) A Tribal college or university library that acts as a public library by having dedicated public library staff, regular hours, and a collection for public use in its community shall be eligible for discounts.

■ 4. Amend § 54.503 by revising paragraph (e) to read as follows:

§ 54.503 Competitive bidding requirements.

* * * * *

(e) *Exemption to competitive bidding requirements.* (1) An applicant that seeks support for commercially available high-speed internet access services for a pre-discount price of $3,600 or less per school or library annually is exempt from the competitive bidding requirements in paragraphs (a) through (c) of this section.

(i) internet access, as defined in § 54.5, is eligible for this exemption only if the purchased service offers at least 100 Mbps downstream and 10 Mbps upstream.

(ii) The Chief, Wireline Competition Bureau, is delegated authority to lower the annual cost of high-speed internet access services or raise the speed threshold of broadband services eligible

for this competitive bidding exemption, based on a determination of what rates and speeds are commercially available prior to the start of the funding year.

(2) A Tribal applicant that seeks support for category one or category two services for a total pre-discount price of $3,600 or less per school or library annually is exempt from the competitive bidding requirements in paragraphs (a) through (c) of this section.

■ 5. Amend § 54.505 by revising paragraph (c) and adding paragraph (g) to read as follows:

§ 54.505 Discounts.

* * * * *

(c) *Matrices.* Except as provided in paragraphs (d), (f), and (g) of this section, the Administrator shall use the following matrices to set discount rates to be applied to eligible category one and category two services purchased by eligible schools, school districts, libraries, or consortia based on the institution's level of poverty and location in an ''urban'' or ''rural'' area.

* * * * *

(g) *Tribal Category Two Discount Level.* For the costs of category two services, Tribal schools and libraries at the highest discount level shall receive a 90 percent discount.

■ 6. Amend § 54.703 by revising paragraphs (b), (b)(12), and (13), and by adding new paragraph (b)(14) to read as follows:

§ 54.703 The Administrator's Board of Directors.

* * * * *

(b) Board composition. The independent subsidiary's Board of Directors shall consist of twenty (20) directors:

* * * * *

(12) One director shall represent state consumer advocates;

(13) One director shall represent Tribal communities; and

(14) The Chief Executive Officer of the Administrator.

* * * * *

■ 7. Amend § 54.705 by revising paragraphs (a)(2)(iv) and (v) and adding new paragraph (a)(2)(vi) to read as follows:

§ 54.705 Committees of the Administrator's Board of Directors.

(a) * * *

(2) * * *

(iv) One Tribal community representative;

(v) One at-large representative elected by the Administrator's Board of Directors; and

(vi) The Administrator's Chief Executive Office

* * * * *

[FR Doc. 2023–04751 Filed 3–8–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2022–0165; FF09E21000 FXES1111090FEDR 234]

Endangered and Threatened Wildlife and Plants; Petition Finding for Joshua Trees (Yucca brevifolia and Y. jaegeriana)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list Joshua trees (*Yucca brevifolia* and *Y. jaegeriana*) as endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). After a thorough review of the best available scientific and commercial information, we find that listing Joshua trees as endangered or threatened species is not warranted. However, we ask the public to submit to us any new information that becomes available concerning the threats to the Joshua trees or their habitat at any time.

DATES: The finding in this document was made on March 9, 2023.

ADDRESSES: This finding is available on the internet at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0165. Supporting information that we developed for this finding, including the species assessment form, species status assessment report, and peer review, are available at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0165 and on the Service's website at *https://www.fws.gov/office/carlsbad-fish-and-wildlife/library.* Supporting information is also available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Ecological Services Field Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008. Please submit any new information, materials, comments, or questions concerning this finding to the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Scott Sobiech, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Ecological Services Field Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008; telephone 760–431–9440. 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:

Previous Federal Actions

On September 29, 2015, we received a petition from Taylor Jones (representing WildEarth Guardians), requesting that *Yucca brevifolia*—either as a full species (*Y. brevifolia*) or as two subspecies (*Y. b. brevifolia* and *Y. b. jaegeriana*)—be listed as threatened and, if applicable, critical habitat be designated. On September 14, 2016, we published a 90-day finding in the **Federal Register** (81 FR 63160) concluding that the petition presented substantial information indicating that listing the Joshua tree may be warranted. On August 15, 2019, we published a 12-month finding (84 FR 41694) concluding that listing either *Y. brevifolia* or *Y. jaegeriana* was not warranted. On November 4, 2019, WildEarth Guardians filed a complaint in the Central District of California challenging the analyses and listing decisions. The court vacated and remanded the listing decisions back to the Service (*WildEarth Guardians* v. *Haaland,* 2021 WL 4263831 (C.D. Cal. September 20, 2021)), ordering us to reconsider whether the two species of Joshua tree should be listed under the Act.

The Service has reassessed its August 2019 12-month finding and revised the species status assessment (SSA) report. This document complies with the September 20, 2021, court-ordered remand of the August 2019 ''not warranted'' 12-month findings for the two species of Joshua tree (*Yucca brevifolia* and *Y. jaegeriana*) and constitutes our new 12-month findings on the September 29, 2015, petition to list the Joshua tree species under the Act.

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for Joshua trees (*Yucca brevifolia* and *Y. jaegeriana*). The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report and the information

reviewed represents compilations of the best scientific and commercial data available for the species, including the impacts of past, present, and projected future factors (both negative and beneficial) affecting the species, that we used to make our determination of status for the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of nine appropriate specialists regarding the SSA report for the Joshua trees. We received responses from five peer reviewers. We also coordinated with the California Department of Fish and Wildlife, Nevada Department of Wildlife, Arizona Department of Agriculture's Environmental Services Division, and the Utah State Department of Natural Resources and Natural Heritage Program during the development of the SSA report for the Joshua trees.

Background

Species Information

In this discussion, we present an overview of the biological information for Joshua trees (*Yucca brevifolia* and *Y. jaegeriana*). For the purposes of this analysis, we discuss both species together using the common name—Joshua tree(s)—when the discussion of information pertains to both species. Literature or conclusions specific to a single species are indicated by the species' scientific name, where applicable.

Species Description

Joshua trees are long-lived plants that occur in desert regions of the southwestern United States including portions of California, Arizona, Nevada, and Utah, well beyond the Joshua Tree National Park in California. Joshua trees are found throughout the Mojave, Great Basin, and Sonoran Deserts. Joshua trees have generally been addressed in the literature as a single species; however, recent references have identified at least two varieties or subspecies (*Yucca brevifolia* var. *brevifolia* and *Y. b.* var. *jaegeriana*). We consider the two entities to be two distinct species, the western Joshua tree (*Yucca brevifolia*) and eastern Joshua tree (*Y. jaegeriana*) based on expert analysis, and we treat them as two separate, listable entities. The SSA report has additional detailed descriptive information on Joshua trees (*Y. brevifolia* and *Y. jaegeriana*) (Service 2023, entire).

Yucca brevifolia—*Yucca brevifolia* is a 16–40 feet (ft) (5–12 meters (m)) tall, evergreen, tree-like monocot. The leaves are between 7.5 and 14.6 inches (in) (19–37 centimeters (cm)) long and are clustered in rosettes at the branch ends. Branching only occurs following flowering events where one or more lateral shoots develop from the base of the inflorescence (cluster of flowers) (McKelvey 1938, p. 130; Simpson 1975, p. 32). The flowers on the inflorescence are nearly spherical with short, wide petals that curve over the tip of the pistil and occur in dense, heavy panicles. *Tegeticula synthetica,* a species of yucca moth, pollinates the flowers; and the resulting seed pods require mechanical action (*e.g.,* a rodent) to open and for the seeds to be dispersed. In addition to sexual reproduction, the species can also reproduce asexually through basal resprouts, particularly when under stress. *Yucca brevifolia* is long-lived (100 to several hundred years old), with a generation time of 50 to 70 years.

Yucca jaegeriana—*Yucca jaegeriana* is a shorter (9–20 ft; 3–6 m), evergreen, tree-like monocot. *Yucca jaegeriana* has shorter leaves (less than 8.7 in (22 cm)) and shorter height to first branching at 2.3–3.3 ft (0.75–1.0 m) than *Y. brevifolia,* which results in a denser canopy (see figure 3–1 in the SSA report; McKelvey 1938, p. 138; Service 2023, p. 9). The flower is elongate with narrow petals that wrap around the pistil forming a corolla tube. *Tegeticula antithetica,* a species of yucca moth, pollinates the flowers. The variation in floral morphology, specifically style length, between *Y. brevifolia* and *Y. jaegeriana* is strongly correlated with the physical characteristics of its obligate moth pollinator due to coevolution with *Tegeticula antithetica* having a shorter ovipositor than the *Y. brevifolia* pollinator, *T. synthetica* (see figure 3–1 in the SSA report; Godsoe et al. 2009, p. 820; Yoder et al. 2013, p. 11; Service 2023, p. 9). The resulting seed pods require mechanical action (*e.g.,* a rodent) to open and for the seeds to be dispersed. In addition to sexual reproduction, the species can also reproduce asexually through basal resprouts, particularly when under stress. *Yucca jaegeriana* is long-lived (100 to several hundred years old), with a generation time of 50 to 70 years.

Hybrids—Hybrids occur in a smaller geographic area compared to the rest of the range, toward Joshua trees' northern limit, where the distribution of both species overlap, and are not reliably identifiable from morphological characteristics alone (Smith 2022, pers. comm.). The hybrid zone was not included in our assessment of viability for *Yucca brevifolia* and *Y. jaegeriana,* although that zone confers additional resiliency, redundancy, and representation to both species.

Taxonomy

Yucca brevifolia var. *jaegeriana* was determined to be a distinct species based on morphological and pollinator differences (Lenz 2007, p. 100) and restriction-site-associated DNA (RAD)-sequencing (Royer et al. 2016, p. 1730). These analyses concluded that *Y. b.* var. *jaegeriana* should be raised to specific rank (Lenz 2007, p. 97) and that it is genetically distinct from *Y. b.* var. *brevifolia* (Royer et al. 2016, p. 1736). Additionally, *Y. brevifolia* diverged at least 5 million years ago, possibly due to geographic separation by the Bouse Embayment (a Pliocene Era chain of lakes) (Smith et al. 2008a, p. 2682). As described above, the two taxa, and their obligate moth pollinators, come into contact and plant hybridization occurs in the Tikaboo Valley, Nevada, (Starr et al. 2013, p. 4; Royer et al. 2016, p. 136).

Based on these analyses (Lenz 2007, entire; Smith et al. 2008b, entire; Royer et al. 2016, entire), and correspondence between the Service and editors of the Jepson Manual (Wallace 2017, p. 2), we consider *Yucca brevifolia* var. *brevifolia* and *Y. b.* var. *jaegeriana* to be two distinct species, and we treat them as two separate listable entities: *Y. brevifolia* and *Y. jaegeriana,* respectively. For additional information on Joshua tree taxonomy, see section 3.2 of the SSA report (Service 2023, p. 9).

Habitat/Life History

Joshua trees occur in desert regions of the southwestern United States and are located on alluvial fans, plains, and bajadas throughout the Mojave, Great Basin, and Sonoran Deserts. Joshua trees occur throughout a wide range of vegetation communities between approximately 1,279 and 8,775 ft (390 and 2,675 m) elevation. Joshua trees are often the tallest plants on the landscape where they occur but are not typically dominant in terms of vegetation cover. Joshua trees are a slow-growing desert plant. Because they do not have growth rings, accurately determining the age of Joshua trees is difficult. The height of a Joshua tree divided by an estimate of growth per year is used to estimate age. Joshua trees can live for several hundred years, though a more common lifespan is about 150 years, and have a generation time of 50 to 70 years. They can reproduce via several mechanisms, have unique habitat and ecological needs, and can disperse through environmental and biological means.

Joshua trees' life cycle includes seedling, established individual, juvenile, and adult stages (see figure 3–2 in the SSA report (Service 2023, p. 11)).

The life history of both *Yucca brevifolia* and *Y. jaegeriana* relies on a complex set of interactions between individual plants, yucca moths, seed dispersers, herbivores/predators, and abiotic conditions for successful reproduction and survival to a reproductively mature adult (see figure 3–2 in the SSA report (Service 2023, p. 11)). Joshua trees reproduce sexually through pollination and seed production as well as asexually through vegetative growth (clones). The relative contribution of sexual and asexual reproduction and whether the proportion varies regionally is not known. The clonal growth strategy likely increases persistence of individuals and populations when under stress. Optimal reproduction and recruitment of Joshua trees requires a convergence of events, including fertilization by its obligate pollinators (Pellmyr and Segraves 2003, p. 721), seed dispersal and caching by rodents (Vander Wall et al. 2006, p. 543; Waitman et al. 2012, p. 5), seedling emergence from a short-lived seed bank triggered by isolated late-summer rainfall (Reynolds et al. 2012, p. 1652), and exposure to cold temperatures that improve seedling and juvenile growth and survival (Went 1957, p. 173). For additional information, see the SSA report's section 3.4 (Service 2023, p. 10).

Historical and Current Range/ Distribution

Historical Distribution—Joshua trees have occurred in southwestern deserts for at least 6 million years (Smith et al. 2008a, p. 255), persisting through several geologic time periods characterized by variable climate conditions (temperature and precipitation patterns). Joshua trees' historical distributions are based on a 2022 empirical study conducted throughout the range of *Yucca brevifolia* and *Y. jaegeriana* and we estimate 9,642,136 acres (ac) (3,903,699 hectares (ha)) were occupied historically (see figure 4–1 in the SSA report; Esque 2022b, pers. comm.). All areas where adult Joshua trees were recorded are considered part of the historical range over an approximate time period of 1900 to 1950, based on the lifespan of Joshua trees and development trends in the region. Presence, absence, and status (alive, dead, or ornamental) of adult Joshua trees were assessed through aerial interpretation and ground truthing of aerial imagery within quarter square kilometer (500 m by 500 m) grid cells. This method could not be applied in the northern portion of the species' range near Nellis Air Force Base in southern Nevada. Therefore, for the species' range near Nellis Air Force Base, we rely on the distribution from the 2018 Joshua tree SSA (Service 2018, p. 11), which provides the best available data for Joshua tree distribution in this area.

Current Distribution—The current range of Joshua trees extends from northwestern Arizona to southwestern Utah west to southern Nevada and southeastern California (see figure 4–1 in the SSA report (Service 2023, p. 31)). Joshua trees are currently distributed over several large discontinuous areas totaling 9,447,883 ac (3,825,054 ha) of a much larger region. The refined distribution presented in the SSA report is based on a 2022 USGS empirical study conducted throughout the range of *Yucca brevifolia* and *Y. jaegeriana* (Esque 2022b, pers. comm.; Service 2023, pp. 30–31). Very little of the historical range has been lost; the current distribution of Joshua trees is reduced by approximately 3 percent compared to the historical distribution. The current distribution is less acreage than we reported in the previous 2019 SSA report (12,144,840 ac; 4,906,749 ha). The previous distribution was based on the records and reports available at that time (Service 2019, p. 14). Although our updated current distribution is less than previously reported, it is not based on a loss of habitat; rather it is an updated estimate of current distribution of the species based on new, more accurate, information. Please see sections 4.1 and 4.2 of the SSA report for further information on Joshua trees' historical and current distributions (Service 2023, pp. 30–31).

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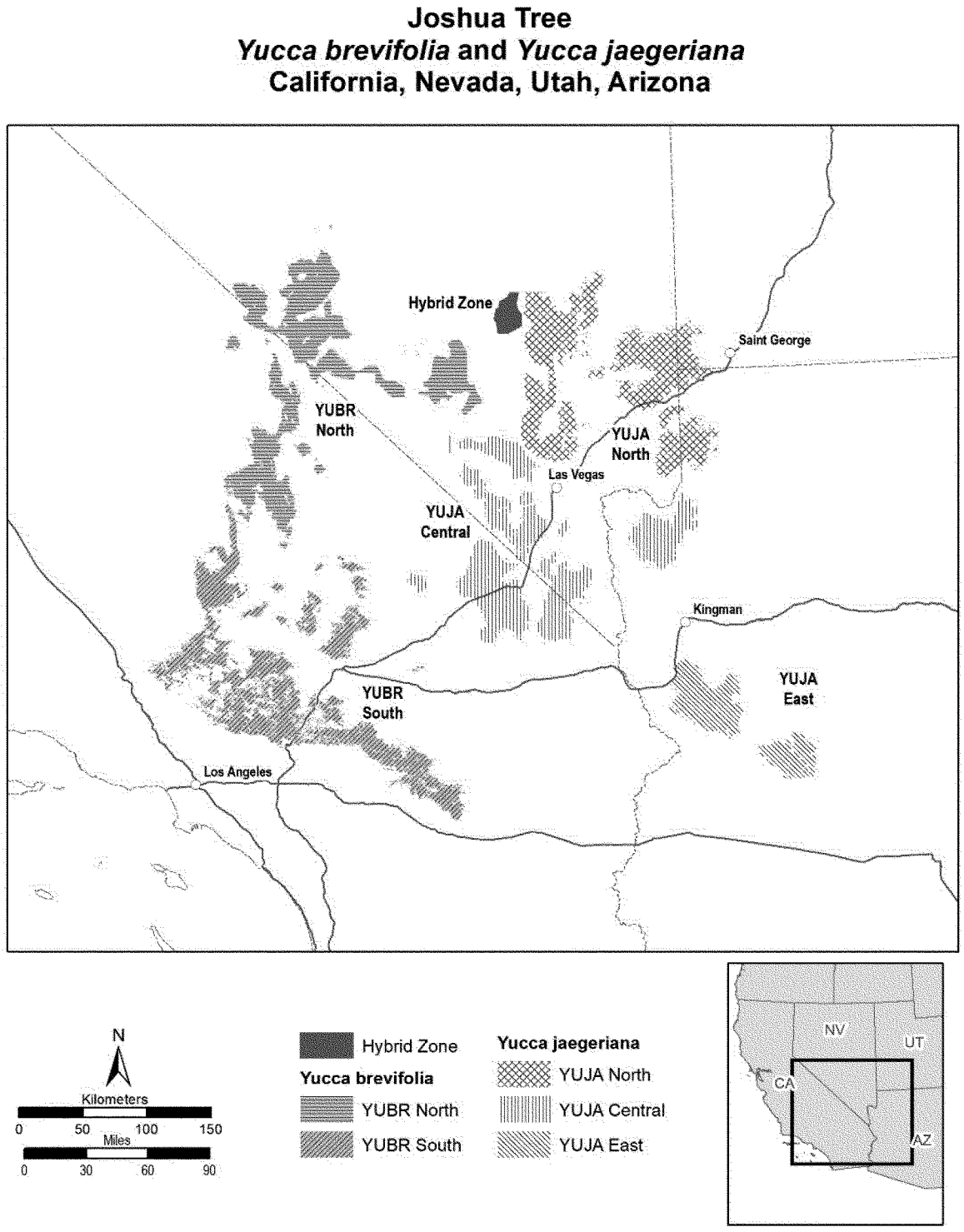


Figure 1. Joshua tree distribution including analysis units occupied by *Yucca brevifolia* and *Y. jaegeriana*.

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Species Ecological Needs

A species' biological condition should be evaluated relative to the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–311). Briefly, resiliency describes the ability of the species to withstand environmental and demographic stochasticity; redundancy describes the ability of the species to withstand catastrophic events; and representation describes the ability of

the species to adapt over time to long-term changes in the environment. In general, the more redundant, representative, and resilient a species is, the more likely it is to sustain populations over time, even under changing environmental conditions. Below we describe the population- and species-level needs for Joshua trees that were used to evaluate resiliency. These concepts will be discussed in more detail in the Analytical Framework section below.

Population Needs

Joshua trees require that habitat and demographic needs are met for population resiliency. Joshua trees rely on habitat elements that include appropriate substrate, appropriate climatic conditions, yucca moth pollinators, rodent seed-caches, nurse plants, and dispersal. Appropriate climatic conditions include adequate amounts of annual precipitation (4.7–16.9 in (11.8–42.9 cm)), summer monthly precipitation in excess of 1.1 in (2.9 cm) in the months of July and August, average summer temperatures based on the range experienced historically (67 to 91 degrees Fahrenheit (°F); 19.4 to 32.8 degrees Celsius (°C)), and winter temperatures between 29 and 50 °F (−1.7 and 10 °C). To reproduce successfully, Joshua trees need yucca moth pollinators, nurse plants, and seed-caching rodents. The demographic needs that Joshua trees require are survival, abundance, recruitment, and dispersal. Sufficient growth and survival at all life stages is required for an individual to reach sexual maturity and to maintain an abundant population. A diverse age structure is important for withstanding variability in climate and the pressures of threats such as drought, herbivory, and wildfire because young age-classes are more susceptible to mortality during these events than adults.

Joshua trees require populations of sufficient abundance to be maintained over time with stable or increasing population growth. Sufficient abundance is achieved through survival of young age classes to adult, successful reproduction, and recruitment to support the next generation. There must be adequate survival at all life stages to support an abundant adult population. We currently lack a population viability analysis and information on the abundance at each age class required to maintain resiliency. Sufficient recruitment is necessary to maintain the population over the long term. In particular, seed set needs to be high enough to ensure future recruitment considering seed predation and the low percentage of viable seed that germinate and survive to reproduce. Dispersal of propagules is important for gene flow to maintain appropriate levels of genetic variability. Dispersal also allows for potential recolonization of sites following disturbance. See chapter 5 of the SSA report for further information on population needs (Service 2023, pp. 41–50).

The 2023 SSA report analyzes resiliency within six analysis units including two populations of *Yucca brevifolia* (YUBR North and YUBR South), three populations of *Y. jaegeriana* (YUJA North, YUJA East, and YUJA Central), and a hybrid zone (described further in section 4.5 of the SSA report (Service 2023, pp. 36–40)). With the exception of the hybrid zone, we use these five analysis units to analyze both current conditions and future conditions in this document and the SSA report (Figure 1, Table 1).

TABLE 1—SUMMARY OF ANALYSIS UNITS USED IN THE SSA REPORT

[This table appears in the SSA report as table 4–3; Service 2023, p. 37]

Population	Occupied habitat ac (ha)	Elevation range ft (m)	Land ownership (%)*
YUBR North	2,129,113 (861,989)	2,475–8,775 (754–2675)	Federal: 97.6, State: 0.51, Private: 1.6.
YUBR South	2,288,162 (926,381)	1,922–7,640 (586–2,328)	Federal: 52.3, State: 2.1, Private: 45.6.
YUJA North	2,065,476 (836,225)	1,540–7,961 (469–2,426)	Federal: 98, State: 0.9, Private: 1.1.
YUJA Central	2,089,163 (845,815)	1,626–7,627 (495–2,325)	Federal: 91, State: 1.9, Private: 7.9.
YUJA East	754,821 (305,595)	1,279–5,067 (390–1,544)	Federal: 59.8, State: 16.7, Private: 23.5.

*Local ownership was less than 1 percent for all analysis units.

Species Needs

Species needs are an exploration of what influences redundancy and representation for Joshua trees. This requires an examination of the Joshua trees' evolutionary history and historical distribution to understand how Joshua trees function across their range. To maintain redundancy, numerous local Joshua tree populations need to be distributed widely across the landscape with some degree of connectivity to withstand catastrophic events. Finally, to maintain representation, which is needed by the species to respond to changing environmental conditions, genetic diversity must be maintained by preserving populations that are morphologically, geographically, or ecologically diverse. In general, Joshua trees need multiple, large, sufficiently resilient populations distributed across the range of ecological variability to have the redundancy and representation to withstand catastrophic events and adapt to environmental change given the trees' moderate adaptive capacity. See chapter 5 of the SSA report for further information on population needs (Service 2023, pp. 41–50).

Regulatory and Analytical Framework

Under section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), we are required to make a finding whether or not a petitioned action is warranted within 12 months after receiving any petition for which we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (''12-month finding''). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted but precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and expeditious progress is being made to add qualified species to the Lists of Endangered and Threatened Wildlife and Plants. We must publish a notice of these 12-month findings in the **Federal Register**.

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an

endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' projected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its projected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the projected effect on the species now and in the foreseeable future.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether *Yucca brevifolia* or *Y. jaegeriana* or both species meet the definition of an endangered species or a threatened species, we considered and thoroughly evaluated the best scientific and commercial information available regarding the past, present, and future stressors and threats. We reviewed the petition, information available in our files, and other available published and unpublished information. Our evaluation may include information from recognized experts; Federal, State, and Tribal governments; academic institutions; foreign governments; private entities; and other members of the public.

A thorough review of the taxonomy, life history, ecology, and threats to Joshua trees is presented in the SSA report (Service 2023, entire). Based on the SSA report and information reviewed, we developed a species assessment form for the species that contains detailed biological information, a thorough analysis of the listing factors, a list of literature cited, and an explanation of why we determined that the species do not meet the Act's definition of an endangered species or a threatened species. This supporting information can be found on the internet at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0165. The following is an informational summary for the findings in this document.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the Joshua trees warrant listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

As discussed above, we used the three conservation biology principles of resiliency, redundancy, and representation to assess the Joshua trees' viability (Shaffer and Stein 2000, pp. 306–311). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. The SSA report for the Joshua trees (*Yucca brevifolia* and *Yucca jaegeriana*), January 2023, Version 2, is a summary of the information we have assembled and reviewed, and the following is a summary of the key results and conclusions based on the SSA report and data evaluated. For more detailed information, please refer to the full SSA report, which can be found at Docket FWS–R8–ES–2022–0165 on *https://www.regulations.gov* and at *https://www.fws.gov/office/carlsbad-fish-and-wildlife/library.*

Foreseeable Future

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a

framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

We considered time horizons at mid-century (2040–2069) and end of century (2070–2100) for analyzing future conditions for Joshua trees. In the SSA report, we developed two future scenarios (Scenario I and Scenario II) to help us understand the plausible range of threats and their potential impacts on the two Joshua tree species and their habitat between now and the end of the century (2070–2099). The two scenarios differ in the amount of projected future change in habitat loss, invasive grasses, wildfire, and drought and increased temperatures associated with climate change. Scenario I modeled future conditions as a continuation of current threats under warmer climate conditions, an approximate 5.4 °F (3 °C) increase (RCP 4.5) in average temperature. Scenario II modeled an increase in threats under much warmer climate conditions, an approximate 9 °F (5 °C) increase (RCP 8.5) in average temperature. When applying the best available information to a listing context in considering what the foreseeable future for Joshua trees is, we considered that (1) the data sources for invasive grass cover, climate change, wildfire, and development provide reliable information without further extrapolation for the time period 2050–2070; (2) the species' response to projected climate change becomes more uncertain the further out we project because we lack information on physiological thresholds; (3) the forecasts for occupied habitat begin to diverge around 2050 due to the differences in RCP projections (Hawkins 2013, entire; Bamzai-Dodson and Rangwala 2019, pp. 31 and 32); and (4) the effects of wildfire at the end of the century depend on where wildfires occur and the time between fires. Upon subsequent review it was determined that although there are climate projections available that project climatically favorable and unfavorable areas through the end of century, climate change is the only threat where we have reliable information for that time period. The best available science for threats to Joshua trees and the species' response to projected climate change and wildfire supported evaluating future conditions out to 2040–2069 when we can reliably characterize the species' response and status, which is a key element in determining the foreseeable future. Beyond 50 years, human decisions that affect global greenhouse gas (GHG) emissions and the species' response to future conditions are a major source of uncertainty (Terando *et al.* 2020, pp. 14–15). Therefore, for our evaluation of future condition, we rely on the same assumptions about the extent and magnitude of threats projected over time in Scenarios I and II of the SSA report for the primary threats and consider an earlier time period (2040–2069) along the trajectory projected for Scenarios I and II. The data sources and rationale that support this decision are summarized below.

Climate change and wildfire are the primary threats driving the future condition of Joshua trees at 2040–2069, which is consistent with the primary threats at the end of century in the SSA. Although all the bioclimatic models project significant losses of climatically favorable habitat, and increased temperatures and drought associated with climate change are generally forecasted to have negative effects, the timing and magnitude of the species' response to climate change are not well established. The literature, in particular bioclimatic models, provide information on the potential timing of future climate change without sufficient empirical data on physiological thresholds to reasonably forecast the magnitude of the species' response or future distribution at the end of the century (Hampe 2004, entire; Pearson and Dawson 2004, entire; Araujo and Townsend Peterson 2012, pp. 1527, 1528; Garcia et al. 2016, pp. 65, 69–72). We consider the bioclimatic models to provide an initial inference or working assumption about the potential effects of climate change to the Joshua trees based on the limited, available information about the two species' response to climate variables (Petru and Tielborger 2008, pp. 717, 718, 723–726; Araujo and Townsend Peterson 2012, pp. 1527, 1528; Franks et al. 2014, entire; Garcia et al. 2016, pp. 65, 69–72; Thompson et al. 2023, pp. 1–7). We note that our future projections (2040–2069) are generally consistent with the limited available empirical information about Joshua trees' response to drought and climate change, and the stable distribution of the two species over the last 40 to 50 years under warmer climate conditions. Therefore, given the uncertainty of the Joshua trees' response to future climate conditions, we did not rely solely on the bioclimatic model results for our 2040–2069 projections of Joshua trees' distribution.

There is high uncertainty in the timing and magnitude of the species' responses because information about physiological thresholds for temperature and other physiological, phenotypic (change in form or shape), and genetic responses that may confer tolerance, local adaption, and adaptive capacity are unknown, and the potential exists for climate refugia in topographically diverse areas. Also, the demographic data are not sufficiently reliable to provide an understanding of when Joshua tree individuals or populations may begin to respond to the effects of climatically unfavorable conditions identified in the bioclimatic models and how long adult trees may persist in modeled climatically unfavorable conditions at the end of century (Thomas 2022, pers. comm; Shafer et al. 2001, p. 207). There is limited monitoring data available for a small area of the range of *Yucca brevifolia* in Joshua Tree National Park (the park represents approximately 18 percent of the entire range for YUBR). Because we do not have historical context to evaluate the data, it is not clear whether the site-specific declines noted are an indication of natural population variability in this portion of the distribution or the early effects of climate change. The best available science indicates that both species are long-lived (150–300 years), adapted to hot and dry conditions, and have been exposed to a range of environmental conditions over thousands of years. Both species continue to occupy most of their historical ranges, despite recent increases in temperature on the order of 1.8 °F (1 °C) over the last 40 to 50 years (Figure 4–1 in Service 2023, p. 31). However, we also consider the potential loss of occupied habitat in localized

areas within the warmest and driest portions of the ranges of both species. Also, the best available science does not provide information on the population dynamics and environmental thresholds for the yucca moth species, which are the pollinators for both Joshua tree species. Therefore, we presumed that yucca moth populations will track Joshua tree flowering, as has been experienced in the past, and the moth will experience similar threat effects as described for the Joshua tree including recent site-specific declines in Joshua tree National Park. We note the high degree of uncertainty regarding these assumptions about the Joshua trees' and the yucca moths' responses to climate change which introduces uncertainty into our future projections of species' status that we cannot quantify at this time; but we have used the best available science in developing them, as the Act requires.

In addition, there is further uncertainty the further into the future we project potential effects to both species because future climate projections and the rate of warming and maximum exposure temperatures varies depending on the global emission trajectory evaluated (*e.g.,* RCP 4.5 compared to RCP 8.5) (Knutti and Sedláček 2013, p. 370). At the end of the century, RCP 4.5 and 8.5 project an approximate 5.4 °F (3 °C) and 9 °F (5 °C) increase in average temperature, respectively; and the magnitude of this difference continues to increase through time. Therefore, most of the difference between the present climate and the climate at 2040–2069 and beyond will be determined by decisions made by policymakers today and during the next few years (Terando et al., 2020, p. 15). At this time, we have little clarity on what decisions will be made by policymakers in the next few decades. Given the long lifespan of Joshua trees, combined with uncertainty around future policy, we determined the climate projections and the response of Joshua trees at the end of century time horizon were too uncertain to make reasonable, reliable predictions of future condition. The climate models used in the SSA project increases in average summer temperatures of approximately 3.6–5.4 °F (2–3 °C) in 2040–2069, depending on the location within the Joshua trees' range (Wang et al. 2016, unpaginated). This temperature range is slightly less than the future climate condition projected in Scenario I of the SSA and within the range of variability that Joshua trees have experienced and were resilient to in the past. Therefore, we consider the mid-century (2040–2069) climate projections to be more reliable than end of century projections (Hawkins 2013, entire; Bamzai-Dodson and Rangwala 2019, pp. 31 and 32).

The data sources evaluated in the SSA also allow us to make more reliable projections of the species' response to wildfire for the time period 2040–2069. The wildfire models used in the SSA characterized current wildfire risk as low to moderate and are considered reliable until 2050–2070 (Klinger 2022, pers. comm). Longer term wildfire risk is dependent on past fire trends, specifically, where and how frequently fires occurred. The best available data provide a range of acreage that may burn at the end of the century but do not inform where those wildfires might occur or how frequently occupied habitat might burn. Therefore, we can more confidently assess the threat of wildfire through 2070, based on currently available models. For wildfire, we project 12 to 18 percent of the current ranges of Joshua trees to be the maximum extent of wildfire at the end of century and we are not able to further refine these extents; but we project the maximum extent to be less for the time period 2040–2069. Wildfire effects on Joshua trees are well documented, and we project effects to be the same as analyzed in the SSA and summarized in the threat section below.

When applying the best available information to develop a reasonable and reliable projection of the Joshua trees' future condition, the projections of occupied Joshua trees' habitats (*i.e.,* future distribution) begin to diverge around 2050 based in large part on RCP projections. As we mentioned earlier, after 2040–2069, there is too much uncertainty in the amount of occupied habitat based on the variability in plausible global emissions trajectories, wildfire risk, and the two species' responses for us to make a reliable projection of the Joshua trees' future condition. Although our SSA report used future scenarios that provide a range of plausible conditions projected to the end of century, we determined that projections within the 2070–2099 timeframe did not provide a reasonable basis to reliably predict the impact of future threats and the species' response to them due to the identified uncertainties. Regardless of how far into the future we could extrapolate the expanding scope of the threats, our confidence is greatest at 2040–2069, the period over which we can make reliable predictions about threats and the species' response to those threats.

Summary of Biological Status and Threats

In the following discussions, we review the biological condition of the species and their resources, and threats that influence the species' current and future conditions, to assess the species' overall viability and the risks to that viability. In this section, we summarize the Joshua trees' future condition to 2069 when we can reliably forecast threats and the species' response to those threats. This is a shorter timeframe than we evaluated future scenarios in the SSA report. Over the next 47 years (approximately one generation and when trees can reproduce sexually), we can reliably characterize the Joshua trees' viability where our confidence is greatest with respect to the range of projected plausible threats and the species' response. There are key areas of uncertainty, primarily regarding the two species' response to projected future wildfire and climate conditions, that do not allow us to reliably project the Joshua trees' status to end of century, as discussed above and in the Finding.

Threats

In the Joshua tree SSA report, we identified the following threats for both *Yucca brevifolia* and *Y. jaegeriana:* (1) Habitat loss and degradation (from urbanization, military training, renewable energy, grazing, and off highway vehicle (OHV) use) (Factor A); (2) invasive grasses (Factor A); (3) increased risk of wildfire (Factor A); (4) seed predation and herbivory (Factor C); and (5) changing climatic trends (*e.g.,* increased temperatures and longer more frequent drought periods) (Factor A). Of these threats, we determined that the primary threats or those threats which have the capacity to potentially drive any population or status trends for the two species are the risk of wildfire (Factor A), invasive grasses (Factor A), and climate effects (increasing temperature, precipitation changes, drought) (Factor A) summarized below both currently and for the foreseeable future (2040–2069). Because the life history, habitat needs, demographic needs, species needs, and general ecology of the two species are congruent, we assumed the effects pathways and threat impacts are the same for both species. Although habitat loss and degradation (from urbanization, military training, renewable energy, grazing, and OHV use) (Factor A) and seed predation and herbivory (Factor C) were identified as potential threats in the SSA report that may impact individuals or portions of the

population, the best available information indicates that these threats have not negatively influenced population dynamics on a population- or species-level scale now and are not projected to negatively influence population dynamics in the foreseeable future.

Overutilization (Factor B), disease (Factor C), and small population size (Factor E) were not identified as threats in the SSA report. In appendix B of the SSA report, we examined the existing regulatory mechanisms, regulations, and policies (Factor D) that affect the species, including those that relate to climate change (Service 2023, pp. 152–161). We found that the regulatory mechanisms, such as the Clean Air Act (42 U.S.C. 7401 *et seq.*), which regulates air emissions from both stationary and mobile sources, and hazardous air pollutants to protect public health, as well as California climate policies that help to reduce GHG emissions through the State's Climate Adaptation and Resiliency Program (funds projects that provide climate adaptation and resilience on California's natural and working lands), all contribute toward reduced GHG emissions in the United States. The National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) also provides some protections for listed species that may be affected by activities undertaken, authorized, or funded by Federal agencies, which may result in the development of avoidance and mitigation measures for the threats that affect special status species. For the purposes of this document, the primary threats are the focus of the threats discussion for the two species which are summarized below both currently and for the foreseeable future (2040–2069). For a complete description of all the threats and existing regulatory mechanisms, refer to chapter 6 and appendix B of the SSA report (Service 2023, pp. 50–87, 152–161).

Habitat Loss and Degradation

The loss of habitat and degradation by urbanization, military training, renewable energy development, grazing, and OHV use are occurring in varying degrees across the range of the Joshua trees and are currently considered a low magnitude threat. The higher severity impacts of urbanization, military training, and renewable energy development are localized and have a limited scope in terms of acreage of impacts and the analysis units where they occur. The YUBR South analysis unit is most affected by habitat loss and degradation both now and in the future due to its proximity to larger, metropolitan centers with increased development and edge effects, along with the amount of the analysis unit that is privately owned (45.6 percent), designated for renewable energy development, and subject to military training. Privately owned landownership is low (7 percent) throughout the range of *Yucca jaegeriana* and is highest in YUJA East (23.5 percent). No information was available to categorize the threat of renewable energy development in Arizona, Nevada, and Utah. Grazing and OHV use are more widespread, but the intensity of the impacts is currently low and diffuse; and impacts are projected to remain low and diffuse in the future.

The best available information indicates that substantial habitat loss due to development, military training, or renewable energy development is unlikely in the foreseeable future. Habitat loss due to development was projected for 2060 based on the average of two models available through the Integrated Climate and Land Use Scenarios (ICLUS) database for RCP 4.5 and 8.5 (Environmental Protection Agency 2015) to be less than 8 percent of the current distribution of *Yucca brevifolia* and less than one percent of the distribution of *Y. jaegeriana.* In addition, estimates include 2040–2069 projections for renewable energy development in California for *Y. brevifolia* (approximately 100,000 ac; 40,469 ha), based on the acreage of current and permitted projects that is forecasted to be approximately half the development projected for the end of century (Service 2023, pp. 53). However, we lacked sufficient information to project renewable energy development outside of California. Habitat loss is forecasted to be a low-magnitude threat in the future.

In addition, impacts to Joshua trees are avoided, minimized, or mitigated on Federal lands and within several jurisdictions in California to varying degrees as discussed in appendix B and section 6.1.6 of the SSA report (Service 2023, pp. 57, 152–161). We anticipate that these measures and regulations will continue to address potential losses in that region now and in the future, particularly on military and federally managed lands, which currently account for 74 percent of the current distribution of *Yucca brevifolia* and 89 percent of the distribution of *Y. jaegeriana* (Table 4–1 in Service 2023, p. 33). However, in Arizona, Nevada, and Utah, there are fewer regulatory protections in place on private land, though private land in these states represents a small percentage of the species' range. Overall, these effects are localized and constitute a small portion of the range, such that they are not likely to have a population- or species-level impact. Therefore, there is no indication that current or future effects (2040–2069) resulting from habitat loss and degradation by urbanization, military training, renewable energy development, grazing, or OHV use, or a combination of these, would significantly reduce the redundancy, representation, or resiliency of *Y. brevifolia* or *Y. jaegeriana.* See chapter 6 of the SSA report for more detailed information (Service 2023, pp. 50–87).

Wildfire

Wildfires are not historically a common occurrence in the desert regions of the southwestern United States. Due to the low, discontinuous vegetative cover and fuel loads, wildfires are typically infrequent and small in size (Brooks and Matchett 2006, p. 148). Fire return intervals of greater than 100 years or more were estimated for *Artemisia tridentata* (Great Basin sagebrush) plant communities in the Southwest, and similar historical return intervals or longer are presumed for the range of Joshua trees (Mensing et al. 2006, p. 75). As a result, native scrub vegetation communities in the desert Southwest, including Joshua trees, have not evolved with wildfire and are generally considered to not be well-adapted to fire (Abella 2010, p. 1249). Wildfires may cause numerous potential direct and indirect effects on Joshua trees and the associated plant community, including immediate mortality, reduced survivorship over time, loss of nurse plants, reduced native cover, lower native plant diversity, damage to the protective bark-like periderm, mortality of the seed bank, and potential disruption of the pollinator and rodent communities. Joshua trees' habitat is estimated to require approximately 100 years to reach densities, cover and stature similar to pre-burn conditions, though nurse plant cover and the understory may attain pre-burn conditions in as little as a few years to several decades depending on whether the root crown survives (Minnich 1995, p. 104). Wildfires also promote colonization by invasive grasses, discussed further below.

The magnitude of the impact varies with the size, severity, and frequency of wildfires; amount of invasive grass cover; and weather conditions both during and after the event (DeFalco et al. 2010, entire; Barrios et al. 2017, entire; Klinger et al. 2019, p. 10). Joshua tree mortality can be high following wildfire (64 to 95 percent) with increased impacts to young age-classes

and when wildfires were followed by drought conditions (Minnich 1995, p. 102; DeFalco et al. 2010, p. 246). Habitat recovery is similarly impacted by subsequent climate conditions and may take 100 years to reach densities, cover, and stature similar to pre-burn conditions (Minnich 1995, p. 104), though habitat recovery may be sooner in low severity wildfires where individual trees persist and can reproduce (flower and resprout) under appropriate climate conditions. Joshua trees also may respond to wildfire by producing resprouts from the trunk or from the primary roots (Minnich 1995, p. 102; Barrios et al. 2017, p. 103; St. Clair et al. 2022, p. 4). Resprouting requires the tree or root system to be viable post-fire. Resprouting is more frequent in areas with a high proportion of surviving trees and decreases with increasing burn severity (Minnich 1995, p. 103). Resprouting and the clonal growth strategy increases persistence of the individual under stress, such as wildfire (Rowlands 1978, p. 50; Harrower and Gilbert 2021, p. 11; Esque 2022a, pers. comm.), and facilitates the ability of Joshua trees to continue to occupy habitat even when the main stem has died. Also, within the burn perimeter, small patches with trees, nurse plants, and a seedbank may persist to facilitate recovery of the species and its habitat post-fire (Klinger 2022, pers. comm.).

The wildfire risk and potential impacts to Joshua trees were characterized based on low (less than 4,000 ft; 1,200 m), middle (4,000–6,000 ft; 1,200–1,800 m) or high (greater than 6,000 ft; 1,800 m) elevation plant communities (see table 6–1 and appendix D in the SSA report (Service 2023, pp. 67, 165; Klinger et al. 2019, entire)). Low elevations tend to have low severity fires due to low vegetative cover. In areas subject to low severity fire, adult Joshua trees have a lower probability of dying from direct mortality, and trees may avoid being burned due to their taller stature, particularly for *Yucca brevifolia.* However, repeated low severity events promoted by invasive grasses contribute to increased charring over time that can increase the risk of mortality, particularly to young plants that are more vulnerable to fire. Middle elevation vegetation communities are correlated with increasing fires, acres burned, and the invasive grass-wildfire cycle (Brooks and Matchett 2006, pp. 153, 155). The invasive grass-fire cycle is well documented in the literature as a positive feedback loop, and invasive grasses alter the fire regime in several ways (discussed further in section 6.3 of the SSA report (Service 2023, pp. 60–70)). Middle elevations typically have a higher fuel load, with sufficient native vegetative cover to carry fires; therefore, wildfires can be more severe and are often associated with increased invasive grass cover. Moderate severity burns may result in adult mortality and are projected to char trees, including singeing the crown, which may contribute to increased mortality and decreased tree densities over time. In moderate severity burns, nurse plants may be burned and die, and the Joshua tree and nurse plant seedbank may also be negatively impacted. Though fires are less frequent in high-elevation vegetation communities with heavier fuels, when they do occur, wildfires tend to have higher severity and can result in direct tree mortality or alter the subsequent vegetation composition and cover. However, most Joshua trees occur in low and middle elevation vegetation communities that are unlikely to experience high severity burns.

Based on the wildfire history and modeled wildfire risk, increased wildfires are an imminent, low-to-moderate magnitude threat currently and in the foreseeable future (2040–2069). Since 1960, only 9 percent of the total acreage across the range of Joshua trees has burned, including 24 percent of the YUJA North analysis unit. We project recovery of the species and habitat to take up to 100 years in areas that do not have an altered invasive grass-wildfire cycle. The modeled risk of wildfires and the modeled wildfire regimes are estimated for current and future conditions through approximately 2070 (Klinger et al. 2021, entire). We project that the acreage of the range of both species of Joshua tree that will burn in 2040–2069 will be less than our end of century projections of 12 to 18 percent of the range of both species of Joshua tree; this estimate is based on a moderate increase in the acreage that has burned in the last 50 years (9 percent on average), and wildfires are more likely to occur in areas that have previously burned (Klinger 2022, pers. comm.). Although the risk of wildfires was modeled, there is uncertainty in where wildfires will occur, how the fire return interval will be affected, and how often high frequency fires will occur; although increased impacts from wildfire are projected for middle- and high-elevation plant communities. We project the potential for tree mortality, reduced tree densities, and limited recruitment following wildfires, while the habitat recovers. Post-fire habitat recovery may occur more quickly in more mesic areas; but the time required for recovery may be extended beyond 100 years due to drought conditions.

Overall, there is limited evidence of the invasive grass-wildfire cycle currently but it is most prevalent in the northern portion of the range of *Yucca jaegeriana. Yucca jaegeriana* is also at higher risk of wildfires due to a high proportion of the analysis units with estimated high ignition probability, fire frequency, and burn severity. Areas of predicted high burn severity occur near predicted high frequency wildfire areas, increasing the probability of large wildfire events that could impact Joshua trees. Wildfire is a low magnitude threat in YUJA East because this area is at low elevation with lower vegetative cover and a low probability of natural ignitions.

The risk of wildfires is a low to moderate threat throughout the range of *Yucca brevifolia* and lower than for *Y. jaegeriana.* YUBR North is at moderate risk for a moderate- to high-severity fire that could alter the vegetation composition and cover in areas adjacent to higher invasive grass cover. The probability of natural ignition is lower in this analysis unit, but there are population centers and high areas of visitation that are likely to increase human-caused ignitions. YUBR South is also considered to be at moderate risk. Approximately 9 percent of the analysis unit has burned in the last 50 years, but most of the analysis unit is at low elevation with wildfire risk characterized by low frequency and severity. Ignition sources may be higher than predicted in the models due to the high frequency of wildfires along the urban-wildland interface consistent with correlations between increasing human population density and fire ignitions (Keely and Fotheringham 2001, p. 1541).

Under projected future climate conditions, areas previously burned have a high probability of being colonized by invasive grasses, particularly cheat grass in the north and northeast, and the elevation limit of the distribution of invasive grasses may increase with increasing temperatures and the potential for increased fire frequency. We forecast vegetation cover to decrease at lower elevations over time with extended droughts and increased fire frequency in previously burned areas, particularly to the east and northeast, though extreme rainfall events have the potential to reestablish high invasive grass cover. Overall, we project there to be a high probability of large, infrequent, high severity wildfires at middle and high elevations in areas

that have not burned, and lower potential and frequency of wildfires at low elevations. Small patches of unburned habitat may remain within burned areas at middle- and high-elevation zones due to topographic heterogeneity and hydrological refugia.

We are not able to accurately predict areas that will burn in the future; however, we project areas that burn once at low to moderate severity may recover slowly (up to 100 years post-burn) and continue to support Joshua trees. We project high severity fires and areas that burn repeatedly are not likely to support the species in the future (Klinger 2022, pers. comm.). Both species occur mostly on Federal lands and existing regulatory mechanisms include BMPs to help protect against wildfire (see *Conservation Measures and Existing Regulatory Mechanisms,* below, and appendix B of the SSA report (Service 2023, pp. 152–161)).

After examining the extent and impact of the risk of wildfire, we project that wildfire conditions in 2040–2069 will be similar or slightly increased relative to current conditions. We determined that while this threat could occur throughout the range, our projections indicate less than 12 to 18 percent of the ranges of the Joshua trees may be at risk of burning by 2040–2069, including areas that have burned previously. Due to the limited portions of the ranges that are anticipated to burn and fire suppression efforts that are implemented on Federal lands, the threat of wildfire would be unlikely to impact either of the two species at a population- or species-level scale. The threat of wildfire does not have the projected extent to drive any declines in status trends for the two species during our evaluation period. As a result, there is no indication that the current or future effects of wildfire would significantly reduce the redundancy, representation, or resiliency of *Yucca brevifolia* or *Y. jaegeriana.* See chapter 6 of the SSA report for more detailed information (Service 2023, pp. 50–87).

Invasive Annual Grasses

Nonnative plant species, particularly invasive grasses spread by humans and anthropogenic disturbance, have the potential to substantially degrade desert habitats and affect the frequency of fire. The potential effects to Joshua trees include competition, perturbations in the natural disturbance and fire regime, plant community composition, vegetation structure, and a microclimate shift (Gordon 1998, p. 976). The severity of the nonnative plant invasion is dependent on the influence of local site factors including soil type, elevation, and disturbance history (Chambers 2000, pp. 1403–1412; Gelbard and Belnap 2003, p. 429; Chambers et al. 2007, entire; Davies 2008, pp. 113–114; Chambers et al. 2013, entire; Davies and Hulet, 2014, pp. 1–2). Disturbed soils provide additional safe sites for weed establishment, and the removal of the existing vegetation alleviates resource competition and promotes the successful invasion of weeds (Case 1990, pp. 9610, 9613–9614; Masters and Sheley 2001, p. 505; Novak and Mack 2001, p. 115; Leonard 2007, pp. iii, 61–62; Hornbeck et al. 2019, entire). Once established, invasive grass cover can increase rapidly in response to rainfall, particularly periods of high winter precipitation typical of El Niño oscillation events and following wildfire (Brooks and Machett 2006, p. 149). In the future, invasive grasses have the potential to expand their competitive edge over native species and benefit under conditions of drought, increased carbon dioxide concentration, extreme precipitation events, and atmospheric nitrogen (Archer and Predick 2008, p. 25). As a result, invasive grasses are projected to increase in the future, particularly in disturbed or burned areas, although they may be constrained by extended drought, with the potential to shift toward longer fire return intervals in the most arid areas of the Mojave Desert (Comer et al. 2013, p. 7).

There are no published studies on the competitive effects of nonnative plant species to the germination, growth, and reproduction of the Joshua trees; however, we project competitive effects to increase with increasing nonnative plant cover and seedlings to be the most vulnerable life stage if they share the same root niche space and their soil water needs are high at a time of active nonnative plant growth and reproduction (Schwinning and Kelly 2013, pp. 888, 894; Craine and Dybzinksi 2013, pp. 837, 839; Gioria and Osborne 2014, pp. 5–6). The largest, potential negative effect of nonnative invasive grasses to the Joshua trees is their contribution to wildfire risk and an altered wildfire regime (see *Wildfire,* above; Brooks and Matchett 2006, p. 149; Service 2023, pp. 60–70).

We evaluated the potential for nonnative plant species to contribute to the risk of wildfire and an altered fire regime within Joshua trees' habitat based on information on the abundance (in terms of percent cover) of invasive grasses including cheatgrass (*Bromus tectorum*), red brome (*Bromus rubens*), and other invasive grasses). Currently, invasive grasses are present in approximately half of the Joshua trees' habitat. We categorized 37 percent (3,539,813 ac; 1,432,511 ha) of the range as low abundance (based on the threshold of less than 15 percent cover of invasive grasses) and 12 percent (1,176,966 ac; 476,301 ha) of the range as high abundance (greater than 15 percent cover), based on the Bureau of Land Management (BLM) Rapid Ecological Assessment (REA) models of potential invasive grass cover for 2025 (Comer et al. 2013, p. 10). We defined these categories based on several studies; although low levels of invasive grasses may increase the risk of fire (Comer et al. 2013, p. 78), higher cover is needed to sustain wildfires and alter the natural fire regime consistent with our high abundance category (Link et al. 2006, pp. 114, 116). YUJA North has the greatest proportion of habitat characterized as high abundance (30 percent), followed by YUBR North (15 percent). Areas of high abundance of invasive grass cover tend to occur along the interface between the Mojave and Central Basin and Range ecoregions near the northern limit of *Yucca brevifolia* and *Y. jaegeriana* distribution and represent 7 percent of the ranges of Joshua trees (see figure 6–2 in the SSA report (Service 2023, p. 62)). Throughout the range of Joshua trees, high abundance areas are located in recently burned areas and along the urban-wildland interface (Comer et al. 2013, p. 79).

Although invasive grasses are highly pervasive and beyond the ability of any agency to eradicate, they and other nonnative plant species are managed on Federal and State lands to varying degrees. In particular, more than half of the distribution of Joshua trees occurs on BLM land (54 percent). BLM has best management practices (BMPs) for invasive and nonnative species that focus on the prevention of further spread and/or establishment of these species (BLM 2008, pp. 76–77). BMPs should be considered and applied where applicable to promote healthy, functioning native plant communities, or to meet regulatory requirements. BMPs include inventorying weed infestations, prioritizing treatment areas, minimizing soil disturbance, and cleaning vehicles and equipment (BLM 2008, pp. 76–77).

Invasive grasses are a low to moderate, pervasive, ongoing threat that affects approximately half of the range of Joshua trees to some degree. The severity ranges from low to moderate depending on the cover and is highest in YUJA North and YUBR North. In the future (2040–2069), invasive grasses are projected to expand their competitive edge over native species and are likely to benefit under conditions of drought,

increased carbon dioxide concentration, extreme precipitation events, and atmospheric nitrogen (Archer and Predick 2008, p. 25). As a result, we predict that the threat of invasive grasses will increase, although extended droughts have also been hypothesized to result in decreased biomass and the potential to shift toward longer fire return intervals in the most arid areas of the Mojave Desert (Comer et al. 2013, p. 7). Using the BLM REA models described above, as well as modeled future invasiveness from the same publication, minor increases in invasive grass cover are projected for 2040–2069. Low invasive grass cover increased by approximately 5 percent as areas with no previous invasive grass cover become invaded; and the acreage at high risk increased by 1 percent to 13 percent of the range of Joshua trees.

After examining the extent and rangewide impact of invasive grasses on Joshua tree, we determined that invasive grasses are a low magnitude threat. Projected impacts are low throughout approximately 80 percent of the Joshua trees' range where invasive grasses are not present or occur in low abundance currently and are projected to remain at low abundance in the future. A smaller portion of the range (approximately 12 to 13 percent) currently has or is projected to have a higher abundance of invasive grass and moderate degree of threat affecting these localized areas, particularly to the north and northeast in burned habitat and along the urban interface. The effect of invasive grasses on competition, soil moisture, and vegetation community composition and structure is not currently influencing population- or species-level dynamics, and we do not project effects to increase in the future in unburned, intact habitat. This threat individually is unlikely to drive any declines in status trends for either species in the future except in developed or burned habitat. The contribution of invasive grasses to the increased risk of wildfire is discussed above. As a result, there is no indication that the current or future effects of invasive grasses associated with competition with Joshua trees or potential effects on habitat structure would significantly reduce the redundancy, representation, or resiliency of *Yucca brevifolia* or *Y. jaegeriana*. See chapter 6 of the SSA report for more detailed information (Service 2023, pp. 50–87).

Climate Change

Temperatures have been increasing in the desert southwest for decades; since 1950, the region experienced hotter temperatures than in any period during the past 600 years (Garfin et al. 2014, p. 464). Current summer temperatures (1991–2010) have increased by approximately 1°C relative to historical temperatures (1961–1990) (figure 6–5 in Service 2023, p. 72; Wang et al. 2016, unpaginated). The southwestern United States is projected to be affected particularly severely by prolonged drought, fewer frost days, warmer temperatures, greater water demand by plants, and an increase in extreme weather events (Archer and Predick 2008, pp. 23–24; Cook et al. 2015, entire; Jepson et al. 2016, p. 49). For *Yucca brevifolia* and *Y. jaegeriana,* the main threats associated with the current and future effects of climate change are temperature increases (increasing maximum summer temperatures and increasing minimum winter temperatures), changes in summer and winter precipitation, and prolonged drought that contribute to increased drought stress. Climate models forecast an increase in the variability of precipitation, including the potential of high precipitation events generally tied to El Niño-Southern Oscillation and the potential increase of prolonged drought conditions in the intervening period. Increasing temperatures may increase moisture stress on adults, potentially limit flowering at lower elevations, and may limit seedling survival and establishment. The most dramatic temperature increases are predicted to occur along the southern edge of the two species' ranges, at lower latitudes and elevations such as in YUJA East, which is warmer on average than the rest of the analysis units. Similarly, YUBR South is currently experiencing higher moisture stress in areas with recent, localized observations (from a 12-year period) of reduced recruitment and survival, though we lack historical data to confirm a declining trend. YUJA East is already experiencing the warmest cold season temperatures under current conditions within its range (see section 5.1.5 in the SSA report (Service 2023, p. 44)) and is projected to be warmer in the future, potentially resulting in reduced seedling growth and establishment (see figure 6–5 in the SSA report (Service 2023, p. 72)). Overall, the pattern of increasing drought stress is likely to occur across all analysis units to varying degrees depending on elevation and latitude. Forecasted changes in climate conditions also have the potential to influence or exacerbate other threats such as increased risk of wildfire. See chapter 6 of the SSA report for more detailed information (Service 2023, pp. 70–80).

We evaluated current and projected changes in climatic parameters averaged across 13 general circulation models from the Climate Model Intercomparison Project 6 (CMIP6) (Mahoney et al. 2003, entire) compiled using the ClimateNA tool (version 7.21, *https://climatena.ca/*) (Wang et al. 2016, entire). We also evaluated six Joshua tree-specific bioclimatic models that forecast the degree to which the current species' range will contain the same climate conditions for both species in the future (2040–2069) or where parts of the species' ranges will not support current climatic conditions, referred to as climatically unfavorable throughout the rest of the document (Shafer et al. 2001, entire; Dole et al. 2003, entire; Cole et al. 2011, entire; Thomas et al. 2012, entire; Barrows and Murphy-Mariscal 2012, entire; Sweet et al. 2019, entire). We did not thoroughly address these models in the 2018 Joshua tree SSA report because earlier models used coarse-scale climate data and the most recent model, using smaller-scale climate data, was limited to a relatively small portion of the Joshua trees' range and, at the time, we determined that the data could not be extrapolated to the entire range due to the lack of demographic data. Since our last review, additional bioclimatic models were evaluated that support the earlier models. However, two of these models used finer-scale data and identified the potential for climate refugia in topographically diverse habitat that does not appear to have been captured in the coarse-scale climate models. We evaluate the combined results of these bioclimatic models below (see also table 6–3 of the SSA report (Service 2023 p. 82)).

There is consistency across the bioclimatic models that the southern portion of the ranges of both species and lower elevation habitat areas may not support current climate conditions for Joshua trees in the future. The models forecast that 66 to 88.6 percent of the current range will be climatically unfavorable, meaning different than the current climate conditions that Joshua trees occupy, in 2040–2069. However, these models do not include estimates of Joshua trees' future distribution and the best available science does not provide physiological temperature thresholds to inform the timing and magnitude of the species' response and when species viability may be affected, as we discussed earlier (see *Foreseeable Future,* above), though we acknowledge the potential for long-term negative effects to both species. The best available science indicates that both

species are long-lived (150–300 years), adapted to hot and dry desert conditions, and have been exposed to extreme and variable climate conditions over thousands of years. Also, individual adult trees have experienced a range of environmental conditions over the typical lifespan of 100 to several hundred years. Both species also continue to occupy most of their historical ranges, despite recent increases (approximately 1.8 °F (1 °C)) in average summer temperatures over the last 40 to 50 years (Figure 4–1 in Service 2023, p. 31).

Joshua trees are projected to experience increases in average summer temperature of approximately 3.6–5.4 °F (2–3 °C) by 2040–2069, depending on the location (Wang et al. 2016, unpaginated). These temperature ranges are anticipated to be within the range of variability that Joshua trees have experienced in the recent past. Therefore, we consider that the majority (approximately 90 percent) of the current range of both species will continue to be occupied and viable in 2040–2069 and acknowledge the potential for the localized loss of occupied habitat in the warmest and driest portions of the ranges of both species. In the last decade several masting events (large flowering events where the majority of trees within a region flower) were recorded despite recent temperature increases, even at the southern limit of their distribution (Service 2023, p. 79); and we project masting events to continue to occur throughout the majority of the ranges of both species. Modeled climatically unfavorable areas, areas projected to experience warmer and drier climate conditions than current climate conditions, may have reduced ability to support species needs with the potential for reduced growth, lower recruitment, increased predation, and tree mortality that may contribute to localized losses at low elevations and latitudes. We cannot reliably assess or characterize the degree of reduction in these demographic parameters; but we do assume and project that recruitment will be reduced throughout portions of the currently occupied habitat modeled as climatically unfavorable in 2040–2069 (66–88.6 percent) based on a projected increase of approximately 3.6–5.4 °F (2–3 °C)(Barrows and Murphy-Mariscal 2012, entire; Thomas et al. 2012, entire). We project recruitment will be reduced relative to current conditions; we assumed no to low recruitment for the warmest and driest portions of the range and an increasing reliance on clonal growth to support occupancy and viability.

The potential effects of increasing temperatures and drought on Joshua trees' habitat are complex and are dependent on the direct effects of future climatic conditions described above, as well as the strength and magnitude of the interaction with their specialist pollinators, the yucca moths, and rodent seed dispersers. In the last decade several mast flowering events were recorded despite recent temperature increases, even at the southern limit of their distribution (Service 2023, p. 79), though there is a limited understanding of yucca moth abundance during these events. Overall, the best available science does not include information on the population dynamics and environmental thresholds for the yucca moth species rangewide. Therefore, we presumed that yucca moth populations will track Joshua tree flowering, as has been experienced in the past, and will experience similar threat effects as described for the Joshua tree. We note that there is a high degree of uncertainty regarding these assumptions which limits our ability to reliably project the Joshua trees' future condition beyond 2040–2069. Prolonged drought conditions may increase seed predation and herbivory as water and food resources are limited; and we project that drought and drought-exacerbated seed predation and herbivory may increase in the future. Currently there is evidence of localized effects of predation and herbivory; but the best available science does not support the potential for population- or species-level effects currently or in the future. Prolonged droughts may have the potential to reduce rodent populations due to limited availability of water and food resources, but we have no reliable means to evaluate future climate effects to the suite of rodents that forage on Joshua trees nor future changes in seed dispersal. Recent mast flowering events in the last decade appeared to satiate rodent populations (Service 2023, p. 79); but any projections that we would develop about the future predation and herbivory effects to Joshua trees or future seed dispersal would be speculative.

The existing regulatory mechanisms in place help protect habitat and provide protective measures for Joshua trees; however, few regulations specifically address the threat of climate change (see appendix B of the SSA report (Service 2023, pp. 152–161)). Therefore, while existing regulatory mechanisms and current conservation efforts may contribute to reduced GHG emissions in the United States, impacts from climate change are forecasted to increase in the future.

The cumulative effects of climate change are complex and ongoing. Currently, climate change is a low-to-moderate magnitude threat with primarily localized effects on individual Joshua trees and portions of populations; there is no indication that climate change is currently reducing redundancy, representation, and resiliency of the Joshua trees. There is the potential for higher magnitude effects in the future, particularly for habitat at low elevation and latitudes along the southern edge of the Joshua trees' ranges. Based on the best available science we project that Joshua trees will still occupy and maintain viability in the majority of the species' current distribution in 2040–2069. Therefore, we project climate change over this time period to be a low to moderate magnitude threat in the foreseeable future with the greatest impacts at lower latitudes and elevations. Forecasted reductions in recruitment may decrease resiliency in portions of populations but there is no indication that climate change will result in a reduction in redundancy and representation that would impact the viability of the species through the years 2040–2069.

Summary of Threats

We evaluated the current threat of habitat loss and degradation, invasive grasses, increased risk of wildfire, climate change, and predation and herbivory within the distribution of Joshua trees, including how threats varied by analysis unit (see table 6–4 of the SSA report (Service 2023, p. 86)). Habitat loss and degradation is generally focused in localized areas within the range of Joshua trees and is currently considered a low magnitude threat overall and across each of the analysis units, despite the intensity of impacts being potentially severe in some localized areas. In the future, we project the threat of habitat loss and degradation to increase, but the effects will continue to be localized.

We consider invasive grasses to have a low-to-moderate potential threat to degrade habitat; moderate potential threat was defined in analysis units with approximately 12 to 13 percent of the area with high invasive grass abundance. Our analysis indicated that there is evidence of an invasive grass-wildfire cycle currently in the northern range of *Yucca jaegeriana.* Wildfire models estimate an increase in the frequency of wildfires to the northeast and high likelihood of more severe fires at northern latitudes and higher elevations, although the area anticipated

to burn is likely to be less than 12 to 18 percent (including areas previously burned). Current climate conditions are warmer than historical climate conditions and warmer climate conditions may be increasing drought stress at lower elevations. It is not clear from the limited monitoring data (from a 12-year period) if YUBR South, the southernmost and warmest analysis unit, is experiencing a declining trend caused by climatic conditions or if it is experiencing a natural fluctuation in population. We do not have information on the effect of warmer climate conditions and the current mega-drought in the rest of the species' range; but masting reproductive events continue to occur several times a decade, even in the southern portion of the ranges of both Joshua tree species. Therefore, we consider climate change a low-to-moderate threat. Predation and herbivory are considered a low-to-moderate potential threat across the species' range. Several regulations, planning documents, and management plans in place help ameliorate the magnitude of these threats on Joshua trees and are further described in appendix B of the SSA report (Service 2023, pp. 152–161). Cumulatively, these threats are not projected to result in population- or species-level declines by 2040–2069, because the majority of the range of both species is projected to remain occupied and viable (Service 2023, figure 6–5, p. 87; Wang et al. 2016, unpaginated).

TABLE 2—SUMMARY OF THE CURRENT AND FUTURE (2040–2069) MAGNITUDE OF THE THREATS * TO JOSHUA TREE BASED ON THE SCOPE, INTENSITY, LIKELIHOOD, AND IMMEDIACY

[Service 2023, p. 51]. [This table appears in the SSA report as table 6–5 (p. 87)]

Population/analysis unit	Habitat loss and degradation	Invasive grasses	Risk of wildfires	Climate change	Predation and herbivory
Yucca brevifolia					
YUBR North	Low	Low to Moderate	Moderate	Low to Moderate	Low.
YUBR South	Low +	Low	Moderate +	Moderate +	Low to Moderate +.
YUBR Summary	Low	Low to Moderate	Low to Moderate	Low to Moderate	Low to Moderate.
Yucca jaegeriana					
YUJA North	Low	Moderate +	Moderate to High +	Low to Moderate	Low.
YUJA Central	Low	Low	Moderate to High	Low to Moderate	Low.
YUJA East	Low	Low	Low	Low to Moderate	Low.
YUJA Summary	Low	Low to Moderate	Moderate	Low to Moderate	Low.
Overall Magnitude of Threat.	Low	Low to Moderate	Moderate	Low to Moderate	Low.

* Level of threat: low refers to impacts to the individuals; moderate refers to impacts affecting portions of an analysis unit; high refers to impacts that may result in population level effects to the analysis unit.

+ Indicates those analysis units where the magnitude of the threat is the greatest.

Conservation Measures and Existing Regulatory Mechanisms

Threats may be ameliorated or reduced through the implementation of existing regulatory mechanisms or other conservation measures that benefit Joshua trees and their habitat. Federal agencies, State agencies, and several local communities have adopted and implemented laws, regulations, or ordinances and conservation measures that protect native habitat and plants such as Joshua trees. Conservation measures that assist in reducing or ameliorating individual threats are discussed at the end of each of the discussions of individual threats in this document and in the SSA report (Service 2023, appendix B, pp. 152–161).

For the Joshua trees, a high percentage of occupied habitat includes lands conserved as open space and resource lands owned by the Federal government, State agencies, and nonprofit organizations, including lands covered by conservation easements, which provide a high level of protection for the species and their habitat. Conservation is categorized by the protected area database (USGS 2018, unpaginated) and is based on how the lands are managed. Approximately 3 million ac (1.2 million ha; 32 percent) of habitat occupied by the Joshua trees is fully conserved, including 23 percent of *Yucca brevifolia'*s and 41 percent *Y. jaegeriana'*s distribution. Considering lands that are protected with allowable low-intensity or isolated impacts (*e.g.,* OHV use), the percentage increases to 75 percent, including 59 percent of the range of *Y. brevifolia* and 89 percent of the range of *Y. jaegeriana.* Additionally, approximately 82 percent of the land within the distribution of Joshua trees is federally owned by the Service, BLM, National Park Service (NPS), U.S. Forest Service (USFS), and Department of Defense (DoD) (see tables 4–1 and 6–5 in the SSA report (Service 2023, pp. 33, 87)).

Federal lands are less likely to be developed and each agency follows established regulations and policies that provide for the consideration or management of Joshua trees or their habitat, including the following Federal regulations and policies: NEPA, Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*), National Forest Management Act (16 U.S.C. 1600 *et seq.*), Sikes Act and Sikes Act Improvement Act of 1997 (16 U.S.C. 670 *et seq.*), National Park Service Organic Act of 1916 (54 U.S.C. 100101 *et seq.*), Organic Administration Act of 1897 (16 U.S.C. 475, 477–478, 479–481, and 551) and the Multiple-Use, Sustained-Yield Act of 1960 (16 U.S.C. 528 *et seq.*), Wilderness Act (16 U.S.C. 1131 *et seq.*), Endangered Species Act (*i.e.,* protections for other listed species may benefit the Joshua tree or its habitat), California Desert Protection Act (43 U.S.C. 1781 and 1781a), and the Desert Renewable Energy Conservation Plan.

Joshua trees are currently addressed under the California Environmental Quality Act and several local jurisdictions in California have enacted specific tree ordinances for the Joshua trees. The Clean Air Act and California climate policies that help to mitigate climate change may also contribute to improved habitat conditions for Joshua trees in the future (see appendix B of the

SSA report (Service 2023, pp. 152–161)). Though Joshua trees are not listed under the California Endangered Species Act (CESA), *Yucca brevifolia* has been considered a candidate for listing since 2020 (CDFW 2022, p. 1). As a candidate for listing under CESA, *Y. brevifolia* is temporarily afforded the same protections as a State-listed endangered or threatened species. The California Department of Fish and Wildlife (CDFW) has since completed their Status review of the *Y. brevifolia* and recommended that listing *Y. brevifolia* was not warranted (CDFW 2022, entire); the issue is now with the California Fish and Game Commission for a final decision. The Commission plans to make a final decision on whether to list the western Joshua tree under CESA in February 2023, to allow for additional Tribal consultation and deliberation time (CALSPAN, 2022). If the Commission accepts CDFW's recommendation, the *Y. brevifolia* would no longer be a candidate for listing under CESA.

The States of Arizona, Nevada, and Utah have no special designation or protection for Joshua trees as a state listed species, however there are regulations in place that limit collection of native desert plants. In Arizona, Joshua trees are a salvage restricted native plant, as prescribed in title 3, chapter 7, of the Arizona Revised Statutes at section 3–903B.2., which means that a permit is required for removal/collection (Arizona Department of Agriculture, 2016). Similarly, Joshua trees, and all members of the Yucca genus, are protected in the State of Nevada from commercial collection (see title 47, chapter 527, of the Nevada Revised Statutes, at section 527.060 *et seq.*); commercial removal and sale of Yucca harvested from State, county, or privately owned land requires a permit from the Nevada State Forester Firewarden.

Cumulative and Synergistic Effects

We note that, by using the SSA framework to guide our analysis of the scientific information reviewed and documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future conditions of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

The threats acting on a species or its habitat do not typically operate in isolation but could impact the species or its habitat in conjunction with other threats. Individually identified threats may not rise to a level of concern or be insignificant in nature and not influence a decline in the species' status on the landscape. However, combined, these threats may result in a greater overall cumulative impact to a species or its habitat. In some cases, threats may also act synergistically, with the resulting impact being greater than if the threats were merely combined. These cumulative or synergistic impacts could result in an increased reduction in individual and habitat resource needs that may result in a loss of resiliency for a species. For example, the severity of drought events could increase under future climate conditions, which would further dry and stress vegetation and potentially make vegetation more vulnerable to wildfire, and predation. In our analysis of the threats facing *Yucca brevifolia* and *Y. jaegeriana,* we took the potential cumulative or synergistic effects of threats into consideration, and they are part of our discussion and conclusions regarding each threat currently and into the future.

Current and Future Condition

To evaluate the biological status of *Yucca brevifolia and Y. jaegeriana* both currently and into the future, we assess a range of conditions to allow us to consider the species' resiliency, redundancy, and representation. We evaluate how anthropogenic threats such as habitat loss and degradation, invasive grasses, increased risk of wildfire, climate change, and predation influence the resiliency, redundancy, and representation of Joshua trees in regional analysis units to describe the species' future viability. The viability of *Y. brevifolia and Y. jaegeriana* depends on maintaining multiple populations with sufficient redundancy and resiliency over time across each species' distribution.

Current Condition

We assess the Joshua trees' current condition by evaluating resiliency, representation, and redundancy. To assess current conditions for *Yucca brevifolia* and *Y. jaegeriana,* each species' range was divided into analysis units that are representative of the range of biotic and abiotic features of Joshua trees' habitat. A high overall resiliency condition score means all population needs are clearly met and that the species in that unit is sufficiently resilient to environmental variation in the range experienced by the species in the recent past; a highly resilient analysis unit is unlikely to become in danger of extinction and is more likely to contribute to species viability. A medium overall resiliency condition score means some habitat or demographic needs are minimally present while others may be met in the analysis unit, but we project that the analysis unit likely has the resiliency necessary to recover from stochastic variability. For units with a medium overall resiliency condition score, although occupancy may be lost in some areas, these units are unlikely to become in danger of extinction, and the functionality of the unit is likely to be retained and contribute to species viability. An overall low population resiliency condition score means that one or more habitat or demographic needs were not met, or all needs are at such low condition that there is a higher probability that the analysis unit may be in danger of extinction; a low resiliency analysis unit is unlikely to contribute substantially to species viability.

Current Resiliency, Redundancy, and Representation

Resiliency is the ability of populations to respond to stochastic variation despite the current level of threat. Based on the habitat and demographic needs identified in the SSA report, condition categories were defined where there was sufficient information to describe low, moderate, and high condition (see table 7–2 in the SSA report (Service 2023, p. 92)). We identified four condition categories including habitat quantity (availability of occupied habitat), habitat quality (invasive grass cover), and two demographic parameters (tree density and recruitment). The analysis units were then assessed to evaluate population resiliency based on these categories (see table 7–3 in the SSA report (Service 2023, p. 93)). Chapter 7 of the SSA report describes the parameters and assessment methodology (Service 2023, pp. 87–100).

We evaluated the Joshua trees' redundancy and representation in the context of the species' needs (see chapters 5 and 7 of the SSA report for a description of the assessment methodology (Service 2023, pp. 41–50,

87–100)). Redundancy describes the ability of a species to withstand catastrophic events that would result in the loss of a substantial component of the species' total overall population and can be assessed based on the number of populations and their resiliency, distribution, and connectivity. Representation is the ability of a species to withstand and adapt to long-term changes in environmental conditions (*i.e.,* significant changes outside the range of normal year-to-year variations). It is measured by the breadth of genetic or ecological diversity within and among populations and is used to evaluate the probability that a species can adapt to environmental changes.

I. Yucca brevifolia

Resiliency: Yucca brevifolia occupies a large and diverse area of 4.4 million ac (1.8 million ha) in two analysis units of similar size within the western Mojave Desert. We consider both YUBR North and YUBR South highly resilient due to moderate to high condition for both habitat (*e.g.,* quantity and quality) and demographic (*e.g.,* tree density and recruitment) parameters (see table 7–3 in the SSA report (Service 2023, p. 93)). The range of *Y. brevifolia* is comprised of approximately 3.3 million ac (1.3 million ha: 74 percent) of Federal lands that are administered by the NPS, BLM, USFS, and Department of Energy, as well as military lands. The species' distribution also includes several National Parks (Joshua Tree National Park, Death Valley National Park), California State Parks (Red Rock Canyon State Park), and County parks and preserves where Joshua trees are protected and managed. The southern analysis unit (YUBR South) has a higher proportion of the area privately owned (45.6 percent) and potentially subject to development, but half (52 percent) of the unit is under Federal management. The species' distribution in this unit occurs along a latitudinal gradient, and the southern analysis unit is currently, and likely historically, more drought-stressed and has a higher magnitude of threat associated with drought-exacerbated predation and herbivory. There is recent site-specific evidence of reduced survival, recruitment, and the availability of recruitment habitat at lower elevations in YUBR South. However, the available data is limited both spatially and temporally and cannot be evaluated in a historical context; therefore, it is not clear if these data points from a 12-year period represent natural variability or are an early indication of the potential effects of increased temperatures and prolonged drought. We also lack data and information on population trend and recruitment for the rest of the species' ranges; therefore, these trends were not extrapolated rangewide. Based on the best available data the current demographic condition for YUBR South is moderate to high. In contrast, YUBR North is characterized by lower temperatures and higher precipitation, which contribute to higher recruitment condition and moderate to high demography overall. Although there is site-specific evidence that demographic and habitat conditions may have declined in recent years, these changes have not been to the level that puts Joshua trees at risk; we consider that both populations currently have a high capacity to withstand or recover from stochastic variability due to the large distribution, moderate to high demography, and large percentage of the distribution conserved or managed on Federal lands. *Yucca brevifolia*'s resiliency is moderate-high to high throughout its range and for all condition categories (habitat quantity, habitat quality, tree density, and recruitment), and overall high for YUBR North and YUBR South (see table 7–3 in the SSA report (Service 2023, p. 93)).

Redundancy: We consider *Yucca brevifolia* to have sufficient redundancy to withstand catastrophic events. YUBR South and YUBR North are spread across a very large area of mostly intact habitat that supports resource needs and contributes to a high level of redundancy. No range contraction has occurred over the last 30 to 40 years, based on distribution mapping (Rowlands 1978, p. 52; Esque 2022a, pers. comm.). The large amount of occupied habitat indicates that the range is occupied by millions of Joshua trees distributed across a latitudinal gradient of approximately 300 miles (mi) (483 kilometers (km)).

Additionally, the majority of occupied habitat is located on Federal lands—with some degree of regulatory protection, management, and reduced probability of anthropogenic disturbance—and is less likely to be impacted by anthropogenic development. For example, NPS prohibits removal of Joshua trees in National Parks, actively monitors the species, and conducts habitat restoration for the species. The risk of catastrophic loss is very low because the species is spread across a 4.4-million-ac (1.8-million-ha) area. Across the range of *Y. brevifolia,* approximately 80 percent of the occupied habitat is characterized by a natural fire regime (*i.e.,* fire return interval of greater than 100 years), and greater than 50 percent of the species' range is characterized as no or low risk from invasive grasses. Although there is recent evidence of reduced recruitment and survival under extreme drought conditions, these effects are documented on a limited to relatively small area of the range; thus, we do not anticipate that current redundancy is substantially reduced such that wildfire, prolonged drought, or extreme predation and herbivory places either analysis unit in danger of extinction.

Representation: We evaluated representation in *Yucca brevifolia* based on the ecological diversity of the habitats it occupies, as a surrogate for genetic diversity, and the species' life-history characteristics that support or hinder adaptive capacity (see appendix A in the SSA report (Service 2023, p. 150). Adaptive capacity was evaluated following Thurman et al. 2020 (entire) to characterize *Y. brevifolia*'s ability to persist in place or shift in space in response to changes in its environment. Representation, as measured by the ecological diversity of habitats, is high for *Y. brevifolia,* as the two analysis units occupy highly diverse areas within the Mojave and Great Basin Deserts that include differences in elevation, aspect, soil type, temperature, rainfall, and vegetation communities. The large area that the species occupies, its broad distribution, and its ability as a habitat generalist promote higher adaptive capacity. We do not anticipate current site-specific reductions in recruitment to substantially reduce abundance or representation. Across these different environmental gradients, *Y. brevifolia* exhibits variability in growth and reproductive strategies, including increased asexual production. The clonal growth strategy increases persistence of the individual under stress, such as wildfire (Rowlands 1978, p. 50; Harrower and Gilbert 2021, p. 11; Esque 2022a, pers. comm.), which along with the Joshua trees' long lifespan, facilitates the ability of *Y. brevifolia* to persist in place in response to long-term or slow changes in its environment (Thurman et al. 2020, entire). Conversely, Joshua trees' long lifespan, limited reproductive events, long generation time, and extended age of sexual maturity limit the ability of *Y. brevifolia* to adapt to short-term changes in its environment. Its adaptive capacity and the extent that its populations can persist in place in the face of variable environmental conditions may also be constrained by its obligate mutualism with the yucca moth; we do not have information to assess the adaptive capacity of the yucca moth. Lastly, we conclude that the species has limited

dispersal capabilities based on the average dispersal distances of the rodent seed dispersers and through the absence of substantial range expansion in the last several thousand years. Therefore, *Y. brevifolia* is unlikely to be able to shift in space beyond average dispersal rates in response to changing environmental conditions. However, the species has other life-history characteristics that confer representation, including high ecological variability and the capacity to persist under similar environmental conditions as it has experienced in the past. Although there is recent site-specific evidence of reduced recruitment and survival under extreme drought conditions, the species currently has the capacity to withstand and adapt to changes in environmental conditions.

Viability: Currently, we consider *Yucca brevifolia* to have adequate resiliency, redundancy, and representation throughout its range to maintain species viability. The species' current distribution is large (approximately 4.4 million ac (1.8 million ha)), occupies a diverse region of topographic and ecological diversity, and spans a large latitudinal gradient of approximately 300 mi (483 km), which collectively confers both redundancy and representation. We consider total abundance across the species' range to be high, although tree densities vary and recruitment may already be reduced in the southern portion of the range. Population resiliency is currently high in the YUBR North and YUBR South analysis units based on the current low-to-moderate level of threat. Drought stress at lower latitudes and elevations due to rising temperatures and drought conditions resulting in decreased tree vigor, mortality, reduced recruitment, and increased herbivory and predation may impact individuals or localized areas but are not anticipated to reduce the viability of the species.

II. Yucca jaegeriana

Resiliency: Yucca jaegeriana is distributed across a 4.9-million-acre (1.9-million-ha) area in three analysis units across the eastern Mojave Desert and a small portion of the southern Great Basin Desert and western Sonoran Desert, which we consider in high condition for habitat quantity. Approximately 89 percent of *Y. jaegeriana's* distribution occurs on federally owned or managed land; private land ownership accounts for only 7 percent of modeled habitat that primarily occurs in YUJA East (23.5 percent). Like *Y. brevifolia, Y. jaegeriana* occurs along a latitudinal gradient, and the southernmost analysis unit is exposed to more drought stress and has the potential for higher drought-exacerbated predation and herbivory, although we have limited data on how prevalent this threat is in *Y. jaegeriana* relative to historical conditions. YUJA North has moderate resiliency due to lower demographic condition, although the unit has a large quantity of occupied habitat. YUJA Central has high population resiliency despite lower condition for habitat quality and demographic condition. YUJA East has moderate resiliency overall, due to the smaller size of the analysis unit and lower tree density and recruitment. Therefore, we consider *Y. jaegeriana* analysis units to have moderate to high resiliency and able to withstand environmental stochasticity (see table 7–3 in the SSA report (Service 2023, p. 93)), due to high habitat quality and quantity associated with the large percentage of the distribution of conserved or managed habitat on Federal lands.

Redundancy: We conclude that current redundancy is high in *Yucca jaegeriana* because YUJA Central, YUJA North, and YUJA East analysis units occur across a very large area of mostly intact habitat that supports resource needs. No range contraction has occurred over the last 40 years based on distribution mapping (Rowlands 1978, p. 52; Esque 2022a, pers. comm.), though wildfire has impacted trees in localized areas in YUJA North and YUJA Central. Additionally, plants are located primarily on Federal lands with less probability of development. The risk of catastrophic loss is very low because the species is spread across a 4.9-million-acre (1.9-million-ha) area distributed over a latitudinal gradient of approximately 300 mi (483 km) and includes potentially millions of individual trees. Despite recent evidence of localized wildfire impacts and the invasive grass-wildfire cycle, we conclude that current redundancy is sufficiently high such that wildfire, prolonged drought, or extreme predation and herbivory does not place any analysis unit of *Y. jaegeriana* in danger of extinction.

Representation: We evaluated representation in *Yucca jaegeriana* with respect to ecological diversity and life-history characteristics that support or hinder adaptive capacity. Adaptive capacity was evaluated following Thurman et al. (2020, entire) to characterize *Y. jaegeriana's* ability to persist in place or shift in space in response to changes in its environment. The large area that the species occupies, its broad distribution, and its ability as a habitat generalist promote higher adaptive capacity. The clonal growth strategy increases persistence of the individual under stress, such as wildfire (Rowlands 1978, p. 50; Harrower and Gilbert 2021, p. 11; Esque 2022a, pers. comm.), which along with the Joshua trees' long lifespan, facilitates the ability of *Y. jaegeriana* to persist in place in response to long-term or slow changes in its environment (Thurman et al. 2020, entire). Conversely, Joshua trees' long lifespan, limited reproductive events, long generation time, and extended age of sexual maturity limit the ability of *Y. jaegeriana* to adapt to short-term changes in its environment. Its adaptive capacity and the extent that its populations can persist in place in the face of variable environmental conditions may also be constrained by its obligate mutualism with the yucca moth; we do not have information to assess the adaptive capacity of the yucca moth. Lastly, we conclude that the species has limited dispersal capabilities based on the average dispersal distances of the rodent seed dispersers and through the absence of substantial range expansion in the last several thousand years. Therefore, *Y. jaegeriana* is unlikely to be able to shift in space beyond average dispersal rates in response to changing environmental conditions. The species has other life-history characteristics that confer representation, including high ecological variability and the capacity to persist under similar environmental conditions as it has experienced in the past. However, there is some preliminary evidence that *Y. jaegeriana*'s shorter stature and extensive branching closer to the ground may make it more susceptible to wildfire than *Y. brevifolia* (Cornett 2022, pp. 186–188). Ecological diversity is high, as *Y. jaegeriana* occupies an extensive area covering approximately 300 mi (483 km) from north to south and there is a high degree of variability in abiotic and biotic conditions within these habitats. YUJA North has high ecological diversity, as this unit is topographically diverse with areas of low, medium, and high elevation. Ecological variability is moderate to high both in topographic heterogeneity and the number of ecoregions. Therefore, we consider *Y. jaegeriana* to have sufficient representation to adapt to environmental conditions over time; however, we conclude that *Y. jaegeriana* has limited capacity to shift in space to overcome more rapid or extreme variability.

Viability: Currently, we consider *Yucca jaegeriana* to have adequate

resiliency, redundancy, and representation throughout its range to maintain species viability. The species' distribution is currently large, approximately 4.9 million ac (1.9 million ha), and it occupies a diverse region of topographic and ecological diversity that spans a large latitudinal gradient of approximately 300 mi (483 km), which confers both redundancy and representation. We characterize abundance as low to moderate condition across the three analysis units based on available tree density information; although tree densities vary and we assumed them to be lower in warm environments. Population resiliency is currently moderate to high across the three analysis units based on the amount and quality of habitat available, and the current low to moderate levels of threat. Although drought stress at lower latitudes and elevations due to rising temperatures and drought conditions may be impacting individuals or localized areas; we conclude that overall, they do not reduce the viability of the species. Thus, the species has sufficient viability to withstand the current level of threats.

Future Condition

In this section, we summarized the Joshua trees' future condition to 2069 where we can reliably forecast threats and the species' response to those threats. Over the next 47 years (approximately one generation and when trees can reproduce sexually), we can reliably characterize Joshua trees' viability where our confidence is greatest with respect to the range of projected plausible threats and the species' response. There are key areas of uncertainty, primarily regarding the two species' responses to projected future climate conditions, that do not allow us to reliably project the Joshua trees' status to end of century, discussed above in *Foreseeable Future* and below in the Finding. This is a shorter timeframe than we evaluated for future scenarios in the SSA report. For our evaluation of future condition (2040–2069), we rely on the same assumptions and data sources about the extent and magnitude of threats projected over time in Scenarios I and II of the SSA report for the primary threats—habitat loss, invasive grasses, wildfire, and future climate change—considering the time period from 2040–2069 along the trajectory projected for Scenarios I and II. Our evaluation of future condition summarized below considered the effects of threats individually and cumulatively to both species of Joshua tree.

In 2040–2069, we project the two species to continue to occupy and maintain viability in most of their current ranges, despite forecasted temperature increases (Figure 4–1 in Service 2023, p. 31). We project adult plant survival and persistence, and clonal growth to continue; and the species distribution to remain similar or slightly reduced relative to current conditions in unburned habitats across their ranges. We project seedling recruitment will continue to occur at reduced levels relative to current conditions due to increased drought stress in areas modeled to be climatically unfavorable, with the greatest reduction projected at lower elevations and latitudes. In low and moderate severity burned habitats, we project recovery of the two species in habitats that do not have an invasive grass-wildfire cycle, though recovery times may take longer due to projected drought conditions. We project localized losses of Joshua trees in developed areas and in areas with an invasive grass-wildfire cycle. We forecast the conditions for 2040–2069 to be similar to current conditions but with slight reductions in resiliency from declines in recruitment, tree density and possibly occupied habitat.

I. Yucca brevifolia

Resiliency: Based on its long persistence across large areas with varied environmental conditions, we project that *Yucca brevifolia* will continue to occupy a large and diverse area of approximately 4 million ac (1.6 million ha) in two analysis units of similar size within the western Mojave Desert. We project the species' distribution will continue to occur along a latitudinal gradient, similar to its current distribution. We project the condition of the habitat and demographic parameters to be slightly reduced in more arid areas, including at low elevations within the analysis unit and at lower latitude (YUBR South), with potential localized areas of habitat loss. We consider both YUBR North and YUBR South to be highly resilient, due to moderate to high condition for habitat (*e.g.,* quantity and quality) and demographic (*e.g.,* tree density and recruitment) parameters, and accounting for the potential for localized reductions in recruitment and survival in YUBR South. This species will continue to occupy habitat primarily in Federal ownership and we project current management protections afforded to the species will continue. The southern analysis unit (YUBR South) has a higher proportion of privately owned land (45.6 percent) and we project approximately 11 percent of the analysis unit may be lost to development in low elevation areas projected to have reduced recruitment. However, approximately 50 percent of the unit is under Federal management and most of that area is likely to continue to support the species in 2040–2069. YUBR South will continue to experience more drought-stress with localized areas of reduced recruitment and tree mortality, with a higher magnitude of threat associated with drought-exacerbated predation and herbivory. Based on our projections, the future demographic condition for YUBR South is moderate and reduced from current conditions; and the analysis unit is forecasted to maintain high resiliency in the foreseeable future. YUBR North will continue to experience lower temperatures and higher precipitation than YUBR South which contributes to higher recruitment condition and high demography as well as high population resiliency.

Overall, our analysis indicated that occupancy will be maintained throughout the range of *Yucca brevifolia,* and approximately 90 percent of the current distribution will be viable in the foreseeable future (2040–2069). We project that high resiliency for *Y. brevifolia* will continue to be maintained in both analysis units; and will be similar or slightly reduced relative to current conditions because tree densities may be lower, and recruitment reduced. We project that these changes in resiliency will not put the *Y. brevifolia* in danger of extinction, as both analysis units are likely to be able to withstand stochastic events and contribute to species viability.

Redundancy: We consider future redundancy in *Yucca brevifolia* to be high and similar to current redundancy. YUBR South and YUBR North will continue to occupy a very large area of mostly intact habitat that supports the species' resource needs. We project small, localized areas of habitat loss will occur (approximately 10 percent of the current range) and that 90 percent of the range will maintain viability by 2040–2069. The large amount of occupied habitat indicates that the range is occupied by millions of Joshua trees distributed across a latitudinal gradient of approximately 300 miles (mi) (483 kilometers (km)).

Additionally, the majority of occupied habitat will be located on Federal lands—with some degree of regulatory protection, management, and reduced probability of anthropogenic disturbance—and is less likely to be impacted by anthropogenic development. The risk of catastrophic

loss is very low because the species is spread across an approximately 4-million-ac (1.6-million-ha) area. Across the range of *Y. brevifolia,* we project approximately 80 percent of the occupied habitat is characterized by a natural fire regime (*i.e.,* fire return interval of greater than 100 years), and approximately 80 percent of the species' range is characterized as no or low risk from invasive grasses. Although we project reduced tree density and recruitment under extreme drought conditions, both analysis units are forecasted to be highly resilient. Therefore, we anticipate that future redundancy will be sufficient to withstand catastrophic events associated with threats (*e.g.,* wildfire, prolonged drought, or extreme predation and herbivory).

Representation: Representation, as measured by the ecological diversity of habitats, remains high and we project it to be similar or slightly reduced from current condition, as we project the two analysis units to occupy highly diverse areas within the Mojave and Great Basin Deserts that include differences in elevation, aspect, soil type, temperature, rainfall, and vegetation communities. The large area that the species occupies, its broad distribution, and its ability as a habitat generalist promote higher adaptive capacity. We do not anticipate projected reductions in tree density and recruitment to substantially reduce abundance or representation. Across these different environmental gradients, *Y. brevifolia* will continue to exhibit variability in growth and reproductive strategies, including the potential for increased asexual production to support persistence of individuals under stress. Its adaptive capacity and the extent that its populations can persist in place in the face of variable environmental conditions may also be constrained by its obligate mutualism with the yucca moth; but we were not able to reliably project changes to this mutualism. Lastly, we project that the species' dispersal capabilities will remain limited and similar to current conditions. Although we project reduced tree density and recruitment, we forecast the species to retain the capacity to withstand and adapt to changes in environmental conditions.

Viability: Our analysis indicates that approximately 90 percent of the current distribution will be viable in the foreseeable future (2040–2069), though tree densities may be lower and recruitment reduced. We predict that resiliency, redundancy, and representation for *Yucca brevifolia* would continue to be viable and similar or slightly reduced relative to current conditions. All analysis units will be occupied, and the distribution includes a large and diverse area of mostly intact habitat that supports resource needs and the ability to withstand stochastic variability in environmental conditions. We project the species to have sufficient population resiliency and the ability to respond to stochastic and year-to-year variability. Because *Y. brevifolia* is long-lived, occupies a broad distribution, is a habitat generalist, is capable of asexual reproduction, and occupies numerous ecological settings, we project that the species has sufficient adaptive capacity and representation to adapt to changing environmental conditions. Therefore, future events, such as severe wildfire due to invasive grasses, or the effects of predation and moisture deficit due to long-term drought and increased temperatures due to climate changes would not lead to population- or species-level declines that would limit species viability.

Under the range of threats forecasted, we project that *Yucca brevifolia* will maintain high population resiliency. We project redundancy to be similar to the current condition with a similar distribution and similar population size. Our analysis indicates that at least 90 percent (4 million ac (1.6 million ha)) of the current distribution will be occupied. We consider this acreage and the species' broad distribution to confer sufficient redundancy for the species to withstand large-scale wildfires, prolonged drought, and episodes of severe predation. No analysis unit is forecasted to be in danger of extinction under a catastrophic event. Similarly, we project representation to be similar or slightly reduced compared to current conditions and that *Y. brevifolia* will retain adequate representation, despite the increased risk of wildfires, increased temperatures, and potential for prolonged drought. We considered the possibility of potential habitat expansion in the future, but we project that it will be limited by dispersal distance and the general lack of continuity between currently occupied habitat and habitat forecasted to be climatically favorable in the future. Therefore, we did not include potential habitat expansion in our projections for resiliency, redundancy, or representation. We project that future resiliency, redundancy, and representation contribute to a viability that does not place *Y. brevifolia* in danger of extinction.

II. Yucca jaegeriana

Resiliency: Based on its long persistence across large areas with varied environmental conditions, we project that *Yucca jaegeriana* will continue to occupy a large and diverse area of approximately 4.4 million ac (1.8 million ha) in three analysis units of similar size within the eastern Mojave Desert, the southern Great Basin Desert, and western Sonoran Desert. We project that the species' distribution in the future will be similar to its current distribution along a latitudinal gradient. We consider all three units, YUJA North, YUJA Central, and YUJA East to be moderately resilient due to moderate to high condition for habitat parameters (*e.g.,* quantity and quality), despite low to moderate demographic (*e.g.,* tree density and recruitment) condition projected due to the forecasted increases in drought stress and reduced recruitment. We project the condition of the habitat and demographic parameters to be slightly reduced in more arid areas, including at low elevations and in the analysis unit at lower latitude (YUJA East), with localized areas of habitat loss. We forecast greater potential for negative impacts to YUJA East due to the increasing temperatures and drought affecting habitat quantity, habitat quality, and demographic parameters due to its lower latitude and elevation. YUJA North and YUJA Central have higher but still moderate resiliency because they occur at higher latitudes, but portions of these analysis units also occur at lower elevation and are subject to the increased aridity and greater effects from climate change. In addition, these analysis units (YUJA North and YUJA Central) in the northern portion of the range have burned, have higher invasive grass cover, and are at increased risk of wildfire in the future with potential impacts to both habitat and demographic parameters. This species will continue to occupy habitat primarily in Federal ownership and we project current management protections afforded to the species will continue.

Overall, our analysis indicated that occupancy will be maintained throughout the range of *Yucca jaegeriana* and approximately 90 percent of the current distribution will be viable in the foreseeable future (2040–2069). We project moderate resiliency for *Y. jaegeriana* in all three analysis units that will be similar or slightly reduced relative to current conditions because tree densities may be lower and recruitment reduced. These changes in resiliency are not projected to put *Y. jaegeriana* at risk of extinction, as all three analysis units are likely to be able to withstand stochastic events and contribute to species viability.

Redundancy: Future redundancy will remain high for *Yucca jaegeriana* and

similar or slightly reduced relative to current redundancy. YUJA Central, YUJA North, and YUJA East analysis units will continue to be occupied and viable across a very large area of mostly intact habitat that supports the species' resource needs. Additionally, plants are located primarily on Federal lands with less probability of development. The risk of catastrophic loss is very low because we project the species to occur across an approximately 4.4-million-acre (1.8-million-ha) area distributed over a latitudinal gradient of approximately 300 mi (483 km) and include potentially millions of individual trees. Despite projected wildfire impacts and the invasive grass-wildfire cycle, we conclude that future redundancy is sufficiently high to withstand catastrophic events associated with wildfire, prolonged drought, or extreme predation and herbivory.

Representation: Representation, as measured by the ecological diversity of habitats, remains high and slightly reduced from current condition, as we project the three analysis units to occupy highly diverse areas within the Mojave, Great Basin, and Sonoran Deserts that include differences in elevation, aspect, soil type, temperature, rainfall, and vegetation communities. The large area that the species occupies, its broad distribution, and the fact that it is a habitat generalist promotes higher adaptive capacity. We do not anticipate reductions in tree density and recruitment to substantially reduce abundance or representation. Across these different environmental gradients, *Yucca jaegeriana* will continue to exhibit variability in growth and reproductive strategies, including increased asexual production to support persistence of the individual under stress. Its adaptive capacity and the extent that its populations can persist in place in the face of variable environmental conditions may also be constrained by its obligate mutualism with the yucca moth; but we were not able to reliably project changes to this mutualism. Lastly, we project that the species' dispersal capabilities will remain limited and similar to the current condition. Although we project reduced tree density and recruitment, we project the species to retain the capacity to withstand and adapt to changes in environmental conditions.

Viability: Our analysis indicates that approximately 90 percent of the current distribution will be viable in the foreseeable future (2040–2069), though densities of plants on the landscape may be lower and recruitment reduced at lower latitudes and elevations. We predict that resiliency, redundancy, and representation for *Yucca jaegeriana* will continue to be maintained and will be similar or slightly reduced relative to current conditions. All analysis units will be occupied, and the distribution will include a large and diverse area of mostly intact habitat that supports resource needs and the ability to withstand stochastic variability in environmental conditions and catastrophic events. Because *Y. jaegeriana* is long-lived, occupies a broad distribution, is a habitat generalist, is capable of asexual reproduction, and occupies numerous ecological settings, we project that the species has sufficient adaptive capacity and representation to adapt to changing environmental conditions. Therefore, future events, such as severe wildfire due to nonnative grasses, or the effects of predation and moisture deficit due to long-term drought and increased temperatures due to climate changes in 2040–2069, would not lead to population- or species-level declines that would limit species viability.

Under the range of threats forecasted, we project that *Yucca jaegeriana* will maintain moderate population resiliency across its range. Redundancy is projected to be similar to or slightly reduced relative to current condition with a similar distribution and population size considering the potential for decreases in distribution and population size as a result of forecasted localized loss of occupied habitat in developed areas and at lower elevations and latitudes. Our analysis indicates that approximately 90 percent (4.4 million ac; 1.8 million ha) of the current distribution will be occupied and viable. We consider this acreage and the species' broad distribution to confer sufficient redundancy for the species to withstand potential large-scale wildfires, prolonged drought, and episodes of severe predation. No analysis unit is projected to be in danger of extinction due to a stochastic or catastrophic event. We project representation to be sufficient and slightly reduced relative to current conditions, despite the increased risk of wildfires, increased temperatures, and potential for prolonged drought. We considered the possibility of potential habitat expansion in the future; but project that habitat expansion will be limited by dispersal capability and the general lack of continuity between currently occupied habitat and habitat forecasted to be climatically favorable in the future. Therefore, we did not include potential habitat expansion in our projections for resiliency, redundancy, or representation. We project that future resiliency, redundancy, and representation will continue to contribute to viability that does not place *Y. jaegeriana* in danger of extinction.

Overall Synthesis of Future Viability

Our analyses of the threats in the future support reasonably reliable projections of the future status of *Yucca brevifolia* and *Y. jaegeriana* from 2040–2069. Population resiliency for both species will be similar or slightly reduced relative to current conditions, ranging from moderate to high. Although there is the potential for localized habitat loss, the majority of the range of both species will continue to be occupied and viable, including approximately 4 million ac (1.6 million ha) for *Y. brevifolia* and 4.4 million ac (1.8 million ha) for *Y. jaegeriana*. All species needs are projected to be met throughout the majority of the occupied habitat, including reproduction through masting events and asexual/clonal reproduction, although recruitment may be lower in some areas. Future resiliency is similar or slightly reduced relative to current conditions and we project both species will have the ability to withstand environmental stochasticity. Localized habitat loss and reductions in recruitment are not projected to substantially decrease redundancy and representation. Therefore, both species are projected to have the ability to adapt to changes in environmental conditions and be able to withstand catastrophic events.

Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Their Ranges

After evaluating threats to both of the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we found that while there are threats that are currently acting on *Yucca brevifolia* and *Y. jaegeriana* such as habitat loss and degradation (from urbanization, military training, renewable energy, grazing, and OHV use) (Factor A), increased risk of wildfire (Factor A), seed predation and herbivory (Factor C), invasive grasses (Factor A), and changing climatic trends (*e.g.,* increased temperatures and longer more frequent drought periods) (Factor A), including cumulative effects, we did not find that the threats are currently acting on either of the two species at either a population- or species-level scale such that the species are in danger of extinction throughout all of their range. The two species are occupying most of their historical ranges—which currently extends to over 4.4 million ac (1.8 million ha) for *Y. brevifolia* and 4.9 million ac (1.9 million ha) for *Y. jaegeriana,* as well as a hybrid zone of approximately 121,147 ac (49,048 ha). We also considered the inadequacy of existing regulatory mechanisms (Factor D) to address the primary threats to Joshua trees from the other four factors (Factors A, B, C, and E). We found no information to indicate that existing regulatory mechanisms (Factor D) in combination with other threats are not helping to address the effects of the threats to the species or would negatively affect the status of the species. Furthermore, as discussed above, we found various Federal and State regulatory mechanisms do currently exist that do provide some level of protection for Joshua trees and their habitat.

Current population resiliency is high for *Yucca brevifolia* due to the large amounts of moderate- to high-quality habitat occupied by the species, as well as moderate to high tree density and recruitment observed throughout the range. The high level of population resiliency indicates that habitat and demographic resource needs are not limiting, and the species is currently able to withstand stochastic events. Similarly, current population resiliency ranges from moderate to high for *Y. jaegeriana.* Although there is also a large amount of habitat occupied by the species, the quality of habitat, tree density, and recruitment are reduced due in part to recent wildfires and higher levels of invasive grass cover within burned habitat, particularly in the northern portion of its range. However, all analysis units of *Y. brevifolia* and *Y. jaegeriana* currently retain resiliency sufficient to withstand stochastic variability because of the quantity of moderate- to high-condition habitat occupied by both species.

While warming and drying climate conditions have been observed, there is no evidence to support substantial population size reductions and range contraction over the last 40 years based on distribution mapping (Rowlands 1978, p. 52; Esque 2022b, pers. comm.). Overall, recruitment of both *Yucca brevifolia* and *Y. jaegeriana* is currently occurring across their respective ranges; although we acknowledge the potential for recent, small, and localized declines along the southern limit of *Y. brevifolia* in Joshua Tree National Park, the data does not support a population decline. The large area that the two species occupy, the broad latitudinal distribution, and the fact that they are habitat generalists promote higher adaptive capacity and representation. Current reductions in recruitment are not anticipated to reduce abundance or representation to the extent of limiting viability. *Yucca brevifolia* and *Y. jaegeriana* exhibit variability in density and reproductive strategies across these different environmental gradients, including the relative proportion of asexual reproduction. The clonal growth strategy increases persistence of the individual under stress (*e.g.,* wildfire), which along with the Joshua trees' long lifespan, is anticipated to facilitate the ability of *Y. brevifolia* and *Y. jaegeriana* to continue to occur in place in response to long-term or slow changes in its environment. Additionally, Joshua trees are located primarily on Federal lands, which inherently have less pressure from anthropogenic development and often provide for management of the species. Potential adverse impacts to both species are dispersed across their ranges in large, occupied areas that span millions of acres across a latitude gradient of approximately 300 mi (483 km). This broad distribution and high number of individuals occupying the landscape provides redundancy to withstand catastrophic events (*e.g.* wildfire; Factor A) such that these events are not likely to place any population of *Y. brevifolia* or *Y. jaegeriana* in danger of extinction. In addition to the existing regulatory mechanisms already in place, several Federal, State, and county agencies have been implementing conservation measures through best management practices specific to the Joshua trees (*Y. brevifolia* and *Y. jaegeriana*), to protect and help sustain the species and their habitats where possible. The net effect of current and predictable threats to the species, after considering applicable conservation measures and existing regulatory mechanisms, is not sufficient to cause the species to meet the definition of an endangered species. Thus, after assessing the best available information, we have determined that Joshua trees (*Y. brevifolia* and *Y. jaegeriana*) are not currently in danger of extinction throughout all of their ranges.

Therefore, we proceed with determining whether Joshua trees (*Yucca brevifolia* or *Y. jaegeriana*) are likely to become endangered within the foreseeable future throughout their ranges. The two species face a variety of future threats, including the threats of habitat loss and degradation (from urbanization, military training, renewable energy, livestock grazing, and OHV use) (Factor A), increased risk of wildfire (Factor A), seed predation and herbivory (Factor C), invasive grasses (Factor A), and changing climatic trends, (*e.g.,* increased temperatures and longer more frequent drought periods) (Factor A) that have the potential to reduce the viability of the two species. Of these threats, the primary future threats are the risk of wildfire (Factor A), invasive grasses (Factor A), and climate effects (increasing temperature, precipitation changes, drought) (Factor A). In the SSA report, we evaluated environmental conditions and primary threat factors acting on the two species and developed two future scenarios projecting to end of century to assist in determining the range of potential future conditions.

We examined the best available data that allow predictions into the future which extends as far as those predictions are sufficiently reliable to provide a reasonable degree of confidence. Many available data sources for the threats evaluated provided specific projections out 30 to 50 years. We based our analysis on future projections of habitat loss (including renewable energy development, invasive grass cover, climate change, and wildfire) and the potential impacts of those changes to species needs and habitat conditions. For example, invasive grass cover was modeled to 2050 (Comer et al. 2013, Figure 2). Wildfire modeling was based on current conditions and is considered accurate for the next 30 to 50 years (Klinger 2022, pers. comm.), and development and habitat loss projections are available to 2060 (Environmental Protection Agency

2015, entire). The climate change analysis considered bioclimatic models that provided projections for 2040–2069 (Thomas et al. 2012, entire; Barrows and Murphy-Mariscal 2012, entire).

Future climate projections for RCP 4.5 and 8.5 and the associated species response are more similar at 2050 and begin to diverge after 2050 based on the different socio-economic and mitigation assumptions included in each RCP. Joshua trees' exposure to climatically unfavorable conditions and the species' response is also more tractable over a shorter time period, which provides greater certainty related to threats and the species' responses to those threats, as discussed below. We determined the climate projections and the response of Joshua trees at the end of century time horizon were too uncertain to rely on to analyze future condition. There is a high degree of variability in future climate forecasts depending on the global emission scenario evaluated at the end of the century and the magnitude of the forecasted temperature increase diverge after 2050. There is also a high degree of uncertainty in the timing and magnitude of the species' response to climatically unfavorable conditions at the end of the century. As a result, it is not clear how and when Joshua tree individuals or populations may begin to experience the effects of climatically unfavorable conditions, including when reduced recruitment may affect species viability, how long adult trees may persist in climatically unfavorable conditions, and what the physiological thresholds are for the species (Thomas 2022, pers. comm; Shafer et al. 2001, p. 207).

We determined that the best available science regarding the status of the species only supports reliable projections to 2040–2069. It was noted that beyond 50 years, human decisions that affect global GHG emissions are a major source of uncertainty (Terando *et al.* 2020, pp. 14–15). Although our SSA report captured the best available information on all key influences and the future scenarios provided a range of plausible conditions projected to the end of century, we determined that using 2040–2069 as the foreseeable future for these listing determinations is more appropriate considering the uncertainties identified above and our ability to reliably predict threats and the species' response.

In the foreseeable future (2040–2069), we predict that resiliency, redundancy, and representation for *Yucca brevifolia* and *Y. jaegeriana* would continue to be maintained in all analysis units. Because the two species are long-lived, occupy broad distributions, are habitat generalists, are capable of asexual reproduction, and occupy numerous ecological settings, we determined that future stochastic variability and catastrophic events, such as severe wildfire due to invasive grasses, or the effects of predation and moisture deficit due to long-term drought and increased temperatures due to climate changes, would not lead to population- or species-level declines that would limit species viability or persistence. Therefore, in 2040–2069, both species are likely to maintain occupancy throughout each analysis unit, within a distribution that is similar to or slightly reduced relative to current conditions. As a result, each Joshua tree analysis unit is likely to contribute representation and redundancy for species viability. In addition, most of the habitat occupied by Joshua trees occurs on Federal land with existing regulatory mechanisms in place. Several Federal, State, and county agencies have been implementing conservation measures through BMPs, specific to the Joshua trees (*Y. brevifolia* and *Y. jaegeriana*), to protect and help sustain the species and its habitat where possible and into the future. The net effect of predictable future threats to the species, after considering applicable conservation measures and the existing regulatory mechanisms, is not sufficient to cause the species to meet the definition of a threatened species. Thus, after assessing the best available information, we have determined that *Y. brevifolia* and *Y. jaegeriana* are not likely to become endangered within the foreseeable future throughout all of their ranges.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Having determined that the two species of Joshua tree are not in danger of extinction or likely to become so in the foreseeable future throughout all of their ranges, we now consider whether they may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of their ranges—that is, whether there is any portion of the species' ranges for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for Joshua trees, we chose to address the status question first. We began by identifying any portions of the species' ranges where the biological status of the species may be different from its biological status elsewhere in its range. For this purpose, we considered information pertaining to the geographic distribution of (a) individuals of the species, (b) the threats that the species face, and (c) the resiliency condition of populations.

We evaluated the range of both Joshua tree species to determine if either of the species is in danger of extinction now or likely to become so in the foreseeable future in any portion of its range. The range of a species can be divided into portions in an infinite number of ways. We focused our analysis on portions of the species' range that may meet the definition of an endangered species or a threatened species. For both Joshua tree species, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. We examined the following threats on both species: habitat loss and degradation (from urbanization, military training, renewable energy, grazing, and OHV use), invasive grasses, increased risk of wildfire, changing climatic trends (*e.g.,* increased temperatures and longer more frequent drought periods), and seed predation and herbivory, including cumulative effects. As noted above, we defined foreseeable future as 2040–2069, the time period for which we can reliably predict the threats and the species' response to the threats.

I. Yucca brevifolia

Yucca brevifolia occupies two distinct areas, which we have identified as a northern analysis unit (YUBR North) and a southern analysis unit (YUBR South). As discussed in our rangewide analysis, the threats of habitat loss and degradation (from urbanization, military training, renewable energy, grazing, and OHV use), invasive grasses, increased risk of wildfire, changing climatic trends (*e.g.,* increased temperatures and longer more frequent drought periods), and seed predation and herbivory are known to negatively affect the YUBR North and YUBR South analysis units,

currently and into the future. All these threats are rangewide, meaning that they are acting throughout the species' range across all analysis units. We identified areas that may have a concentration of threats, including threats with the largest potential impacts to the species, which may be occurring on a biologically meaningful scale. The concentration of threats is more likely to result from increased temperatures and drought associated with projected climate change (modeled areas of climatically unfavorable habitat), increased risk of wildfire, and associated habitat loss in the future. These threats occur throughout the YUBR North and YUBR South analysis units to varying degrees, but have the highest potential impact to the species in the lower elevation habitat areas generally defined as less than 1,200 m. Therefore, we determined that there may be a geographical concentration of threats due to the combination of climate change, risk of wildfire, and habitat loss in lower elevation habitat both now and in the future.

Approximately 66 to 88.6 percent of the range of *Yucca brevifolia* is projected to be climatically unfavorable between 2040 and 2069. While modeling predicts a large decline in climatically favorable habitat, we project that habitat loss will be localized in these modeled areas due to uncertainties in the species' response and because modeled climatically unfavorable habitat does not equate to an immediate loss of occupied habitat or a potential range contraction between 2040 and 2069 (Shafer et al. 2001, p. 207). The potential species' response is greatest at lower elevation areas that are currently experiencing higher levels of drought stress with a projected increase in aridity in the foreseeable future. Although there is a low probability of natural wildfire ignitions and low frequency of wildfires projected for lower elevation areas, habitat recovery post-fire may be further hindered in these lower elevation zones under drought conditions, and human-induced ignitions are projected to be higher in YUBR South along the urban-wildland interface. In addition, habitat loss due to urbanization and renewable energy development is likely to occur in the level terrain that occurs at lower elevation in localized areas projected to have reduced recruitment and survival, particularly in YUBR South. The effects of these threats on the YUBR North and YUBR South analysis units are discussed further above (see *Threats*).

We next examined the status of the low-elevation areas of the YUBR North and YUBR South analysis units, either in total (41 percent of the species range) or within each analysis unit (5 and 74 percent respectively) by examining the species' response at low elevation and the resiliency, redundancy, and representation of *Yucca brevifolia* in these portions. As we evaluate effects to the species in the foreseeable future, the cumulative threats at low elevation may result in reduced growth and recruitment, with the potential for localized tree mortality and thinning across the low-elevation areas. We forecast asexual reproduction to be maintained, particularly when trees are stressed by drought or in response to wildfire, which supports the persistence of the species at low elevations. We project habitat loss to be localized, including in a small proportion of the low-elevation habitat area. Therefore, Joshua trees are projected to maintain viability throughout the majority of the habitat in each analysis unit at low elevations into the foreseeable future.

Population resiliency at low elevations is projected to decrease slightly relative to current conditions, including the potential for reduced tree densities and recruitment, but is projected to be moderate overall because of the large quantity of occupied habitat and moderate to high habitat quality. As such, the species will continue to be able to withstand stochastic events and normal year-to-year variation in environmental conditions within low-elevation areas. In the foreseeable future, forecasted tree mortality and localized habitat loss may reduce abundance but are not anticipated to result in range contractions or cause the species to be more vulnerable to catastrophic events such as prolonged drought and wildfire. As a result, redundancy would be maintained in low-elevation areas. Similarly, the species' latitudinal range is projected to be maintained, and no substantial losses of ecological diversity are forecasted at low elevations; therefore, representation would be minimally impacted.

In the foreseeable future, we forecast that the species will continue to occupy habitat in lower elevation areas, even in the more southern latitudes of *Yucca brevifolia'*s range, where models consistently predict a loss of climatically favorable habitat (YUBR South). We project that asexual and sexual reproduction will occur throughout all analysis units and that ecological diversity will be maintained at low elevations. Therefore, resiliency, redundancy, and representation for the species would continue to be maintained in the lower elevation areas of both analysis units despite the concentration of threats in these areas. Overall, the species will continue to maintain viability in the foreseeable future within the low-elevation areas of each analysis unit, despite the potential for projected reductions in demographic measures (tree density and reduced recruitment) resulting from all the threats, but particularly from changing climatic trends, wildfire, urbanization, and renewable energy development threats, which will be more concentrated in the lower elevation areas.

The best scientific and commercial information available indicates that in the lower elevations of YUBR North and YUBR South analysis units, *Yucca brevifolia* does not have a different status from its rangewide status, so there are no portions of the species' range that meet the Act's definition of an endangered species or a threatened species. Therefore, we do not need to consider whether any portions are significant.

II. Yucca jaegeriana

Yucca jaegeriana occupies three distinct areas, which we have identified as a northern analysis unit (YUJA North), a central analysis unit (YUJA Central), and an eastern analysis unit (YUJA East). As discussed in our rangewide analyses, the threats of habitat loss and degradation (from urbanization, military training, renewable energy, grazing, and OHV use), invasive grasses, increased risk of wildfire, changing climatic trends (*e.g.,* increased temperatures and longer more frequent drought periods), and seed predation and herbivory are known to negatively affect the YUJA North, YUJA Central, and YUJA East analysis units, currently and into the future. All these threats are rangewide, meaning that they are acting throughout the species' range across all analysis units. We have identified areas that may have a concentration of threats, including threats with the largest potential impact to the species, which may be occurring at a biologically meaningful scale. This is more likely to result from increased risk of invasive grasses and associated wildfire, increased temperatures and drought associated with projected climate change in the future (modeled areas of climatically unfavorable habitat), and habitat loss from urbanization and renewable energy development. These threats occur throughout the range to varying degrees but have the highest magnitude impact and potential species' response in the lower elevation habitat areas (generally defined as less than 1,200 m). Therefore, we determined that there may be a geographical concentration of threats

due to the combination of climate change, risk of wildfire, and habitat loss in lower elevation habitat both now and in the future.

Approximately 66 to 88.6 percent of the range of *Yucca jaegeriana* is projected to be climatically unfavorable in the foreseeable future. Although we do not forecast that climatically unfavorable habitat will translate to the loss of occupied habitat due to the magnitude of the temperature increases forecasted and the timeframe over which the species is exposed to climatically unfavorable conditions, the potential species' response is greatest in lower elevation areas. Low elevation areas are currently experiencing higher levels of drought stress with a projected increase in aridity in the foreseeable future. There is a higher probability of natural wildfire ignitions in YUJA North and YUJA Central due to lightning associated with monsoonal storm events. The frequency of wildfires is projected to be higher at lower elevation areas, including in portions that have burned recently and have higher invasive grass cover. Although fire severity will be lower at low elevations, habitat recovery post-fire may be further hindered in the future due to drought stress, such as in YUJA East, which occurs at both lower elevation and latitude. In addition, habitat loss due to urbanization is likely to occur in the level terrain that occurs at lower elevation, particularly in YUJA East. Approximately 23.5 percent of the analysis unit is under private land ownership (Service 2023, p. 37), but less than 1 percent of the area of the analysis unit is anticipated for further development in the foreseeable future. The effects of these threats on the YUJA North, YUJA Central, and YUJA East analysis units are discussed further above (see *Threats*).

We next examined the status in the low-elevation areas in the YUJA North, YUJA Central, and YUJA East analysis units, either in total (60 percent of the species range) or within each analysis unit (56, 51, and 98 percent, respectively), by examining the species' response at low elevation and the resiliency, redundancy, and representation of *Yucca jaegeriana* in these portions. As we evaluate effects to the species in the foreseeable future (2040–2069), the cumulative threats at low elevation may result in reduced growth and recruitment, with the potential for tree mortality and thinning across the low-elevation areas. We forecast asexual reproduction to be maintained, particularly when trees are stressed by drought or in response to wildfire, that will support the persistence of the species at low elevations. We project habitat loss to be localized, including in a small proportion of the low-elevation habitat area. Therefore, Joshua trees are projected to maintain viability throughout the majority of the habitat in each analysis unit at low elevations into the foreseeable future as defined.

Population resiliency at low elevations is projected to decrease slightly relative to current conditions, including the potential for reduced tree densities and recruitment, but is projected to be moderate overall because of the large quantity of occupied habitat and moderate habitat quality. As such, the species will continue to be able to withstand stochastic events and normal year-to-year variation in environmental conditions within the low-elevation areas. In the foreseeable future, forecasted tree loss and localized habitat loss may reduce abundance; but are not anticipated to result in range contractions or cause the species to be more vulnerable to catastrophic events such as prolonged drought and wildfire. As a result, redundancy would be maintained in the low-elevation areas. Similarly, the species' latitudinal range is projected to be maintained in 2040–2069, and no substantial losses of ecological diversity or potential arid-adapted genotypes are forecasted at low elevations; therefore, representation would be minimally impacted.

In the foreseeable future, we forecast that the species will continue to occupy habitat in lower elevation areas, even in the more southern latitudes of *Yucca jaegeriana'*s range where models consistently predict a decline in climatically favorable habitat (YUJA East). We project that asexual and sexual reproduction will occur throughout all analysis units and that ecological diversity will be maintained at low elevations. Therefore, resiliency, redundancy, and representation for the species would continue to be maintained in the lower elevation areas of all analysis units despite the concentration of threats in these areas. Overall, the species will continue to maintain viability in the foreseeable future within the low-elevation areas of each analysis unit, despite the potential for projected reductions in demographic measures (range thinning and reduced recruitment) resulting from all the threats, but particularly from changing climatic trends, wildfire, invasive grasses, and urbanization threats, which will be more concentrated in the lower elevation areas.

The best scientific and commercial information available indicates that in the lower elevations of the YUJA North, YUJA Central, and YUJA East analysis units, *Yucca jaegeriana* does not have a different status from its rangewide status, so there are no portions of the species' range that meet the Act's definition of an endangered species or a threatened species. Therefore, we do not need to consider whether any portions are significant.

Therefore, we find that *Yucca brevifolia* and *Y. jaegeriana* are not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of their ranges. This does not conflict with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014), including the definition of ''significant'' that those court decisions held to be invalid.

Determination of Status

Our review of the best available scientific and commercial information indicates that *Yucca brevifolia* and *Y. jaegeriana* do not meet the definition of an endangered species or a threatened species in accordance with sections 3(6) and 3(20) of the Act. Therefore, we find that listing either of the Joshua tree species is not warranted at this time. Further discussion of the basis for these findings can be found in the Joshua trees' species assessment form, the revised SSA report (Service 2023, entire), and other supporting documents (see **ADDRESSES**, above) that capture the scientific information upon which our decision was based.

New Information

We request that you submit any new information concerning the taxonomy of, biology of, ecology of, status of, or stressors to Joshua trees (*Yucca jaegeriana* or *Y. brevifolia*) to the person listed above under **FOR FURTHER INFORMATION CONTACT**, whenever it becomes available. New information will help us monitor these species and make appropriate decisions about their conservation and status. We encourage local agencies and stakeholders to continue cooperative monitoring and conservation efforts.

References Cited

A list of the references cited in this document is available on the internet at

https://www.regulations.gov under Docket No. FWS–R8–ES–2022–0165 in the species assessment form, or upon request from the person listed above under **FOR FURTHER INFORMATION CONTACT**.

Authors

The primary authors of this document are the staff members of the Species Assessment Team, Ecological Services Program.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–04680 Filed 3–8–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 230302–0061]

RIN 0648–BL81

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction of the Pier 3 Replacement Project at Naval Station Norfolk

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to the replacement of Pier 3 at Naval Station (NAVSTA) Norfolk in Norfolk, Virginia over the course of five years (2023–2028). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take, and requests comments on the proposed regulations. Agency responses will be included in the notice of the final decision.

DATES: Comments and information must be received no later than April 10, 2023.

ADDRESSES: A copy of the Navy's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-replacement-pier-3-naval-station-norfolk-norfolk.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2022–0110 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public records and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kim Corcoran, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

This proposed rule would establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to the Navy's construction activities including pile driving and drilling activities at Naval Station (NAVSTA) Norfolk.

We received an application from the Navy requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B and Level A harassment, incidental to impact and vibratory pile driving and drilling. Please see Background below for definitions of harassment.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Proposed Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing 5-year regulations, and for any subsequent letters of authorization (LOAs). As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Proposed Rule

Following is a summary of the major provisions of this proposed rule regarding Navy construction activities. These measures include:

- Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities;
- Shutdown of construction activities under certain circumstances to avoid injury of marine mammals;
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least

practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further review under NEPA.

We will review all comments submitted in response to this document prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On April 8, 2022, NMFS received a request from the Navy for authorization to take marine mammals incidental to construction activities related to the replacement of Pier 3 at Naval Station Norfolk in Norfolk, Virginia. Following NMFS' review of the application, the Navy provided responses to questions on June 3, 2022 and August 29, 2022. A revised version of the application was submitted on September 22, 2022. The application was deemed adequate and complete on September 26, 2022 and published for public review and comment on October 7, 2022 (87 FR 60998). We did not receive substantive comments on the NOR.

The Navy requests authorization to take a small number of five species of marine mammals by Level B harassment and, for harbor porpoise and harbor seal, Level A harassment. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity. The proposed regulations would be valid for five years (2023–2028).

Description of Proposed Activity

Overview

The Navy is currently conducting, and proposes to continue, the replacement of Pier 3 at NAVSTA Norfolk, in Norfolk, VA. This proposed rule follows an Incidental Harassment Authorization (IHA) issued to the Navy on March 15, 2022, effective from April 1, 2022 through March 31, 2023 (87 FR 15945; March 21, 2022), which covered the first year of project activities, and covers the remaining activities for the pier replacement. During this period demolition and construction activities will occur at existing Pier 3, new Pier 3, CEP–176 wharf, CEP–102 relieving platform, and on a fender system of CEP–175 bulkhead (See Figure 1). The proposed project includes both vibratory pile driving and removal, impact pile driving, and pre-drilling (hereafter, referred to as ''drilling''). Sounds resulting from pile driving, drilling and removal may result in the incidental take of marine mammals by Level A and Level B harassment in the form of auditory injury or behavioral harassment.

Dates and Duration

The proposed regulations would be valid for a period of five years (2023–2028) The specified activities may occur at any time during the five-year period of validity of the proposed regulations. The Navy expects pile driving and drilling for the entire project to occur on approximately 513 non-consecutive days over a four year duration, with the greatest amount of work occurring during Year 4 (approximately 204 days). However, in the event of unforeseen delays, the project may occur over the full 5-year duration of this proposed rule. The Navy plans to conduct all work during daylight hours.

Specific Geographic Region

Pier 3 at NAVSTA Norfolk is located at the confluence of the Elizabeth River, James River, Nansemond River, LaFeyette River, Willoughby Bay, and Chesapeake Bay (Figure 2).

Anthropogenic sound is a significant contributor to the ambient acoustic environment surrounding NAVSTA Norfolk, as it is located in close proximity to shipping channels as well as several Port of Virginia facilities with frequent vessel traffic that altogether have an annual average of 1,788 vessel calls (Port of Virginia, 2021). Other sources of human-generated underwater sound not specific to naval installations include sounds from echosounders on commercial and recreational vessels, industrial ship noise, and noise from recreational boat engines. Additionally, on average, maintenance dredging of the navigation channel occurs every 2 years (USACE and Port of Virginia, 2018).

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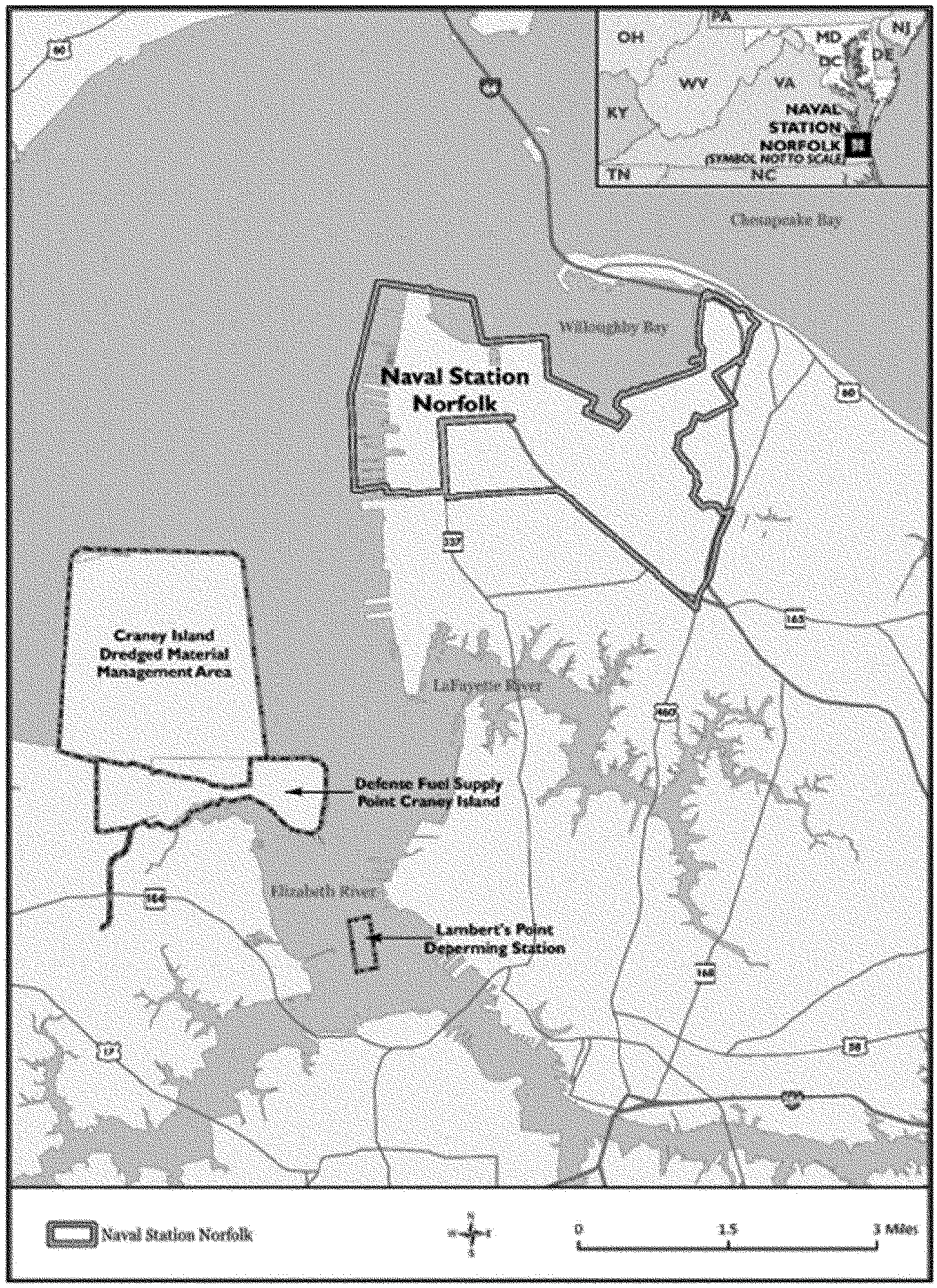


Figure 1: Site Location Map for NAVSTA Norfolk in Norfolk, Virginia

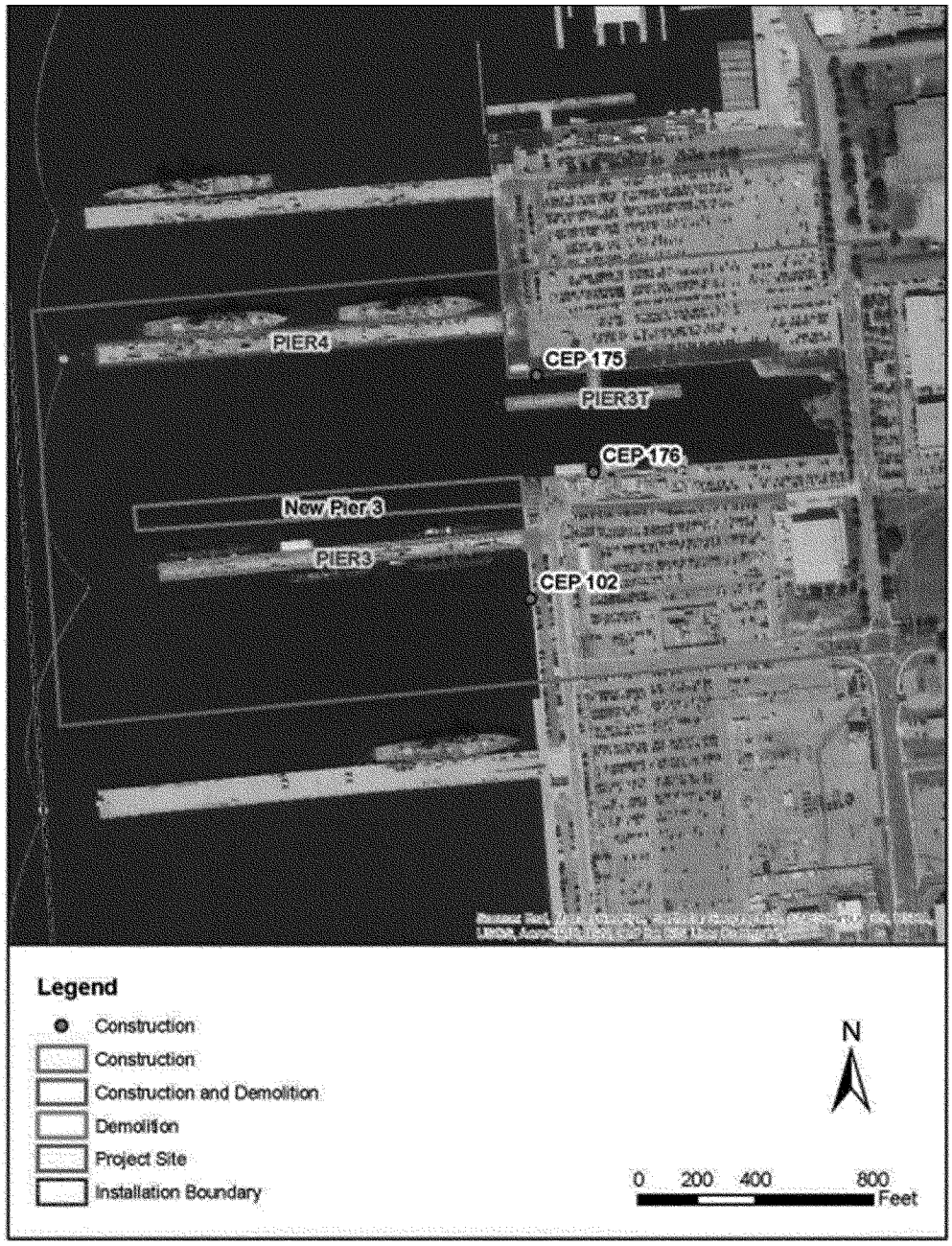


Figure 2: Project Site Map at NAVSTA Norfolk in Norfolk, Virginia

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Detailed Description of Specific Activity

The proposed project involves the replacement of Pier 3 at NAVSTA waterfront. The existing Pier 3 would be completely demolished and a new Pier 3 would be constructed immediately north of the existing location (Figure 2). The project scope for the replacement of Pier 3 under this proposed rule would also include construction of new CEP–176 wharf, construction of new CEP–102 relieving platform, and construction of a portion of fender system at CEP–175. The project includes 6 phases, the first of which has begun under the previously issued IHA (87 FR 15945; March 21, 2022). A preliminary work schedule and activity details for the work under this proposed rule are provided in Table 1. In-water construction activities, including pile driving, pile removal, and drilling are described in detail below:

Pile Removal—Piles are anticipated to be removed with a vibratory hammer, however, direct pull or clamshell removal may be used depending on site conditions. All three pile removal methods are described below. Take is not expected to occur for clamshell and direct pull removal, therefore they will not be described past what is provided below nor included in our analysis:

• Vibratory Extraction—This method uses a barge-mounted crane with a vibratory driver to remove all pile types. The vibratory driver is a large mechanical device (5 to 16 tons) suspended from a crane by a cable and positioned on top of a pile. The pile is then loosened from the sediments by activating the driver and slowly lifting up on the driver with the aid of the crane. Once the pile is released from the sediments, the crane continues to raise the driver and pull the pile from the sediment. The driver is typically shut off once the pile is loosened from the sediments. The pile is then pulled from the water and placed on a barge. Vibratory extraction usually takes between less than 1 minute (for timber piles) to 30 minutes per pile depending on the pile size, type, and substrate conditions;

• Clamshell—In cases where use of a vibratory driver is not possible (*e.g.,* when the pile may break apart from clamp force and vibration), a clamshell apparatus may be lowered from the crane in order to remove pile stubs. The use and size of the clamshell bucket would be minimized to reduce the potential for generating turbidity during removal; and

• Direct Pull—Piles may be removed by wrapping the piles with a cable or chain and pulling them directly from the sediment with a crane. In some cases, depending on access and location, piles may be cut at or below the mudline.

Pile Installation—Pile installation/removal would occur using land-based or barge-mounted cranes, as appropriate. Concrete piles would be installed using an impact hammer. Steel piles and polymeric piles can be installed using an impact hammer or vibratory hammer. Hammers can be steam, air, or diesel drop, single-acting, double-acting, differential-acting, or hydraulic type. Additionally, pre-drilling may occur for installation of concrete piles and at locations where there may be a higher likelihood of obstructions or where soil layers are harder to penetrate. Drilling is not permitted for installation of steel piles on this project or for concrete piles at Pier 3 because hard soil layers are not expected at these locations.

Table 1 provides the estimated construction schedule and production rates for the proposed construction activities considered for this proposed rulemaking beginning with Year 2. As indicated above, Year 1 of the Pier 3 replacement project was authorized under the 2022 IHA, effective from April 1, 2022–March 31, 2023. Therefore, Year 2 of the project aligns with year 1 of the proposed rule. Some project elements will use only one method of pile installation (*e.g.,* impact hammer or vibratory hammer or impact hammer and drilling), but all methods have been analyzed. The method of installation will be determined by the construction crew once demolition and installation has begun.

TABLE 1—PRELIMINARY CONSTRUCTION SCHEDULE FOR IN-WATER ACTIVITIES

Year***	Activity	Total number of piles	Activity component	Method	Daily rate (piles/day)	Total days	Total days per year
Year 2	CEP–176 Bulkhead	103	42 inch Steel Pipe Bearing Piles.	Install: Impact or Vibratory	4	26	185
Year 2	CEP–176 Bulkhead	221	28 inch sheet piles	Install: Impact or Vibratory	14	16	
Year 2	CEP–176 Bulkhead	9	13 inch polymeric fender piles	Install: Impact or Vibratory*	5	2	
Year 2	CEP–102 Platform phase 2	11	24 inch square precast concrete bearing piles.	Install: Impact*	2	6	
Year 2	Pier 3	280	24 inch square precast concrete.	Install: Impact	4	70	
Year 2	CEP–102 Platform phase 2	6	18 inch square precast concrete fender piles.	Install: Impact	4	2	
Year 2	Pier 3	250	24 inch square precast concrete bearing piles.	Install: Impact	4	63	
Year 3	Pier 3	409	24 inch square precast concrete fender files.	Install: Impact*	6	69	92
Year 3	Pier 3	18	18 inch steel pipe fender piles	Install: Impact	6	3	
Year 3	CEP–102 Platform South Portion.	26	42 inch steel pipe bearing piles	Install: Impact or Vibratory	2	13	
Year 3	CEP–102 Platform South Portion.	53	28 inch steel sheet piles	Install: Impact or Vibratory	14	4	
Year 3	CEP–102 Platform South Portion.	26	18 inch square precast concrete fender piles**.	Extract: Vibratory	9	3	
Year 4	CEP–102 Platform South Portion.	40	24 inch square precast concrete bearing piles.	Install: Impact*	2	20	204
Year 4	Existing Pier 3	624	14 inch timber fender piles** ...	Extract: Vibratory	25	25	
Year 4	CEP–102 Platform South Portion.	25	18 inch square precast concrete fender piles.	Install: Impact*	4	7	
Year 4	CEP–102 Platform Center Portion.	50	42 inch steel pipe bearing piles	Install: Impact or Vibratory	2	25	
Year 4	Existing Pier 3	72	24 inch square precast concrete fender piles**.	Extract: Vibratory	12	6	
Year 4	CEP–102 Platform Center Portion.	102	28 inch steel sheet piles	Install: Impact or Vibratory	14	8	
Year 4	CEP–102 Platform Center Portion.	36	18 inch square precast concrete fender piles**.	Extract: Vibratory	9	4	
Year 4	Existing Pier 3	873	16 inch and 18 inch square precast concrete bearing piles**.	Extract: Vibratory	10	88	
Year 4	CEP–102 Platform Center Portion.	41	24 inch square precast concrete bearing piles.	Install: Impact*	2	21	
Year 5	Existing Pier 3	30	16 and 18 inch square precast bearing piles**.	Extract: Vibratory	10	3	32
Year 5	CEP–102 Platform Center Portion.	32	24 inch square precast bearing piles.	Install: Impact*	2	16	
Year 5	CEP–102 Platform Center Portion.	50	18 inch square precast concrete fender piles.	Install: Impact*	4	13	

TABLE 1—PRELIMINARY CONSTRUCTION SCHEDULE FOR IN-WATER ACTIVITIES—Continued

Year***	Activity	Total number of piles	Activity component	Method	Daily rate (piles/day)	Total days	Total days per year
Total Piles Installed		1,726					Total: 513
Total Piles Removed		1,661					

Note: Estimated construction schedule. Delays may occur due to equipment failure or weather.
* Pre-drilling is permitted to assist with pile installation.
** Denotes Piles Removed.
*** Year 2 refers to the second year of the Pier 3 replacement project, however it is considered as Year 1 under the 2023 Rule proposed for authorization.

Concurrent Activities—In order to maintain project schedules, it is likely that multiple pieces of equipment would operate at the same time within the project area. Table 2 provides a summary of the possible equipment combinations by structure and construction year where a maximum of four in-water activities may be occurring simultaneously. As mentioned above, the method of installation, and whether concurrent pile driving scenarios will be implemented, will be determined by the construction crew once the project has begun. Therefore, the total take estimate reflects the worst case scenario for the proposed project.

TABLE 2—SUMMARY OF POSSIBLE CONCURRENT PILE DRIVING SCENARIOS

Year	Structure	Pile types	Total equipment quantity	Equipment (quantity)
Year 3	Pier 3	Driving of precast bearing piles	2	Rotary Drill (2).
			2	Impact Hammer (1), Rotary Drill (1).
			2	Impact Hammer (2).
	CEP–102	Driving 42-inch steel pipe and 28-inch steel sheet.	2	Vibratory Hammer (2).
			2	Impact Hammer (2).
			2	Vibratory Hammer (1), Impact Hammer (1).
Year 4	Existing Pier 3 and CEP–102.	Extraction of 14-inch timber piles from Pier 3 and Driving of 42-inch steel pipe, sheet piles, and precast concrete piles.	4	Vibratory Hammer (3), Rotary Drill (1).
			4	Vibratory Hammer (2), Impact Hammer (2), Rotary Drill (1).
			4	Vibratory (1), Impact Hammer (3).
Year 4–Year 5	Existing Pier 3 and CEP–102.	Extraction of 16- to 18-inch concrete piles from Pier 3 and Driving of 24-inch precast concrete bearing piles.	2	Vibratory Hammer (1), Rotary Drill (1).
			2	Vibratory Hammer (1), Impact Hammer (1).

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 3 lists all species or stocks for which take is expected and proposed to be authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is expected to occur, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All stocks managed under the MMPA in this region are assessed in NMFS' U.S. draft 2022 SARs. All values presented in Table 2 are the most recent available at the time of publication and are available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 3—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-,-, Y	1,396 (0, 1,380, 2016)	22	12.15
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose Dolphin	*Tursiops truncatus*	Western North Atlantic (WNA) Coastal, Northern Migratory.	-,-, Y	6,639 (0.41, 4,759, 2016)	48	12.2–21.5
		WNA Coastal, Southern Migratory.	-, -, Y	3,751 (0.6, 2,353, 2016)	24	0–18.3
		Northern North Carolina Estuarine.	-, -, Y	823 (0.06, 782, 2017)	7.8	7.2–30
Family Phocoenidae (porpoises):						
Harbor Porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-, -, N	95,543 (0.31, 74,034, 2016)	851	164
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Western North Atlantic	-, -, N	61,336 (0.08, 57,637, 2018)	1,729	339
Gray seal [4]	*Halichoerus grypus*	Western North Atlantic	-, -, N	27,300 (0.22, 22,785, 2016)	1,458	4453

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] This stock abundance estimate is only for the U.S. portion of this stock. The actual stock abundance, including the Canadian portion of the population, is estimated to be approximately 424,300 animals. The PBR value listed here is only for the U.S. portion of the stock, while M/SI reflects both the Canadian and U.S. portions.

As indicated above, all five species (with seven managed stocks) in Table 3 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. While North Atlantic right whales (*Eubalaena glacialis*), minke whales (*Balaenoptera acutorostrata acutorostata*), and fin whales (*Balaenoptera physalus*) have been documented in the area, the temporal and/or spatial occurrence of these whales is far outside the proposed area for this project and take is not expected to occur. Therefore, they are not discussed further beyond the explanation provided below.

Based on sighting data and passive acoustic studies, the North Atlantic right whale could occur off the coast of Virginia year-round (Department of Navy (DoN) 2009; Salisbury *et al.,* 2016). They have also been reported seasonally off Virginia during migrations in the spring, fall, and winter (Cotter 2019). Right whales are known to frequent the coastal waters of the mouth of the Chesapeake Bay (Knowlton *et al.,* 2002) and the area is a seasonal management area (November 1–April 30) mandating reduced ship speeds out to approximately 20 nautical miles (37 kilometers [km]); however, the project area is further inside the Bay and away from this area.

North Atlantic right whales have stranded in Virginia, one each in 2001, 2002, 2004, 2005; three during winter (February and March) and one in the summer (September) (Costidis *et al.,* 2017, 2019). In January 2018, a dead, entangled North Atlantic right whale was observed floating over 60 miles (96.6 km) offshore of Virginia Beach (Costidis *et al.,* 2019). All North Atlantic right whale strandings in Virginia waters have occurred on ocean-facing beaches along Virginia Beach and the barrier islands seaward of the lower Delmarva Peninsula (Costidis *et al.,* 2017). Right whales are not expected to occur in the project area, and NMFS is not proposing to authorize take of this species.

Fin whales have been sighted off Virginia (Cotter 2019), and in the Chesapeake Bay (Aschettino *et al.,* 2018); however, they are not likely to occur in the project area. Sightings have been documented around the Chesapeake Bay Bridge Tunnel (CBBT) during winter months (Aschettino *et al.,* 2018).

Eleven fin whale strandings have occurred off Virginia from 1988 to 2016, mostly during the winter months of February and March, followed by a few in the spring and summer months (Costidis *et al.,* 2017). Six of the strandings occurred in the Chesapeake Bay (three on the eastern shore; three on the western shore) with the remaining five occurring on the Atlantic coast (Costidis *et al.,*2017). Documented strandings near the project area have occurred: February 2012, a dead fin whale washed ashore on Oceanview Beach in Norfolk (Swingle *et al.,* 2013); December 2017, a live fin whale stranded on a shoal in Newport News and died at the site (Swingle *et al.,* 2018); February 2014, a dead fin whale stranded on a sand bar in Pocomoke Sound near Great Fox Island, Accomack (Swingle *et al.,* 2015); and, March 2007, a dead fin whale near Craney Island, in the Elizabeth River, in Norfolk (Barco 2013). Only stranded fin whales have been documented in the project area; no free swimming fin whales have been observed. Fin whales are not expected to occur in the project area, and NMFS is not proposing to authorize take of this species.

Minke whales have been sighted off Virginia (CeTAP 1981, 1982; Hyrenbach *et al.,* 2012; Barco 2013; Mallette *et al.,* 2016a, b; McLellan 2017; Engelhaupt *et al.,* 2017, 2018; Cotter 2019), near the CBBT (Aschettino *et al.,* 2018), but sightings in the project area are from strandings (Jensen and Silber 2004; Barco 2013; DoN 2009). In August 1994, a ship strike incident involved a minke whale in Hampton Roads (Jensen and Silber 2004; Barco 2013). It was reported that the animal was struck offshore and was carried inshore on the bow of a ship (DoN 2009). Twelve strandings of minke whales have occurred in Virginia waters from 1988 to 2016 (Costidis *et al.,* 2017). There have been six minke whale stranding from 2017 through 2020 in Virginia waters. Minke whales are not expected to occur in the project area, and NMFS is not proposing to authorize take of this species.

Humpback Whale

Humpback whales are found worldwide in all oceans. In winter, humpback whales from waters off New England, Canada, Greenland, Iceland, and Norway, migrate to mate and calve primarily in the West Indies, where spatial and genetic mixing among these groups occurs. NMFS defines a humpback whale stock on the basis of feeding location, *i.e.,* Gulf of Maine. However, our reference to humpback whales in this document refers to any individual of the species that are found in the species geographic region. These individuals may be from the same breeding population (*e.g.,* West Indies breeding population of humpback whales) but visit different feeding areas.

Based on photo-identification studies, only 39 percent of individual humpback whales observed along the mid- and south Atlantic U.S. coast are from the Gulf of Maine stock (Barco *et al.,* 2002). Therefore, the SAR abundance estimate is an underrepresentation of the relevant population, *i.e.,* the West Indies breeding population.

Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.,* 2015), NMFS established 14 Distinct Population Segments (DPSs) with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. Humpback whales in the project area are expected to be from the West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland. This DPS is not ESA listed. Bettridge *et al.,* (2003) estimated the size of the West Indies DPS at 12,312 (95% CI 8,688–15,954) whales in 2004–05, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.,* 2003; Smith *et al.,* 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.,* 2015).

Although humpback whales are migratory between feeding areas and calving areas, individual variability in the timing of migrations may result in the presence of individuals in high-latitude areas throughout the year (Straley, 1990). Records of humpback whales off the U.S. mid-Atlantic coast (New Jersey to North Carolina) from January through March suggest these waters may represent a supplemental winter feeding ground used by juvenile and mature humpback whales of U.S. and Canadian North Atlantic stocks (LaBrecque *et al.,* 2015).

Humpback whales are most likely to occur near the mouth of the Chesapeake Bay and coastal waters of Virginia Beach between January and March; however, they could be found in the area year-round, based on shipboard sighting and stranding data (Barco and Swingle, 2014; Aschettino *et al.,* 2015; 2016; 2017; 2018). Photo-identification data support the repeated use of the mid-Atlantic region by individual humpback whales. Results of the vessel surveys show site fidelity in the survey area for some individuals and a high level of occurrence within shipping channels—an important high-use area by both the Navy and commercial traffic (Aschettino *et al.,* 2015; 2016; 2017; 2018). Nearshore surveys conducted in early 2015 reported 61 individual humpback whale sightings, and 135 individual humpback whale sightings in late 2015 through May 2016 (Aschettino *et al.,* 2016). Subsequent surveys confirmed the occurrence of humpback whales in the nearshore survey area: 248 individuals were detected in 2016–2017 surveys (Aschettino *et al.,* 2017), 32 individuals were detected in 2017–2018 surveys (Aschettino *et al.,* 2018), and 80 individuals were detected in 2019 surveys (Aschettino *et al.,* 2019). Sightings in the Hampton Roads area in the vicinity of NAVSTA Norfolk were reported in nearshore surveys and through tracking of satellite-tagged whales in 2016, 2017 and 2019. The numbers of whales detected, most of which were juveniles, reflect the varying level of survey effort and changes in survey objectives from year to year, and do not indicate abundance trends over time. Most recently, the Hampton Roads Bridge-Tunnel Expansion Project (HRBT), which spanned from September 2020 through July 10, 2021 did not observe any humpback whales near the project site between Norfolk and Hampton, VA over 197 days of observations (Hampton Roads Connector Partners (HRCP), *Unpublished*).

Bottlenose Dolphin

Along the U.S. East Coast and northern Gulf of Mexico, the bottlenose dolphin stock structure is well studied. There are currently 53 management stocks identified by NMFS in the western North Atlantic and Gulf of Mexico, including oceanic, coastal, and estuarine stocks (Hayes *et al.,* 2017; Waring *et al.,* 2015, 2016).

A recent study proposes that bottlenose dolphins inhabiting nearshore coastal and estuarine waters between New York and Florida are likely a separate species from their offshore counterparts (Costa *et al.,* 2022). The offshore form is larger in total length and skull length, and has wider nasal bones than the coastal form. Both inhabit waters in the western North Atlantic Ocean and Gulf of Mexico (Curry and Smith, 1997; Hersh and Duffield, 1990; Mead and Potter, 1995) along the U.S. Atlantic coast. The coastal species of bottlenose dolphin is continuously distributed along the Atlantic coast south of Long Island, New York, around the Florida peninsula, and along the Gulf of Mexico coast. This type typically occurs in waters less than 25 meters deep (Waring *et al.,* 2015). The range of the offshore bottlenose dolphin includes waters beyond the continental slope (Kenney, 1990), and offshore bottlenose dolphins may move between the Gulf of Mexico and the Atlantic (Wells *et al.,* 1999).

Two coastal stocks are likely to be present in the project area: the Western North Atlantic Northern Migratory Coastal stock and the Western North Atlantic Southern Migratory Coastal stock. Additionally, the Northern North Carolina Estuarine System stock may occur in the project area.

Bottlenose dolphins are the most abundant marine mammal along the Virginia coast and within the Chesapeake Bay, typically traveling in groups of 2 to 15 individuals, but occasionally in groups of over 100 individuals (Engelhaupt *et al.,* 2014; 2015; 2016). Bottlenose dolphins of the Western North Atlantic Northern Migratory Coastal stock winter along the coast of North Carolina and migrate as far north as Long Island, New York, in the summer. They are rarely found north of North Carolina in the winter (NMFS, 2018). The Western North Atlantic Southern Migratory Coastal

stock occurs in waters of southern North Carolina from October to December, moving south during winter months and north to North Carolina during spring months. During July and August, the Western North Atlantic Southern Migratory Coastal stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to the eastern shore of Virginia (NMFS, 2018). It is possible that these animals also occur inside the Chesapeake Bay and in nearshore coastal waters. The North Carolina Estuarine System stock dolphins may also occur in the Chesapeake Bay during July and August (NMFS, 2018a).

Vessel surveys conducted along coastal and offshore transects from NAVSTA Norfolk to Virginia Beach in most months from August 2012 to August 2015 reported bottlenose dolphins throughout the survey area, including the vicinity of NAVSTA Norfolk (Engelhaupt *et al.,* 2014; 2015; 2016). The final results from this project confirmed earlier findings that bottlenose dolphins are common in the study area, with highest densities in the coastal waters in summer and fall months. However, bottlenose dolphins do not completely leave this area during colder months, with approximately 200–300 individuals still present in winter and spring months, which is commonly referred to as the Chesapeake Bay resident dolphin population (Engelhaupt *et al.,* 2016).

Harbor Porpoise

Harbor porpoises inhabit cool temperate-to-subpolar waters, often where prey aggregations are concentrated (Watts and Gaskin, 1985). Thus, they are frequently found in shallow waters, most often near shore, but they sometimes move into deeper offshore waters. Harbor porpoises are rarely found in waters warmer than 63 degrees Fahrenheit (17 degrees Celsius) (Read 1999) and closely follow the movements of their primary prey, Atlantic herring (Gaskin 1992).

In the western North Atlantic, harbor porpoise range from Cumberland Sound on the east coast of Baffin Island, southeast along the eastern coast of Labrador to Newfoundland and the Gulf of St. Lawrence, then southwest to about 34 degrees North on the coast of North Carolina (Waring *et al.,* 2016). During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada (Waring *et al.,* 2016). Harbor porpoises sighted off the mid-Atlantic during winter include porpoises from other western North Atlantic populations (Rosel *et al.,* 1999). There does not appear to be a temporally coordinated migration or a specific migratory route to and from the Bay of Fundy region (Waring *et al.,* 2016). During fall (October to December) and spring (April to June), harbor porpoises are widely dispersed from New Jersey to Maine, with lower densities farther north and south (LaBrecque *et al.,* 2015).

Based on stranding reports, passive acoustic recorders, and shipboard surveys, harbor porpoise occur in coastal waters primarily in winter and spring months, but there is little information on their presence in the Chesapeake Bay. They do not appear to be abundant in the NAVSTA Norfolk area in most years, but this is confounded by wide variations in stranding occurrences over the past decade. In the recent HRBT project, zero harbor porpoises were observed near the project area (HRCP, *Unpublished*).

Harbor Seal

The Western North Atlantic stock of harbor seals occurs in the project area. Harbor seal distribution along the U.S. Atlantic coast has shifted in recent years, with an increased number of seals reported from southern New England to the mid-Atlantic region (DiGiovanni *et al.,* 2011; Hayes *et al.,* 2021). Regular sightings of seals in Virginia have become a common occurrence in winter and early spring (Costidis *et al.,* 2019). Winter haulout sites for harbor seals have been documented in the Chesapeake Bay at the CBBT, on the Virginia Eastern Shore, and near Oregon Inlet, North Carolina (Waring *et al.,* 2016; Rees *et al.,* 2016; Jones *et al.,* 2018).

Harbor seals regularly haul out on rocks around the portal islands of the CBBT and on mud flats on the nearby southern tip of the Eastern Shore from December through April (Rees *et al.,* 2016; Jones *et al.,* 2018). Seals captured in 2018 on the Eastern Shore and tagged with satellite-tracked tags that lasted from 2 to 5 months spent at least 60 days in Virginia waters before departing the area. All tagged seals returned regularly to the capture site while in Virginia waters, but individuals utilized offshore and Chesapeake Bay waters to different extents (Ampela *et al.,* 2019). The area that was utilized most heavily was near the Eastern Shore capture site, but some seals ranged into the Chesapeake Bay. To supplement this information, the HRBT project reported seeing zero seals in or around the project area (HRCP, *Unpublished*).

Gray Seal

The Western North Atlantic stock of gray seal occurs in the project area. The western North Atlantic stock is centered in Canadian waters, including the Gulf of St. Lawrence and the Atlantic coasts of Nova Scotia, Newfoundland, and Labrador, Canada, and the northeast U.S. continental shelf (Hayes *et al.,* 2021). Gray seals range south into the northeastern United States, with strandings and sightings as far south as North Carolina (Hammill *et al.,* 1998; Waring *et al.,* 2004). Gray seal distribution along the U.S. Atlantic coast has shifted in recent years, with an increased number of seals reported in southern New England (DiGiovanni *et al.,* 2011; Kenney R.D., 2019; Waring *et al.,* 2016). Recent sightings included a gray seal in the lower Chesapeake Bay during the winter of 2014 to 2015 (Rees *et al.,* 2016). Along the coast of the United States, gray seals are known to pup at three or more colonies in Massachusetts and Maine.

Unusual Mortality Events

An unusual mortality even (UME) is defined under section 410(6) of the MMPA as a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response. Currently, there are active UMEs for northeast pinnipeds (harbor and gray seals) and humpback whales along the east coast.

Northeast Pinniped UME

Since June 2022, elevated numbers of sick and dead harbor seal and gray seal have been documented along the southern and central coast of Maine from Biddeford to Boothbay (including Cumberland, Lincoln, Knox, Sagadahoc and York Counties). This event has been declared a UME. Additional information is available at: *https://www.fisheries.noaa.gov/2022-pinniped-unusual-mortality-event-along-maine-coast.*

Atlantic Humpback Whale UME

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida. This event was declared an UME in 2017 however. A portion of the whales have shown evidence of pre-mortem vessel strike; however, this finding is not consistent across all whales examined, and additional research is needed. Additional information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2021-humpback-whale-unusual-mortality-event-along-atlantic-coast.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 4.

TABLE 4—MARINE MAMMAL HEARING GROUPS (NMFS, 2018)

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far. The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include vibratory pile removal, impact and vibratory pile driving, and drilling. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI 1986; NIOSH 1998; ANSI 2005; NMFS 2018). Non-impulsive sounds (*e.g.,* aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007).

Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is

characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. The vibrations produced also cause liquefaction of the substrate surrounding the pile, enabling the pile to be extracted or driven into the ground more easily. Vibratory hammers produce significantly less sound than impact hammers. Peak sound pressure levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards 2002; Carlson *et al.,* 2005). As mentioned previously, drilling is considered a continuous source, similar to vibratory pile driving. The drilling may be used before driving piles in order to facilitate pile driving and hence is referred to as ''pre-drilling''. For the proposed project, the drilling apparatus utilized would vary depending on the different applications during in-water construction activities. Drilling would be used as necessary to remove sand with shell fragments or any obstructions in order to accelerate pile driving.

The likely or possible impacts of the Navy's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, any impacts to marine mammals are expected to be primarily acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile driving, removal and drilling.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving or drilling is the primary means by which marine mammals may be harassed from the Navy's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007). In general, exposure to pile driving or drilling noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving or drilling noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and there animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2004; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). The amount of threshold shift is customarily expressed in decibels (dB). A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how an animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.,* 1958, 1959; Ward 1960; Kryter *et al.,* 1966; Miller 1974; Ahroon *et al.,* 1996; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.,* 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS 2018).

Temporary Threshold Shift (TTS)—TTS is a temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Based on data from cetacean TTS measurements (see Southall *et al.,* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000, 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SEL_{cum}) in an accelerating fashion: At low exposures with lower $SEL_{cum,}$ the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SEL_{cum}, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and

octave-band noise) in laboratory settings (Finneran 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.,* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018). Installing piles for this project requires a combination of drilling, impact pile driving and vibratory pile driving. For this project, these activities would not occur at the same time and there would be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the ensonified area and not remaining for extended periods of time, the potential for TS declines.

Behavioral Harassment—Exposure to noise from pile driving and removal also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007; NRC 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B and C of Southall *et al.* (2007) and Gomez *et al.* (2016) for reviews of studies involving marine mammals behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

As noted above, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; National Research Council (NRC), 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a,b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort

and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005, 2006; Gailey *et al.,* 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996, Bowers *et al.,* 2018). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a 5 day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,*

1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar construction projects.

Acoustic Masking—Sound can disrupt behavior through masking, or interfering with, and animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical rations, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked.

Airborne Acoustic Effects—Although pinnipeds are known to haul-out regularly on man-made objects, such as the nearby Chesapeake Bay Bridge Tunnel, we believe that incidents of take resulting solely from airborne sound are unlikely due to the sheltered proximity between the proposed project area and these haulout sites (over 16 miles (26 km)). There is a possibility that an animal could surface in-water, but with head out, within the area in which airborne sound exceeds relevant thresholds and thereby be exposed to levels of airborne sound that we associate with harassment, but any such occurrence would likely be accounted for in our estimate of incidental take from underwater sound. Therefore, authorization of incidental take resulting from airborne sound for pinnipeds is not warranted, and airborne sound is not discussed further here. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Marine Mammal Habitat Effects

The Navy's construction activities could have localized, temporary impacts on marine mammal habitat by increasing in-water sound pressure levels and slightly decreasing water quality. However, since the focus of the proposed action is pile driving and drilling, no net habitat loss is expected as the new Pier 3 will be immediately north of the existing Pier 3 and, once complete, the current Pier 3 will be demolished. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater sounds. Increased noise levels may affect the acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During pile driving activities, elevated levels of underwater noise would ensonify the project area where both fishes and marine mammals may occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations.

Temporary and localized reduction in water quality will occur because of in-water construction activities as well. Most of this effect will occur during the installation and removal of piles when bottom sediments are disturbed. The installation of piles will disturb bottom sediments and may cause a temporary increase in suspended sediment in the project area. In general, turbidity associated with pile installation is localized to about 25-ft (7.6 meter) radius around the pile (Everitt *et al.,* 1980). Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could avoid localized areas of turbidity. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

In-Water Construction Effects on Potential Foraging Habitat—The proposed activities would not result in permanent impacts to habitats used directly by marine mammals except for the actual footprint of the new Pier 3. The total seafloor area affected by pile installation and removal is a very small area compared to the vast foraging area available to marine mammals in the project area and lower Chesapeake Bay. Pile extraction and installation may have impacts on benthic invertebrate species primarily associated with disturbance of sediments that may cover or displace some invertebrates. The impacts will be temporary and highly localized, and no habitat will be permanently displaced by construction. Therefore, it is expected that impacts on foraging opportunities for marine mammals due to the demolition and reconstruction of Pier 3 would be minimal.

It is possible that avoidance by potential prey (*i.e.,* fish) in the immediate area may occur due to temporary loss of this foraging habitat. The duration of fish avoidance of this area after pile driving stops is unknown, but we anticipate a rapid return to normal recruitment, distribution and behavior. Any behavioral avoidance by fish of the disturbed area would still leave large areas of fish and marine mammal foraging habitat in the nearby vicinity in the project area and lower Chesapeake Bay.

Effects on Potential Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* fish). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick *et al.,* 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear

sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

The most likely impact to fish from pile driving activities at the project areas would be temporary behavioral avoidance of the area. The duration of fish avoidance of an area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

The area impacted by the project is relatively small compared to the available habitat in the remainder of the project area and the lower Chesapeake Bay, and there are no areas of particular importance that would be impacted by this project. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. As described in the preceding, the potential for the Navy's construction to affect the availability of prey to marine mammals or to meaningfully impact the quality of physical or acoustic habitat is considered to be insignificant.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as noise generated from in-water pile driving (vibratory and impact) and drilling has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high- and low-frequency species and phocids because predicted auditory injury zones are larger than for mid-frequency species. However, auditory injury is unlikely to occur for low- and mid- frequency species as proposed shutdown zones encompass the entirely of the auditory injury zones for all proposed activities (see Proposed Mitigation section). The proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater

anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (*e.g.,* vibratory pile-driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

The Navy's construction includes the use of continuous (vibratory pile driving/removal, drilling) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) are applicable.

Level A Harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). As previously noted, the Navy's proposed activity includes the use of non-impulsive (vibratory pile driving/removal, drilling) and impulsive (impact pile driving) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-p-rotection/marine-mammal-acoustic-technical-guidance.*

TABLE 5—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

In order to calculate the distances to the Level A harassment and the Level B harassment sound thresholds for the methods and piles being used in this project, NMFS used acoustic monitoring data from other locations to develop proxy source levels for various pile types (Table 6). Generally we choose source levels from similar pile types and locations (*e.g.,* geology, bathymetry) similar to the project. At this time, NMFS is not aware of reliable source levels available for polymeric piles using vibratory pile installation, therefore source levels for timber pile driving were used as a proxy. Vibratory pile driving of polymeric piles expected to occur under the 2022 IHA has yet to occur and therefore has not been measured. Similarly, the following proxies were used as source levels for piles where no data was available: Source levels from the 48-inch steel pile from Naval Base Kitsap at Bangor, Washington (Caltrans 2020) was used as a proxy for 42 inch steel pipe piles (impact); the 30-inch steel pipe pile was used as a proxy for the 28 inch steel sheet pile (impact and vibratory); source levels for timber piles were used as a proxy for concrete as they are expected to have similar sound levels as they are similarly sized, non-metallic, and will be removed using the same methods.

Very little information is available regarding source levels for in-water drilling activities associated with nearshore pile installation. Measurements made during a pile drilling project in 1–5 m (3–16 ft) depth at Santa Rosa Island, CA, by Dazey *et al.* (2012) appear to provide the best available proxy source levels for proposed activities. Dazey *et al.* (2012) reported average rms source levels ranging from 151 to 157 db re 1 μPa during 62 days that spanned all related drilling activities during a single season.

TABLE 6—PROJECT SOUND SOURCE LEVELS AND PROXY SOURCE LEVELS USED FOR ACOUSTIC MODELING

Pile type	Pile size (inch)	Method	Peak SPL (re 1 μPa (rms))	RMS SPL (re 1 μPa (rms))	SEL (re 1 μPa (rms))	Source
Steel Pipe Pile	42	Impact	213	190	177	Caltrans 2020.
		Vibratory	N/A	168	N/A	Sitka 2017.
Steel Sheet	28	Impact [1]	211	196	181	NAVFAC SW 2020.
		Vibratory [2]	N/A	167	167	Navy 2015.
Concrete Pile	24	Impact	189	176	163	Illingworth and Rodkin 2017.
		Vibratory Removal [3]	185	162	157	Caltrans 2020.
Concrete Pile	18	Impact [3]	185	166	154	Caltrans 2020.
		Vibratory Removal [4]	185	162	157	Caltrans 2020.
Polymeric Pile	13	Impact	177	153		Denes *et al.,* 2016.
		Vibratory [5]	185	162	157	Caltrans 2020.

TABLE 6—PROJECT SOUND SOURCE LEVELS AND PROXY SOURCE LEVELS USED FOR ACOUSTIC MODELING—Continued

Pile type	Pile size (inch)	Method	Peak SPL (re 1 μPa (rms))	RMS SPL (re 1 μPa (rms))	SEL (re 1 μPa (rms))	Source
Timber Pile	14	Vibratory Install/Removal	185	162	157	Caltrans 2020.
N/A[6]	"Multiple pile sizes"[6]	Drilling	N/A	154	N/A	Dazey *et al.,* 2012.

[1] A source level value for impact pile driving of 28-inch steel sheet piles could not be found so a value for a 30-inch steel pipe pile has been used as a proxy (NAVFAC SW, 2020 [p.A–4]).
[2] A source level value for vibratory pile driving of 28-inch steel sheet piles could not be found so a value for a 30-inch steel pipe pile has been used as a proxy (Navy, 2015 [p. 14]).
[3] Data on vibratory extraction of concrete piles is not available, however source levels are expected to be similar to the levels produced by timber piles as they are similar in size, material and removal method.
[4] Proxy data for 18-inch octagonal piles.
[5] Vibratory proxy for polymeric/plastic piles is unavailable; we assume SPL to be consistent with timber.
[6] See Table 2 for pile types/size that may use drilling, as needed.

TABLE 7—SOURCE LEVEL MATRIX FOR CONCURRENT ACTIVITIES

Pile diameter		42-inch steel pipe	28-inch steel pipe	14-inch timber	14-inch polymeric	24-inch concrete	18-inch concrete	14-inch timber	Multiple
	SSL	168	167	162	162	162	162	162	154
42-inch Steel Pipe	168	171	171	169	169	169	169	169	168
28-inch Steel Pipe	167	171	170	168	168	168	168	168	167
14-inch Timber	162	169	168	165	165	165	165	165	163
14-inch Polymeric	162	169	168	165	165	165	165	165	163
24-inch Concrete	162	169	168	165	165	165	165	165	163
18-inch Concrete	162	169	168	165	165	165	165	165	163
14-inch Timber	162	169	168	165	165	165	165	165	163
Multiple	154	168	167	163	163	163	163	163	157

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources, such as pile driving, removal, and drilling, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the optional User Spreadsheet tool are reported in Table 1 and Table 2, and source levels used in the User Spreadsheet are reported in Table 6. The resulting isopleths are reported in Table 7 (impact pile driving), Table 8 (vibratory pile driving/removal, and drilling), and Table 9 (concurrent pile driving scenarios) below.

TABLE 8—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS FOR IMPACT PILE DRIVING

Year	Pile driving site	Source	Level A harassment isopleths (m)				Level B (behavioral) (m)
			LF	MF	HF	Phocids	
Year 2	CEP–176	42-inch Steel Pipe	1,482	53	1,766	793	1,000
		28-inch Steel Sheets	1,783	63	2,123	954	2,512
	CEP–175	13-inch Polymeric Piles	17	1	20	9	3
	CEP–102	24-inch Square Precast Concrete	117	4	139	63	117
		18-inch Square Precast Concrete	7	0	9	4	25
	Pier 3 (bearing piles)	24-inch Square Precast Concrete	254	9	302	136	117
Year 3	Pier 3 (Fender Piles)	24-inch Square Precast Concrete	37	1	44	20	117
		18-inch Steel Pipe	661	24	788	354	25
	CEP–102	42-inch Steel Pipe	1,002	36	1,193	536	1,000
		28-inch Steel Sheet	1,783	63	2,123	954	2,512
Year 4	CEP–102	24-inch Square Precast Concrete	117	4	139	63	117
		18-inch Square Precast Concrete	7	0	9	4	25
		42-inch Steel Pipe	1,002	36	1,193	536	1,000
		28-inch Steel Sheet	1,783	63	2,123	954	2,512
Year 5	CEP–102	24-inch Square Precast Concrete	117	4	139	63	117
		18-inch Square Precast Concrete	7	0	9	4	25

TABLE 9—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS FOR VIBRATORY PILE DRIVING, REMOVAL AND DRILLING

Year	Pile driving site	Source	Level A harassment isopleths (m)[1]				Level B behavioral (m)
			LF	MF	HF	Phocids	
Year 2	CEP–176	42-inch Steel Pipe (Vibratory)	127	11	188	77	15,849
		28-inch Steel Sheet (Vibratory)	100	9	147	61	13,594
	CEP–175	13-inch Polymeric Piles (Vibratory)	15	1	22	9	6,310
	CEP–102	24-inch Square Precast Concrete (Drilling)	1	0	1	0	1,848

TABLE 9—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS FOR VIBRATORY PILE DRIVING, REMOVAL AND DRILLING—Continued

Year	Pile driving site	Source	Level A harassment isopleths (m) [1]				Level B behavioral (m)
			LF	MF	HF	Phocids	
		18-inch Square Precast Concrete (Drilling)	1	0	1	0	1,848
Year 3	Pier 3 (Fender Piles)	24-inch Square Precast Concrete (Drilling)	1	0	1	1	1,848
	CEP–102	42-inch Steel Pipe (Vibratory Install)	80	7	118	49	15,849
		28-inch Steel Sheet Piles (Vibratory)	100	9	147	61	13,594
		18-inch Square Precast Concrete (Vibratory Extraction).	35	3	51	21	6,310
Year 4	CEP–102	24-inch Square Precast Concrete (Drilling)	1	0	1	0	1,848
		14-inch Timber (Vibratory Extraction)	68	6	101	41	6,310
		18-inch Square Precast Concrete (Drilling)	1	0	1	0	1,848
		42-inch Steel Pipe (Vibratory)	80	7	118	49	15,849
		28-inch Steel Sheet (Vibratory)	100	9	147	61	13,594
		18-inch Square Precast Concrete (Vibratory Extraction).	35	3	51	21	6,310
	Existing Pier 3	24-inch Square Precast Concrete (Vibratory Extraction).	42	4	62	25	6,310
		16-inch and 18-inch Square Precast Concrete (Vibratory Extraction).	37	3	55	23	6,310
Year 5	CEP–102	24-inch Square Precast Concrete (Drilling)	1	0	1	0	1,848
		18-inch Square Precast Concrete (Drilling)	1	0	1	0	1,848
	Existing Pier 3	16-inch and 18-inch Square Precast Concrete (Vibratory Extraction).	37	3	55	23	6,310

TABLE 10—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS FOR CONCURRENT PILE DRIVING AND DRILLING SCENARIOS

Year	Pile driving site	Source	Level A harassment isopleths (m)				Level B behavioral (m)
			LF	MF	HF	Phocids	
2	CEP–176 Bulkhead	Install of 42-inch steel pipe and 28-inch steel sheets	549	49	811	334	25,119
2	CEP–176 Bulkhead	Install of two 42-inch steel pipe piles	320	28	472	194	25,119
2	CEP–176 and CEP–102	Install of 42-inch steel pipe and 24-inch Square precast concrete.	166	15	246	101	15,849
2	CEP–176 and CEP–175	Install of 42-inch steel pipe piles and 13-inch polymeric piles.	254	23	376	155	18,478
3	Pier 3	Install of 24-inch Square precast concrete fender piles using two drills.	2	0.1	2	1	2,929
3	CEP–102 Bulkhead	Install of 42-inch steel pipe and 28-inch steel sheets	507	45	750	308	25,119
4	Existing Pier 3 CEP–102 Platform.	Extraction of 14-inch timber piles, install of 42-inch steel pipe and 28-inch steel sheets, and rotary drilling of 24-inch Square precast concrete.	981	87	1,450	596	25,119
5	Existing Pier 3 CEP–102 Platform.	Concurrent extraction of 16- and 18-inch Square precast concrete and rotary drilling of 24-inch Square precast concrete.	77	7	114	47	7,356

The maximum distance to the Level A harassment threshold during construction would be during the impact driving of 28 inch steel sheets at CEP–176 and CEP–102 (1783 m for humpback whale; 63 m for bottlenose dolphin; 2123 m for harbor porpoises; and 954 m for pinnipeds). The largest calculated Level B harassment isopleth extends out to 25,119 m, which would result from concurrent pile driving of the scenarios presented in Table 10. While 25,119 m may not be an attainable observable distance in all directions, the Level B harassment zone will be monitored to the maximum extent possible.

Marine Mammal Occurrence and Take Estimation

In this section we provide information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. We describe how the information provided above is brought together to produce a quantitative take estimate for each species.

Humpback Whales

Humpback whales occur in the mouth of the Chesapeake Bay and nearshore waters of Virginia during winter and spring months. Several satellite tagged humpback whales were detected west of the Chesapeake Bay Bridge Tunnel, including two individuals with locations near NAVSTA Norfolk and Joint Expeditionary Base Little Creek (Aschettino *et al.,* 2017). Group size was not reported in these surveys, however most whales detected were juveniles. Although two individuals were detected in the vicinity of the proposed project activities, there is no evidence that they linger for multiple days. Because no density estimates are available for the species in this area, the Navy estimated one potential sighting of a group of average size (2 individuals) every 60 days of pile driving. Therefore, given the number of project days expected in each year (Table 1), NMFS is proposing to authorize a total of 19 takes by Level B harassment of humpback whale over the five-year authorization, with no more than seven takes by Level B harassment in a given year.

The largest Level A harassment zone for low-frequency cetaceans extends approximately 1783 m from the source during impact pile driving of the 28-inch steel sheet piles (Table 8). The Navy plans to shut down if a humpback whale is sighted within any of the Level A harassment zones for all activities, as indicated in Table 11. Therefore, the Navy did not request, and NMFS is not proposing to authorize, take by Level A harassment of humpback whales.

Bottlenose Dolphin

The expected number of bottlenose dolphins in the project area was estimated using inshore seasonal

densities provided in Engelhaupt *et al.* (2016) from vessel line-transect surveys near NAVSTA Norfolk and adjacent areas near Virginia Beach, Virginia, from August 2012 through August 2015 (Engelhaupt *et al.,* 2016). This density includes sightings inshore of the Chesapeake Bay from NAVSTA Norfolk west to the Thimble Shoals Bridge, and is the most representative density for the project area. To calculate potential Level B harassment takes of bottlenose dolphin, NMFS conservatively multiplied the density of 1.38 dolphin/km^2 (from Englehaupt *et al.,* 2016) by the largest Level B harassment isopleth for each project location (Table 8, 9 and 10), and then by the number of days associated with that activity (Table 1). For example, to calculate Level B harassment takes associated with work at the existing Pier 3 in year 2, NMFS multiplied the density (1.38 dolphins/km^2) by the largest Level B harassment zone for impact pile driving on the 24-inch concrete bearing piles at the new Pier 3 (0.043 km^2) by the proportional number of pile driving days for that activity (70 days) for a total of 4 Level B harassment takes at Pier 3, for that activity in year 1. Takes by Level B harassment were calculated for both individual pile driving activities and concurrent pile driving activities, as authorized takes are conservatively based on the scenario that produces more takes by Level B harassment (Table 11). Therefore, NMFS proposes to authorize 28,480 [1] takes by Level B harassment of bottlenose dolphin across all five years, with no more than 13,190 takes in a given year.

Harbor Porpoise

Harbor porpoises are known to occur in the coastal waters near Virginia Beach (Hayes *et al.,* 2019). Density data for this species within the project vicinity do not exist or were not calculated because sample sizes were too small to produce reliable estimates of density. Harbor porpoise sighting data collected by the U.S. Navy near NAVSTA Norfolk and Virginia Beach from 2012 to 2015 (Engelhaupt *et al.* 2014; 2015; 2016) did not produce enough sightings to calculate densities. One group of two harbor porpoises was seen during spring 2015 (Engelhaupt *et al.* 2016). Elsewhere in their range, harbor porpoises typically occur in groups of two to three individuals (Carretta *et al.* 2001; Smultea *et al.* 2017).

Because there are no density estimates for the species in the proposed project area, the Navy conservatively estimated one harbor porpoise sighting (of two individuals) once every 60 days of pile driving or drilling. Therefore, the assumption of two individuals per 60 days was used for calculation of take numbers. Total pile driving days for Year 2 would be 185 days, Year 3 would be 92 days, Year 4 would be 204 days, and Year 5 would have 32 days. Takes by Level B harassment were calculated for both individual pile driving activities and concurrent pile driving activities, as authorized takes are conservatively based on the scenario that produced the larger exposure estimate (Table 11). Using the above methodology, NMFS calculated an exposure estimate of 19 incidents of take for harbor porpoises.

The largest Level A harassment zone for high-frequency cetaceans is 2,123 m during impact pile driving of the 28-inch steel sheet piles. The Navy has proposed to shut down at 500 m for harbor porpoises during the aforementioned activity, in addition to shorter distances where appropriate for other proposed activities as noted in Table13 as a reasonable area to observe for harbor porpoises and implement shutdown procedures while avoiding an impracticable number of shutdowns. Consequently, the Navy has requested authorization of take by Level A harassment for harbor porpoise during the course of the project. Take by Level A harassment may not actually occur due to the duration of time harbor porpoise would be required to remain within the Level A harassment zone to accumulate enough energy to experience PTS. However, as a precaution NMFS proposes to authorize a total of 4 takes by Level A harassment as requested by the Navy (Table 11) with no more than 2 takes by Level A harassment occurring in a given year, and 15 total takes by Level B harassment with no more than 5 takes by Level B harassment occurring in a given year, equaling the aforementioned total of 19 takes over 5 years.

Harbor Seal

The expected number of harbor seals in the project area was estimated using systematic land- and vessel-based survey data for in-water and hauled out seals collected by the U.S. Navy at the CBBT rock armor and portal islands from 2014 through 2019 (Jones *et al.,* 2020). The average daily seal count from the field season ranged from 8 to 23 seals, with an average of 13.6 harbor seals across all the field seasons.

The Navy expects, and NMFS concurs, that harbor seals are likely to be present from November to April. Consistent with previous nearby projects (87 FR 15945; March 31, 2022, 86 FR 24340; May 6, 2021, 86 FR 17458; April 2, 2021), NMFS calculated take by Level B harassment by multiplying 13.6 seals by the number of pile driving days expected to occur from November through April (seal season): 74 days in Year 2, 23 days in Year 3, 133 days in Year 4. And 32 days in Year 5. Potential takes by Level A harassment were calculated based on the number of production days within seal season on which the Level A harassment isopleth exceeds the shutdown zone of 200 m (42 days in Year 2; 3 days in Year 3; and 0 days in Year 4 and 5), assuming that approximately 10 percent of harbor seal exposures would be at or above the Level A harassment threshold. Potential takes by Level B harassment were calculated by subtracting the Level A harassment takes estimated per year from the total calculated takes. Consistent with previous species, take estimates are based on the scenario (individual or concurrent) that produced the higher take estimate (Table 11). Therefore, the Navy is requesting and NMFS is proposing to authorize a total of 4,182 takes by Level B harassment and 61 takes by Level A harassment (Table 12).

Gray Seal

Very little information is available about the occurrence of gray seals in the Chesapeake Bay and coastal waters. Although the population of the United States may be increasing, there are only a few records available at the known haulout sites in Virginia used by gray seals, strandings are rare, and they have not been reported in shipboard surveys. Assuming that they may utilize the Chesapeake Bay waters, the Navy conservatively estimates one gray seal may be exposed to elevated noise levels for every 60 days of vibratory pile driving during the six month period when they are most likely to be present. Similar to harbor seals, the maximum number of pile driving days where gray seals may be exposed during seal season per year were used for calculations. The scenario (concurrent or individual activities) that produced the larger exposure estimate is proposed for authorization (Table 11). Therefore, the Navy has requested and NMFS is proposing to authorize 5 takes by Level B harassment. Given the low likelihood of encountering gray seals during the project and low number of days in

[1] **Note:** This total number of takes by Level B harassment proposed for authorization differs from that in the Navy's request for Rulemaking. The number presented here conservatively uses exposure estimates for concurrent pile driving scenarios in Year 5, which were higher than those produced for individual pile driving activities.

which Level A harassment isopleths may exceed proposed shutdown zones, no take by Level A harassment is proposed for authorization.

TABLE 11—CALCULATED TAKES BY LEVEL A AND LEVEL B HARASSMENT FOR CONCURRENT AND INDIVIDUAL PILE DRIVING, REMOVAL AND DRILLING SCENARIOS [1]

Year	Species	Individual activities		Concurrent activities	
		Level A	Level B	Level A	Level B
2	Humpback whale	*0*	*6*	0	2
	BND—Northern Migratory	0	2691	*0*	*5609*
	BND—Southern Migratory.				
	BND—NC Estuarine.				
	Harbor porpoise	*2*	*4*	0	1
	Harbor seal	*57*	*949*	25	832
	Gray seal	*0*	*1*	0	1
3	Humpback whale	*0*	*3*	0	1
	BND—Northern Migratory	*0*	*3061*	0	1440
	BND—Southern Migratory.				
	BND—NC Estuarine.				
	Harbor porpoise	*0*	*3*	0	1
	Harbor seal	4	309	*7*	*537*
	Gray seal	0	0	*0*	*1*
4	Humpback whale	*0*	*7*	0	1
	BND—Northern Migratory	*0*	*13190*	0	3023
	BND—Southern Migratory.				
	BND—NC Estuarine.				
	Harbor porpoise	*2*	*5*	0	1
	Harbor seal	0	*1809*	*26*	232
	Gray seal	*0*	*2*	0	0
5	Humpback whale	0	2	*0*	*3*
	BND—Northern Migratory	0	383	*0*	*6620*
	BND—Southern Migratory.				
	BND—NC Estuarine.				
	Harbor porpoise	0	1	*0*	*3*
	Harbor seal	0	435	*0*	*1115*
	Gray seal	*0*	*2*	0	1

[1] Potential takes by Level A and Level B harassment are conservatively based on the scenario (individual vs. concurrent pile driving, removal, or drilling) that produced the highest exposure estimate. Therefore, the number of takes by Level A and Level B harassment proposed for authorization is *italicized* and used to determine percent of stock.

TABLE 12—PROPOSED AUTHORIZED TAKES BY LEVEL A AND LEVEL B HARASSMENT BY SPECIES AND STOCK IN COMPARISON TO STOCK ABUNDANCE

Year	Species	Abundance	Proposed take		Total	Percent of stock
			Level A	Level B		
2	Humpback whale [a]	1396	0	6	6	0.43
	BND—Northern Migratory [b c]	6639	0	5609	2705	40.74
	BND—Southern Migratory [b c]	3751			2705	72.10
	BND—NC Estuarine [b c]	823			200	24.30
	Harbor porpoise	95543	2	4	6	0.01
	Harbor seal	61336	57	949	1006	1.64
	Gray seal	27300	0	1	1	0.00
3	Humpback whale [a]	1396	0	3	3	0.21
	BND—Northern Migratory [b c]	6639	0	3061	1431	21.55
	BND—Southern Migratory [b c]	3751			1431	38.15
	BND—NC Estuarine [b c]	823			200	24.30
	Harbor porpoise	95543	0	3	3	0.00
	Harbor seal	61336	7	537	544	0.89
	Gray seal	27300	0	1	1	0.00
4	Humpback whale [a]	1396	0	7	7	0.50
	BND—Northern Migratory [b c]	6639	0	13190	6495	97.83
	BND—Southern Migratory [b c]	3751			6495	173.15
	BND—NC Estuarine [b c]	823			200	24.30
	Harbor porpoise	95543	2	5	7	0.01
	Harbor seal	61336	26	1783	1809	2.95
	Gray seal	27300	0	2	2	0.01
5	Humpback whale [a]	1396	0	3	3	0.21
	BND—Northern Migratory [b c]	6639	0	6620	3210	48.35
	BND—Southern Migratory [b c]	3751			3210	85.58
	BND—NC Estuarine [b c]	823			200	24.30
	Harbor porpoise	95543	0	3	3	0.00

TABLE 12—PROPOSED AUTHORIZED TAKES BY LEVEL A AND LEVEL B HARASSMENT BY SPECIES AND STOCK IN COMPARISON TO STOCK ABUNDANCE—Continued

Year	Species	Abundance	Proposed take		Total	Percent of stock
			Level A	Level B		
	Harbor seal	61336	0	1115	1115	1.82
	Gray seal	27300	0	2	2	0.01

[a] West Indies DPS. Please see the Description of Marine Mammals in the Area of Specified Activities section for further discussion.
[b] Take estimates are weighted based on calculated percentages of population for each distinct stock, assuming animals present would follow the same probability of presence in the project area. Please see Small Numbers section for additional information.
[c] Assumes multiple repeated takes of the same individuals from a small portion of each stock as well as repeated takes of Chesapeake Bay resident population (size unknown). Please see Small Numbers section for additional information.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, and impact on operations.

In addition to the measures described later in this section, the Navy will employ the following mitigation measures:

- The Navy will conduct briefings between construction supervisors and crews, the marine mammal monitoring team, and Navy staff prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- If a marine mammal comes within 10 meters of construction activities, including in-water heavy machinery work not being analyzed in this proposed rule, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;
- Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or is within the harassment zone.

The following mitigation measures apply to the Navy's in-water construction activities.

Establishment of Shutdown Zones—The Navy will establish shutdown zones for all pile driving and removal and drilling activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 13).

Protected Species Observers (PSOs)—The placement of PSOs during all pile driving and removal and drilling activities (described in the Proposed Monitoring and Reporting section) will ensure that the entire shutdown zone is visible. Should environmental conditions deteriorate such that the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving and removal and drilling must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

Monitoring for Level A and B Harassment—The Navy will monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact pile driving, and the 120 dB rms threshold during drilling and vibratory pile driving and removal) and Level A harassment zones to the extent practicable, and all of the shutdown zones, during all pile driving, removal or drilling days. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

Pre-Activity Monitoring—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zones listed in Table 13, pile driving and drilling activity must be delayed or halted. If pile driving and/or drilling is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zones or 15 minutes have passed without re-detection of the animal. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence. A determination that the shutdown zone is clear must be made during a period of

good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

Soft Start—Soft-start procedures are used to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

TABLE 13—PROPOSED SHUTDOWN ZONES [1]

LOA year	Pile type, size, and driving method	Shutdown distance (m) for humpback whales	Shutdown distance (m) for harbor porpoise	Shutdown distance (m) for all other species	Level B (behavioral) harassment distance (m) all marine mammals
Year 2	Impact Install 42-inch steel pipe piles	1,490	500	200	1,000
	Vibratory Install 42-inch steel pipe piles	140	200	70	2,500
	Impact Install 28-inch steel sheet piles	1,790	500	200	2,500
	Vibratory Install 28-inch steel sheet piles	110	150	80	2,500
	Impact Install 13-inch polymeric piles	20	30	30	30
	Vibratory Install 13-inch polymeric piles	20	30	30	2,500
	Impact Install 24-inch precast concrete bearing piles	260	500	200	117
	Impact Install 18-inch precast concrete fender piles	10	10	10	30
	Pre-drilling	10	10	10	2,500
Year 3	Impact Install 24-inch precast concrete fender piles	40	50	30	120
	Impact Install 18-inch steel piles	700	500	200	30
	Impact Install 42-inch steel pipe piles	1,010	500	200	1,000
	Vibratory Install 42-inch steel pipe piles	90	120	50	2,500
	Impact Install 28-inch steel sheet piles	1,790	500	200	2,500
	Vibratory Install 28-inch steel sheet piles	110	150	70	2,500
	Vibratory Extract 18-inch precast concrete fender piles	40	60	30	2,500
	Pre-drilling	10	10	10	2,500
Year 4	Impact Install 24-inch precast concrete bearing piles	120	150	70	120
	Vibratory Extract 14-inch timber piles	70	110	50	2,500
	Impact Install 18-inch precast concrete fender piles	10	10	10	30
	Impact Install 42-inch steel pipe piles	1,010	500	200	1,000
	Vibratory Install 42-inch steel pipe piles	90	120	50	2,500
	Vibratory Extract 24-inch concrete fender piles	50	70	30	2,500
	Impact Install 28-inch steel sheet piles	1,790	500	200	2,500
	Vibratory Install 28-inch steel sheet piles	120	150	70	2,500
	Vibratory Extract 18-inch precast concrete fender piles	40	60	30	2,500
	Vibratory Extract 16- to 18-inch precast concrete bearing piles.	40	60	30	2,500
	Pre-drilling	10	10	10	2,500
Year 5	Vibratory Extract 16- to 18-inch precast concrete bearing piles.	40	60	30	2,500
	Impact Install 24-inch precast concrete bearing piles	120	150	70	120
	Impact Install 18-inch precast concrete fender piles	10	10	10	30
	Pre-drilling	10	10	10	2,500

[1] Calculated Level A harassment isopleths for concurrent pile driving were smaller than those calculated for individual impact pile driving, vibratory pile driving and removal, and drilling. Therefore, proposed shutdown zones conservatively reflect individual activity.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);

- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral

context of exposure (*e.g.,* age, calving or feeding areas);

- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

The Navy will submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of the start of construction.

Visual Monitoring

- Marine mammal monitoring during pile driving and removal must be conducted by qualified, NMFS approved PSOs, in accordance with the following: PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- PSOs must be approved by NMFS prior to beginning any activity subject to this proposed rulemaking; and
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

The Navy must establish the following monitoring locations and visual monitoring of the entire shutdown zones must occur for all pile driving and drilling activities. For all pile driving activities, a minimum of one PSO must be assigned to the active pile driving or drilling location to monitor the shutdown zones and as much of the Level A and Level B harassment zones as possible. If the active project location includes demolition activities, then the next adjacent pier may be used as an appropriate monitoring location ensuring that the aforementioned criteria is met. Monitoring must be conducted by a minimum of three PSOs for any activity with an associated harassment isopleth over 1000 m. All other activities would require a minimum of two PSOs. For activities in Table 8, 9 and 10, with Level B harassment zones larger than 3000 m, at least one PSO must be stationed on either Pier 14 or the North Jetty to monitor the part of the zone exceeding the edge of the Norfolk Naval Station (see Figure 3). The third PSO for activities whose harassment isopleths exceed 1000 m would be located on Pier 1. PSOs will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures (See Figure 3 for representative monitoring locations). If changes are necessary to ensure full coverage of the proposed shutdown zones, the Navy shall contact NMFS to alter observer locations (*e.g.,* vessel blocking view from pier locations). Additionally, the shutdown/monitoring zones may be modified with NMFS' approval following NMFS' acceptance of an acoustic monitoring report.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from drilling or piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

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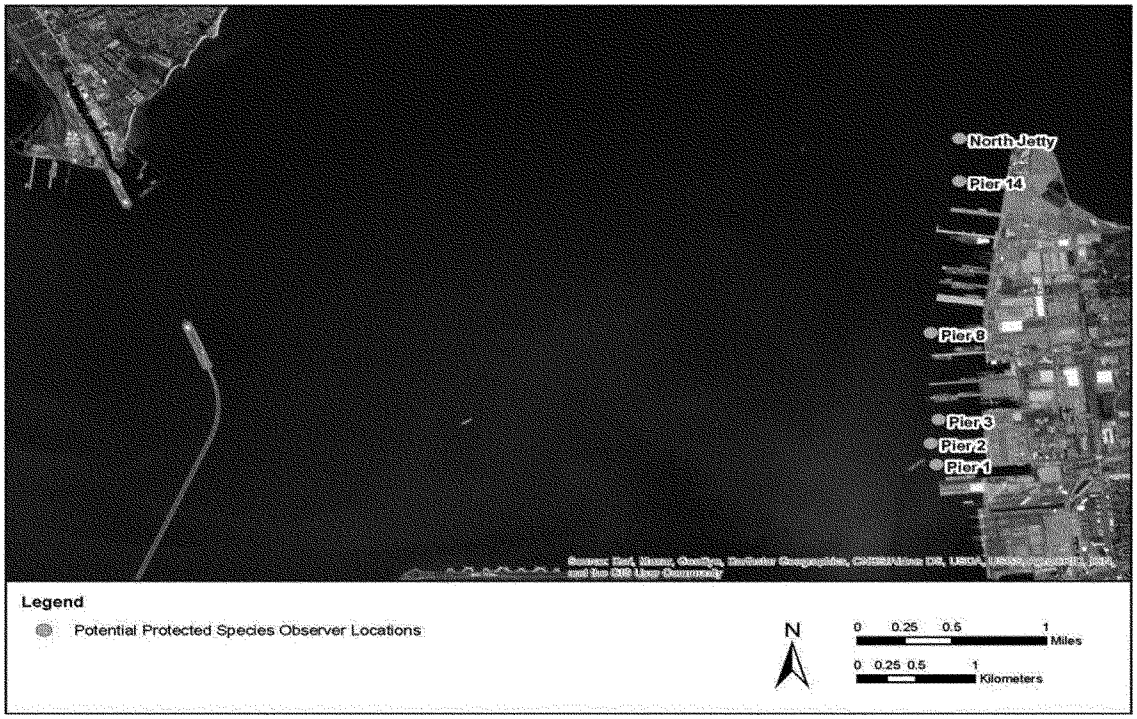


Figure 3. Proposed Protected Species Observer Locations at Naval Station Norfolk at Norfolk, Virginia

Acoustic Monitoring

The Navy plans to implement *in situ* acoustic monitoring efforts to measure SPLs from in-water construction activities for pile types and methods that have not been previously collected at NAVSTA Norfolk (Table 14). The Navy will collect and evaluate acoustic sound recording levels during pile driving activities. Hydrophones would be placed at locations 33 ft from the noise source and, where the potential for Level A (PTS onset) harassment exists, at a second representative monitoring location that is a distance of 20 times the depth of water at the pile location. For the pile driving events acoustically measured, 100 percent of the data will be analyzed. Please see the Navy's Marine Mammal Monitoring Plan and application for additional detail.

Table 14—Hydroacoustic Monitoring Summary

Pile Type[1]	*Count*[2]	*Method of Install/Removal*[2]	*Number Monitored*[2]
18-inch/24-inch concrete	614	Pre-Drilling	5
13-inch Polymeric	9	Vibratory	5
13-inch Polymeric	9	Impact	5
14-inch timber	624	Vibratory Extract	10
16-inch or 18-inch concrete	903	Vibratory Extract	10
18-inch steel pipe	18	Impact	5
18-inch concrete	93	Impact	10
18-inch concrete	62	Vibratory Extract	10
24-inch concrete	1,063	Impact	10
24-inch concrete	72	Vibratory Extract	10
42-inch steel pipe	179	Vibratory	10
42-inch steel pipe	179	Impact	10
28-inch steel sheet	376	Vibratory	10
28-inch steel sheet	376	Impact	10

[1] Data has previously been collected on the impact driving of 24-inch concrete piles and timber piles at NAVSTA Norfolk; therefore, no additional data collection is proposed for these pile types.

[2] Some piles may be either vibratory or pile driving, or a combination of both. Pre-drilling may not be utilized if site conditions do not require it. The hydroacoustic report at the end of construction will clarify which

installation method was utilized and monitored for each pile type.

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Environmental data shall be collected, including but not limited to, the following: Wind speed and direction, air temperature, humidity, surface water temperature, water depth, wave height, weather conditions, other factors that could contribute to influencing underwater sound levels (*e.g.,* aircrafts, boats, etc.).

Reporting

The Navy is required to submit an annual report on all activities and marine mammal monitoring results to NMFS within 90 days following the end of each construction year. Additionally, a draft comprehensive 5-year summary report must be submitted to NMFS within 90 days of the end of the project. The annual reports will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring
- Construction activities occurring during each daily observation period, including: (a) how many and what type of piles were driven or removed and the method (*i.e.,* impact or vibratory); and (b) the total duration of time for each pile (vibratory driving) or hole (drilling) and number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring; and
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance.

Upon observation of a marine mammal the following information must be reported:

- Name of PSO who sighted the animal(s) and PSO location and activity at the time of sighting;
- Time of sighting;
- Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species;
- Distance and location of each observed marine mammal relative to the pile being driven or hole being drilled for each sighting;
- Estimated number of animals (min/max/best estimate);
- Estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.);
- Description of any marine mammal behavioral observations (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species; and
- Detailed information about implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specified actions that ensured, and resulting changes in behavior of the animal(s), if any.

The acoustic monitoring report must contain the informational elements described in the Marine Mammal Monitoring Plan and, at minimum, must include:

- Hydrophone equipment and methods: Recording device, sampling rate, distance (m) from the pile where recordings were made; depth of water and recording device(s);
- Type and size of pile being driven, substrate type, method of driving during recordings (*e.g.,* hammer model and energy), and total pile driving duration;
- Whether a sound attenuation device is used and, if so, a detailed description of the device used and the duration of its use per pile;
- For impact pile driving and/or drilling (per pile): Number of strikes and strike rate; depth of substrate to penetrate; pulse duration and mean, median, and maximum sound levels (dB re: 1 µPa): Root mean square sound pressure level (SPL_{rms}); cumulative sound exposure level (SEL_{cum}), peak sound pressure level (SPL_{peak}), and single-strike sound exposure level (SEL_{s-s}); and
- For vibratory driving/removal and/or drilling (per pile): Duration of driving per pile; mean, median, and maximum sound levels (dB re: 1 µPa): Root mean square sound pressure level (SPL_{rms}), cumulative sound exposure level (SEL_{cum}) (and timeframe over which the sound is averaged).

If no comments are received from NMFS within 30 days, the draft reports will constitute the final reports. If comments are received, a final report addressing NMFS' comments must be submitted within 30 days after receipt of comments. All PSO datasheets and/or raw sighting data must be submitted with the draft marine mammal report.

Reporting of Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to NMFS Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS (301–427–8401) and to the Greater Atlantic Region New England/Mid-Atlantic Stranding Coordinator (866–755–6622) as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this proposed rule. The Navy shall not resume their activities until notified by NMFS that they can continue.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing

regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analysis applies to all the species listed in Table 3, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Construction activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level A and Level B harassment from underwater sounds generated by pile driving activities, pile removal, and drilling. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level A and Level B harassment, identified above, while activities are underway.

The Level A harassment zones identified in Tables 6 and 7 are based upon an animal exposed to pile driving or drilling multiple piles per day. Considering the short duration to impact drive each pile and breaks between pile installations (to reset equipment and move pile into place), an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement throughout the area, especially for small, fast moving species such as small cetaceans and pinnipeds. Additionally, no Level A harassment is anticipated for humpback whales due to the required mitigation measures, which we expect the Navy will be able to effectively implement given the majority of the Level A harassment zones are small (under 300 m except for a few activities where additional PSOs will be utilized to cover the entirety of the Level A harassment zone), and high visibility of humpback whales. If an animal was exposed to sufficient accumulated sound energy to incur PTS, the resulting PTS would likely be small (*e.g.,* PTS onset) at lower frequencies where pile driving energy is concentrated, and unlikely to result in impacts to individual fitness, reproduction, or survival.

The nature of activities included in the Navy's pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take will occur within a limited, confined area (immediately surrounding NAVSTA Norfolk in the Chesapeake Bay area) of the stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Furthermore, the amount of take authorized is extremely small when compared to stock abundance for all species aside from bottlenose dolphins, however take authorized for bottlenose dolphins is still expected to be small relative to the stock abundance as described in the Small Numbers section.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff 2006). Individual animals, even if taken multiple times, will most likely move away from the sound source and be temporarily displaced from the areas of pile driving or drilling, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving and drilling activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted along both Atlantic and Pacific coasts, which have taken place with no known long-term adverse consequences from behavioral harassment. Furthermore, many projects similar to this one are also believed to result in multiple takes of individual animals without any documented long-term adverse effects. Level B harassment will be minimized through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is located on a busy waterfront with high amounts of vessel traffic.

UMEs have been declared for Northeast pinnipeds (including harbor seal and gray seal) and Atlantic humpback whale. However, we do not expect authorized takes to exacerbate or compound upon these ongoing UMEs. As noted previously, no injury, serious injury, or mortality is expected or authorized, and Level B harassment takes of humpback whale, harbor seal and gray seal will be reduced to the level of least practicable adverse impact through the incorporation of the mitigation measures. For the WNA stock of gray seal, the estimated stock abundance is 27,300 (424,300 including estimates in Canadian waters). Given that only 1–2 takes by Level B harassment are authorized for this stock annually, we do not expect this authorization to exacerbate or compound upon the ongoing UME.

For the WNA stock of harbor seals, the estimated abundance is 61,336 individuals. The estimated M/SI (339) is well below the PBR (1,729). As such, the Level B harassment takes of harbor seal are not expected to exacerbate or compound upon the ongoing UMEs.

With regard to humpback whales, the UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy.

Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.,* 2015), NMFS established 14 DPSs with different listing statuses (*81 FR 62259;* September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.,* 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (*i.e.,* 12,312 (95 percent CI 8,688–15,954) whales in 2004–2005 (Bettridge *et al.,* 2003)), and appears to be experiencing consistent growth. NMFS is proposing to authorize no more than eight takes by Level B harassment annually of humpback whale.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities will not modify existing marine mammal habitat for a significant amount of time. The

activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected (with no known particular importance to marine mammals), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- Authorized Level A harassment would be very small amounts and of low degree;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks;
- The number of anticipated takes is very low for humpback whale, harbor porpoise, and gray seal;
- The specified activity and associated ensonified areas are very small relative to the overall habitat ranges of all species and do not include habitat areas of special significance;
- The lack of anticipated significant or long-term negative effects to marine habitat;
- The presumed efficacy of the mitigation measures in reducing the effects of the specified activity;
- Monitoring reports from similar work in the Chesapeake Bay have documented little to no effect on individuals of the same species impacted by similar activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The maximum annual take of take NMFS proposes to authorize for the five marine mammal stocks is below one-third of the estimated stock abundance for all species except for the WNA southern coastal migratory stock and the WNA northern coastal migratory stock of bottlenose dolphins (see Table 12).

There are three bottlenose dolphin stocks that could occur in the project area. Therefore, largest estimated annual take by Level B harassment of 13,190 bottlenose dolphin would likely be split among the western WNA northern coastal migratory stock, the WNA southern coastal migratory stock, and the northern North Carolina Estuarine stock (NNCES). Based on the stocks' respective occurrence in the area, NMFS estimates that there would be no more than 200 takes from the NNCES stock, representing 24 percent of that population, with the remaining takes split evenly between the northern and southern coastal migratory stocks. Based on the consideration of various factors as described below, we have preliminarily determined that the number of individuals taken will comprise of less than one-third of the best available population abundance estimate of either coastal migratory stock. Detailed descriptions of the stocks' ranges have been provided in the Description of Marine Mammals in the Area of Specified Activities section.

Both the northern migratory coastal and southern migratory coastal stocks have expensive ranges and they are the only dolphin stocks thought to make broad scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these two stocks, it is unlikely that large segments of either stock would approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The northern migratory coastal stock is found during warm water months from coastal Virginia, including the Chesapeake Bay and Long Island, New York. The stock migrates south in late summer and fall. During cold water months, dolphins may be found in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia border. During January–March, the southern Migratory coastal stock appears to move as far south as northern Florida. From April–June, the stock moves back north to North Carolina. During the warm water months of July–August, the stock is presumed to occupy the coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Chesapeake Bay and waters offshore of the mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be located in the vicinity of the Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~2 months) animals might remain at these boundaries, it is reasonable to assume that takes are likely to occur only within some small portion of either of the migratory coastal stocks.

Many of the dolphin observations in the Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (Mann, Personal Communication). Similarly, using available photo-identification data, Engelhaupt *et al.* (2016) determined that specified individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-sighted individuals (100 of 110) in the study area were recorded less than 30 kilometers from the initial sighting location. Multiple sightings of the same individual would considerably reduce the number of individual animals that are taken by harassment. Furthermore, the existence of a resident dolphin

population in the Bay would increase the percentage of dolphin takes that are actually re-sightings of the same individuals.

In summary and as described above, the following factors primarily support our determination regarding the incidental take of small numbers of the affected stocks of a species or stock:

- The take of marine mammal stocks proposed for authorization comprises less than 3 percent of any stock abundance (with the exception of the three bottlenose dolphin stocks);
- Potential bottlenose dolphin takes in the project area are likely to be allocated among three distinct stocks;
- Bottlenose dolphin stocks in the project area have extensive ranges and it would be unlikely to find a high percentage of the individuals of any one stock concentrated in a relatively small area such as the project area or the Chesapeake Bay;
- The Chesapeake Bay represents the migratory boundary for each of the specified dolphin stocks and it would be unlikely to find a high percentage of any stock concentrated at such boundaries; and
- Many of the takes would likely be repeats of the same animals and likely from a resident population of the Chesapeake Bay.

Based on the analysis contained herein of the activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stock.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy construction activities would contain an adaptive management component. The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Request for Information

NMFS requests that interested persons submit comments, information, and suggestions concerning the Navy's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare a final rule and make final determinations on whether to issue the requested authorization. This proposed rule and supporting documents provide all environmental information relating to our proposed action for public review.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have significant economic impact on a substantial number of small entities. The U.S. Navy is the sole entity that would be subject to the requirements in these proposed regulations, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis in not required and none has been prepared.

This proposed rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency.

List of Subjects in 50 CFR Part 217

Acoustics, Administrative practice and procedure, Construction, Endangered and threatened species, Marine mammals, Mitigation and Monitoring requirements, Reporting requirements, Wildlife.

Dated: March 2, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, NOAA proposes to amend 50 CFR part 217 as follows:

PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Revise subpart L to read as follows:

Subpart L—Taking and Importing Marine Mammals Incidental to Navy Construction of the Pier 3 Replacement Project at Naval Station Norfolk at Norfolk, Virginia

Sec.

217.110 Specified activity and geographical region.
217.111 Effective dates.
217.112 Permissible methods of taking.
217.113 Prohibitions.
217.114 Mitigation requirements.
217.115 Requirements for monitoring and reporting.
217.116 Letters of Authorization.
217.117 Renewals and modifications of Letters of Authorization.
217.118 [Reserved]
217.119 [Reserved]

§ 217.110 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities related to the replacement of Pier 3 at Naval Station Norfolk at Norfolk, Virginia.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if it occurs at Naval Station Norfolk, Norfolk, Virginia.

§ 217.111 Effective dates.

Regulations in this subpart are effective for a period of five years from the date of issuance.

§ 217.112 Permissible methods of taking.

Under an LOA issued pursuant to §§ 216.106 of this chapter and 217.116, the Holder of the LOA (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.110(b) by harassment associated with construction activities related to replacement of Pier 3, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

§ 217.113 Prohibitions.

(a) Except for the takings contemplated in § 217.112 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.116, it is unlawful for any person to do any of the following in connection with the activities described in § 217.110:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 217.116;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA after NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA after NMFS determined such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved].

§ 217.114 Mitigation requirements.

(a) When conducting the activities identified in § 217.110(a), the mitigation measures contained in this subpart and any LOA issued under §§ 216.106 of this chapter and 217.116 must be implemented by the Navy. These mitigation measures include:

(1) A copy of any issued LOA must be in the possession of the Navy, supervisory construction personnel, lead protected species observers (PSOs), and any other relevant designees of the Navy operating under the authority of the LOA at all times that activities subject to the LOA are being conducted;

(2) The Navy must ensure that construction supervisors and crews, the monitoring team, and relevant Navy staff are trained prior to the start of activities subject to any issued LOA, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work;

(3) The Navy, construction supervisors and crews, and relevant Navy staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction;

(4) The Navy must employ PSOs and establish monitoring locations as described in the NMFS-approved Marine Mammal Monitoring Plan. The Navy must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions;

(5) For all pile driving and drilling activity, the Navy shall implement shutdown zones with radial distances as identified in a LOA issued under § 217.116. If a marine mammal is observed entering or within the shutdown zone, such operations must be delayed or halted.

(6) Monitoring must take place from 30 minutes prior to initiation of pile driving or drilling activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving or drilling activity.

(7) Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones are clear of marine mammals. Pile driving and drilling may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals

(8) If pile driving and/or drilling is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.

(9) Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone.

(10) The Navy must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

(b) [Reserved]

§ 217.115 Requirements for monitoring and reporting.

(a) The Navy shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction. Marine mammal monitoring must be conducted in accordance with the conditions in this section and the NMFS-approved Marine Mammal Monitoring Plan.

(b) Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following conditions:

(1) PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;

(2) At least one PSO must have prior experience performing the duties of an observer during construction activity pursuant to a NMFS-issued incidental take authorization;

(3) Other observers may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of an observer during construction activity pursuant to a NMFS-issued incidental take authorization;

(4) One observer must be designated as lead observer or monitoring coordinator. The lead observer must have prior experience performing the

duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;

(5) Observers must be approved by NMFS prior to beginning any activity subject to any issued LOA;

(6) For all pile driving activities, a minimum of two observers shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures;

(7) For all pile driving activities, a minimum of two observers shall be stationed at the active pile driving site, docks, or piers to monitor the harassment and shutdown zones, and as described in the Marine Mammal Monitoring Plan. For shutdown zones exceeding 1000 meters, a minimum of three observers shall be stationed appropriately, as described in the Marine Mammal Monitoring Plan, to monitor the entire shutdown zone.

(8) The Navy shall monitor the harassment zones to the extent practicable and the entire shutdown zones. The Navy shall monitor at least a portion of the Level B harassment zone on all pile driving days.

(9) The Navy shall conduct hydroacoustic data collection in accordance with a Marine Mammal Monitoring Plan that must be approved by NMFS in advance of construction.

(10) The shutdown/monitoring zones may be modified with NMFS' approval following NMFS' acceptance of an acoustic monitoring report.

(11) The Navy must submit a draft monitoring report to NMFS within 90 calendar days of the completion of each construction year. A draft comprehensive 5-year summary report must also be submitted to NMFS within 90 days of the end of the project. The reports must detail the monitoring protocol and summarize the data recorded during monitoring. Final annual reports and the final comprehensive report must be prepared and submitted within 30 days following resolution of any NMFS comments on the draft report. If no comments are received from NMFS within 30 days of receipt of the draft report, the report must be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. The reports must at minimum contain the informational elements described below (as well as any additional information described in the Marine Mammal Monitoring Plan), including:

(i) Dates and times (begin and end) of all marine mammal monitoring;

(ii) Construction activities occurring during each daily observation period, including the number and type of piles that were driven or removed and by what method (*i.e.,* impact, vibratory or drilling), total duration of driving time for each pile (vibratory and drilling) and number of strikes for each pile (impact);

(iii) PSO locations during marine mammal monitoring;

(iv) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

(v) Upon observation of a marine mammal, the follow information:

(A) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting;

(B) Time of sighting;

(C) Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species;

(D) Distance and location of each observed marine mammal relative to the pile being driven for each sighting;

(E) Estimated number of animals (min/max/best estimate);

(F) Estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.);

(G) Animal's closest point of approach and estimated time spent within the harassment zone;

(vi) Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted form the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

(vii) Number of marine mammals detected within the harassment zones, by species; and

(viii) Detailed information about implementation of any mitigation (*e.g.,* shutdown and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

(12) The Holder must submit all PSO datasheets and/or raw sighting data within the draft report.

(13) All draft and final monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.corcoran@noaa.gov.*

(14) The Navy must report hydroacoustic data collected as required by a LOA issued under §§ 216.106 of this chapter and 217.116 and as discussed in the Navy's Marine Mammal Monitoring Plan approved by NMFS.

(15) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. The Navy must not resume their activities until notified by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

§ 217.116 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Navy must apply for and obtain a modification of the LOA as described in § 217.116.

(e) The LOA must set forth the following information:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.117 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.116 for the activity identified in § 217.110(a) may be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) A LOA issued under §§ 216.106 of this chapter and 217.116 for the activity identified in § 217.110(a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from Navy's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS must publish a notice of proposed LOA in the **Federal Register** and solicit public comment;

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to §§ 216.106 of this chapter and 217.116, a LOA may be modified without prior notice or opportunity for public comment. Notification would be published in the **Federal Register** within 30 days of the action.

§§ 217.118–217.119 [Reserved]

[FR Doc. 2023–04613 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230303–0063]

RTID 0648–XC715

Fisheries of the Northeastern United States; Atlantic Spiny Dogfish Fishery; 2023 Specifications

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes specifications for the 2023 Atlantic spiny dogfish fishery, as recommended by the Mid-Atlantic and New England Fishery Management Councils. This action is necessary to establish allowable harvest levels for the spiny dogfish fishery to prevent overfishing while enabling optimum yield, using the best scientific information available. This rule also informs the public of the proposed fishery specifications and provides an opportunity for comment.

DATES: Comments must be received by March 24, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0014, by the following method:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *https://www.regulations.gov,* and enter ''NOAA–NMFS–2023–0014'' in the Search box;

2. Click the ''Comment'' icon, complete the required fields; and

3. Enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are 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. NMFS will accept anonymous comments (enter''N/A'' in the required fields if you wish to remain anonymous). If you are unable to submit your comment through *www.regulations.gov,* contact Cynthia Ferrio, Fishery Policy Analyst, *Cynthia.Ferrio@noaa.gov.*

A draft environmental assessment (EA) has been prepared for this action that describes the proposed measures and other considered alternatives, as well as provides an analysis of the impacts of the proposed measures and alternatives. Copies of the specifications document, including the EA, are available on request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. These documents are also accessible via the internet at *https://www.mafmc.org/action-archive.*

FOR FURTHER INFORMATION CONTACT: Cynthia Ferrio, Fishery Policy Analyst, (978) 281–9180.

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic and New England Fishery Management Councils jointly manage the Atlantic Spiny Dogfish Fishery Management Plan (FMP), with the Mid-Atlantic Council acting as the administrative lead. Additionally, the Atlantic States Marine Fisheries Commission manages the spiny dogfish fishery in state waters from Maine to North Carolina through an interstate fishery management plan. The Federal FMP requires the specification of an acceptable biological catch (ABC), annual catch limit (ACL), annual catch target (ACT), total allowable landings (TAL), and a coastwide commercial quota. These limits and other related management measures may be set for up to five fishing years at a time, with each

fishing year running from May 1 through April 30. This action proposes Atlantic spiny dogfish specifications for fishing year 2023, as recommended by the Councils and Commission.

In September 2022, the Mid-Atlantic Council's Scientific and Statistical Committee (SSC) reviewed a spiny dogfish 2022 data update with the best available catch and biomass estimates, including the Northeast Fisheries Science Center's spring trawl surveys. In response to declining trends in stock biomass and productivity shown in the data, the SSC recommended a 7,788 mt ABC for fishing year 2023, which is a 55-percent decrease from fishing year 2022. Both the Mid-Atlantic and New England Councils accepted the SSC's recommended ABC at their subsequent meetings in October and December 2022, respectively. The Councils also considered the inclusion of a management uncertainty buffer to account for potentially underestimated commercial discards. Buffers of 0, 5, 13, and 18 percent were considered; however, both Councils ultimately recommended adopting the SSC's recommended ABC of 7,788 mt, with no additional management uncertainty buffer, resulting in a coast-wide commercial quota of 5,449 mt; a 59-percent decrease from 2022. Neither Council recommended any changes to other management measures, such as trip limits.

Proposed Specifications

This action proposes the Councils' recommendations for 2023 Atlantic spiny dogfish catch specifications, which are consistent with the Mid-Atlantic SSC's recommended ABC and the best available science. These proposed specifications would decrease all catch limits by at least 55 percent in fishing year 2023, based on recent declining trends in stock biomass and productivity. A comparison of the current 2022 and proposed 2023 specifications is summarized below in Table 1.

TABLE 1—COMPARISON OF CURRENT 2022 AND PROPOSED 2023 ATLANTIC SPINY DOGFISH FISHERY SPECIFICATIONS

	2022 (Current)		2023 (Proposed)		Percent change
	Million lb	Metric tons	Million lb	Metric tons	
ABC	38.58	17,498	17.17	7,788	55
ACL = ACT	38.48	17,453	17.09	7,751	56
TAL	29.68	13,461	12.48	5,663	58
Commercial Quota	29.56	13,408	12.01	5,449	59

The Councils did not recommend changes to any other management measures as a part of these specifications. Therefore, all other management measures, including trip limits, would remain unchanged for fishing year 2023.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Atlantic Spiny Dogfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

NMFS finds that a 15-day comment period for this action provides a reasonable opportunity for public participation in this action pursuant to Administrative Procedure Act section 553(c) (5 U.S.C. 553(c)), while also ensuring that the final specifications are in place for the start of the spiny dogfish fishing year on May 1, 2023. Stakeholder and industry groups have been involved with the development of this action and have participated in public meetings throughout the past year. A prolonged comment period and subsequent potential delay in implementation past the start of the 2023 fishing year would be contrary to the public interest, as it could create confusion both in the spiny dogfish industry around current quotas, and with state agencies as they prepare their annual management measures.

This action is exempt from review under Executive Order 12866 because it contains no implementing regulations.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows.

The Councils conducted an evaluation of the potential socioeconomic impacts of the proposed specifications in conjunction with an EA. There are no proposed regulatory changes in this spiny dogfish action, so none are considered in the evaluation. The proposed specifications would decrease the 2023 ABC by 55 percent, and the coastwide commercial quota by 59 percent, consistent with the Mid-Atlantic Council's SSC's recommendations in response to recent declines in stock biomass and productivity. This action proposes no changes to other management measures beyond specifications, such as trip limits.

This proposed action would affect those entities that hold Federal commercial fishing permits for Atlantic spiny dogfish. Vessels may hold multiple fishing permits and some entities own multiple vessels and/or permits. According to the Northeast Fisheries Science Center commercial ownership database, 1,785 separate vessels held commercial spiny dogfish permits in 2021, the most recent year of fully available data. A total of 1,126 commercial entities owned those permitted vessels, and of those entities, 1,115 are categorized as small entities and 11 as large entities.

Although 59 percent is a substantial quota reduction, this change is not expected to substantially change overall fishing activity, or result in catch overages or revenue losses in the spiny dogfish fishery. In recent years, the spiny dogfish quotas have not constrained landings in the fishery. Even with the 59-percent decrease, the proposed coastwide commercial quota of 12 million lb (5,449 mt) is higher than the most recent, complete fishing year (2021) landings of 10.3 million lb (4,672 mt), and is therefore not constraining. The average landings of the last three years (2019–2021; 14.1 million lb, 6,396 mt) is slightly higher than the proposed quota; however, the fishery has been following a declining landings trajectory in recent years and it is reasonable to expect that the new quota will not be limiting or substantially affect effort. Additionally, effort in the Atlantic spiny dogfish fishery remains largely dependent on market conditions and pricing, which are not expected to

substantially change as a result of these specifications. As such, this proposed action is not expected to have a substantial impact on the way the fishery operates or the revenue of small entities.

Overall, analyses indicate that the proposed specifications are not expected to substantially change fishing effort or the risk of overfishing, prices/revenues, or fishery behavior. Therefore, the Council concluded, and NMFS agrees, that this action would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This action would not establish any new reporting or record-keeping requirements.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

(Authority: 16 U.S.C. 1801 *et seq.*)

Dated: March 3, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2023–04799 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 46
Thursday, March 9, 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–FGIS–22–0082]

Notice of Intent To Certify Delegated Agencies: Alabama Department of Agriculture and Industries and the Washington State Department of Agriculture; Request for Comments

AGENCY: Agricultural Marketing Service (AMS), USDA.

ACTION: Notice; request for comments.

SUMMARY: AMS is asking for comments on the quality of official services at export port locations provided by the following delegated states: Alabama Department of Agriculture and Industries (Alabama) and the Washington State Department of Agriculture (Washington). We consider comments and other available information when determining certification.

DATES: Comments must be received by April 10, 2023.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. All comments must be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov* and should reference the document number, the date, and page number of this issue of the **Federal Register**. Instructions for submitting and reading comments are detailed on the site. All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at the address provided above.

Read Comments: All comments will be available for public inspection online at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jacob Thein, Compliance Officer; Telephone 816–308–1351; Email: *Jacob.D.Thein@usda.gov* or *FGISQACD@usda.gov.*

SUPPLEMENTARY INFORMATION: The United States Grain Standards Act (USGSA) sec. 7(e) (7 U.S.C. 79(e)), requires the Secretary of Agriculture (Secretary) to certify, every five years, that each State agency with a delegation of authority is meeting the criteria described for carrying out inspections on behalf of the Secretary. This certification process includes: (1) Publishing, in the **Federal Register**, a notice of intent to certify a State agency and providing a 30-day period for public comment; (2) evaluating the public comments received; and (3) conducting an investigation to determine whether the State agency is qualified. Findings must be based on public comments received and investigation conducted. Once concluded, USDA will publish a **Federal Register** notice announcing whether the certification has been granted, describing the basis upon which the Secretary made the decision.

Areas of Delegation

Alabama

Pursuant to section 7(e)(2) of the USGSA, the following export port locations in the State of Alabama are assigned to this State agency.

In Alabama: All export port locations in the State of Alabama.

Washington

Pursuant to section 7(e)(2) of the USGSA, the following export port locations in the State of Washington are assigned to this State agency.

In Washington: All export port locations in the State of Washington.

Request for Comments

We are publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by Alabama and Washington. We are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the delegation of the applicant. Such comments should be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov.*

Authority: 7 U.S.C. 71–87k.

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–04811 Filed 3–8–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request; Reinstatement

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and reinstatement under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology Comments regarding these information collections are best assured of having their full effect if received by April 10, 2023. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Livestock Mandatory Reporting Act of 1999.

OMB Control Number: 0581–0186.

Summary of Collection: The Livestock Mandatory Reporting Act of 1999 (1999 Act) authorizes the collection and reporting of information on the prices and quantities of livestock and livestock products. In 2001, the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) implemented the Livestock Mandatory Reporting (LMR) program as required by the 1999 Act [Pub. L. 106–78; 113 Stat. 1188; 7 U.S.C. 1635–1636(i)]. On September 30, 2015, the Agriculture Reauthorizations Act of 2015 (2015 Reauthorization Act) reauthorized LMR for an additional five years, until September 30, 2020. The Reauthorization was extended through September 30, 2021, in the Consolidated Appropriations Act of 2021 and currently extended through September 30, 2022, in the Consolidated Appropriations Act of 2022.

The request for information, as mandated by the 1999 Act and amended under the 2015 Reauthorization Act, requires livestock packing plants that annually slaughter an average of 125,000 cattle, 100,000 barrows and gilts, or 200,000 sows and boars; or slaughter or process an average of 35,000 lambs to report information as described in the 1999 Act. In addition, the 1999 Act, as amended under the 2015 Reauthorization Act, requires importers that annually import an average of 1,000 metric tons of lamb meat products to report information as described in the 1999 Act.

Need and Use of the Information: The information collection and recordkeeping requirements mandated by the 1999 Act are essential for AMS to administer a mandatory reporting program of livestock and livestock products. Using the information submitted by packers and importers, AMS publishes over 100 daily, weekly, and monthly reports covering market transactions for fed cattle, swine, lamb, beef, lamb meat, and pork. Collection is accomplished through electronic means, and AMS reports the information up to three times daily and once weekly. The information collected in order for AMS to meet the requirements and intentions of the 1999 Act is only available from the entities required to report.

Description of Respondents: Business or other for-profit.

Number of Respondents: 110.

Frequency of Responses: Reporting; Weekly; Other (Daily).

Total Burden Hours: 23,035.

Agricultural Marketing Service

Title: Pecans Grown in Multiple States, Marketing Order No. 986.

OMB Control Number: 0581–0291.

Summary of Collection: The marketing order regulates the handling of pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas and is authorized by the Agricultural Marketing Agreement Act of 1937 (Act), Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674. The Act permits regulation of certain agricultural commodities for the purpose of providing orderly marketing conditions in interstate commerce and to improve returns to growers. Section 608(d)(1) of the Act provides the Department of Agriculture (USDA) with the authority to request from the regulated handlers such information as is deemed necessary to determine the extent to which a marketing order has effectuated the declared policy of the Act.

Need and Use of the Information: Collection of this information enables the Council to calculate assessments owed by each handler. Gaining the authority to collect nationwide data on pecan inventories, shipments and foreign deliveries and acquisitions was the primary reason the U.S. pecan industry approached AMS for a Federal marketing order.

Description of Respondents: Businesses or other for-profits.

Number of Respondents: 4,512.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,587.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–04827 Filed 3–8–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Food Labelling

AGENCY: U.S. Codex Office, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The U.S. Codex Office is sponsoring a public meeting on Tuesday, April 11, 2023, 1:00–4:00 p.m. EDT. The objective of the public meeting is to provide information and receive public comments on agenda items and draft U.S. positions to be discussed at the 47th Session of the Codex Committee on Food Labelling (CCFL) of the Codex Alimentarius Commission, which will meet in Gatineau, Canada, May 15–19, 2023. The U.S. Manager for Codex Alimentarius and the Under Secretary for Trade and Foreign Agricultural Affairs recognize the importance of providing interested parties the opportunity to obtain background information on the 47th Session of the CCFL and to address items on the agenda.

DATES: The public meeting is scheduled for April 11, 2023, from 1:00–4:00 p.m. EDT.

ADDRESSES: The public meeting will take place via Video Teleconference only. Documents related to the 47th Session of the CCFL will be accessible via the internet at the following address: *https://www.fao.org/fao-who-codexalimentarius/meetings/detail/en/?meeting=CCFL&session=47.*

Dr. Douglas Balentine, U.S. Delegate to the 47th Session of the CCFL, invites interested U.S. parties to submit their comments electronically to the following email address: *douglas.balentine@fda.hhs.gov.*

Registration: Attendees may register to attend the public meeting here: *https://www.zoomgov.com/meeting/register/vJIsc--upjwsHXeBUO4dR9xL9gyNKRgIcFs.* After registering, you will receive a confirmation email containing information about joining the meeting.

For further information about the 47th Session of the CCFL, contact U.S. Delegate, Dr. Douglas Balentine, Senior Science Advisor, International Nutrition Policy, Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, 5001 Campus Drive (HFS–830), College Park, MD 20740; phone: +1 (240) 672–7292; email: *douglas.balentine@fda.hhs.gov.* For further information about the public meeting, contact the U.S. Codex Office by email at: *uscodex@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers

and ensure fair practices in the food trade.

The Terms of Reference of the Codex Committee on Food Labelling are:

(a) to draft provisions on labeling applicable to all foods;

(b) to consider, amend if necessary, and endorse draft specific provisions on labeling prepared by the Codex Committees drafting standards, codes of practice and guidelines;

(c) to study specific labeling problems assigned to it by the Commission; and

(d) to study problems associated with the advertisement of food with particular reference to claims and misleading descriptions.

The CCFL is hosted by Canada. The United States attends the CCFL as a member country of Codex.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 47th Session of the CCFL will be discussed during the public meeting:

- Matters referred to the Committee by the Codex Alimentarius Commission and/or other subsidiary bodies
- Matters of interest arising from FAO and WHO
- Consideration of labelling provisions in draft Codex standards (endorsement)
- Food Allergen Labelling
- Proposed draft revision to the *General Standard for the Labelling of Prepackaged Foods*—Provisions relevant to allergen labelling
- Proposed draft Guidance on Precautionary Allergen Labelling
- Proposed draft Guidance on the Provision of Food Information for Prepackaged Foods to be Offered via e-commerce: Amendment to the *General Standard for the Labelling of Prepackaged Foods* (supplementary text)
- Proposed draft Guidelines on the Use of Technology to Provide Food Information: Amendment to the *General Standard for the Labelling of Prepackaged Foods*
- Discussion Paper on the Labelling of alcoholic beverages
- Discussion Paper on the Labelling of foods in joint presentation and multipack formats
- Discussion Paper on Labelling exemptions in emergency situations
- Discussion Paper on Trans fatty acids
- Discussion Paper on the Sustainability labelling claims
- Discussion Paper on Future work and direction of CCFL
- Approach and criteria for evaluation and prioritization of work of CCFL

Public Meeting

At the April 11, 2023 public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Dr. Douglas Balentine, U.S. Delegate for the 47th Session of the CCFL (see **ADDRESSES**). Written comments should state that they relate to activities of the 47th Session of the CCFL.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the U.S. Codex Office will announce this **Federal Register** publication on-line through the USDA web page located at: *http://www.usda.gov/codex/,* a link that also offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscription themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer,* or write a letter signed by you or your authorized representative. Send your completed complaint form or letter to USDA by mail, fax, or email. Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410; Fax: (202) 690–7442; Email: *program.intake@usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on March 3, 2023.

Mary Frances Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2023–04801 Filed 3–8–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

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

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business 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 Nevada Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a virtual business meeting via ZoomGov at 9 a.m. Pacific on Tuesday, March 14, 2023. The purpose of the meeting is for the Committee to discuss possible briefing dates and vote to approve potential panelists.

DATES: The meeting will take place on Tuesday, March 14, 2023, from 9 a.m.–10 a.m. PT.

ADDRESSES:

Link to Join (Audio/Visual): https://www.zoomgov.com/j/1617033119?pwd=ZkozeGdKdVQ3QTBjV1VIYTU0bmE0Zz09

Telephone (Audio Only): Dial (833) 435–1820 USA Toll Free; Meeting ID: 161 703 3119

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or (202) 656–8937.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the conference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. If joining via phone, 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. Individuals who are deaf, deafblind, and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at (800) 877–8339 and providing the Service with the conference details found through registering at the web link above. To

request additional accommodations, please email *dbarreras@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (202) 656–8937.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination 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, Nevada 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 Coordination Unit at the above phone number.

Agenda

I. Welcome & Roll Call
II. Approval of Minutes
III. Committee Discussion
IV. Public Comment
V. Next Steps
VI. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given fewer than 15 calendar days prior to the meeting because of the exceptional circumstances of staffing shortage.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04834 Filed 3–8–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

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

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business 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 Nevada Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a virtual business meeting via ZoomGov at 9 a.m. Pacific on Tuesday, March 14, 2023. The purpose of the meeting is for the Committee to discuss possible briefing dates and vote to approve potential panelists.

DATES: The meeting will take place on Tuesday, March 14, 2023, from 9 a.m.–10 a.m. PT.

ADDRESSES:

Link to Join (Audio/Visual): https://www.zoomgov.com/j/1617033119?pwd=ZkozeGdKdVQ3QTBjV1VIYTU0bmE0Zz09

Telephone (Audio Only): Dial (833) 435–1820 USA Toll Free; Meeting ID: 161 703 3119

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or (202) 656–8937.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the conference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. If joining via phone, 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. Individuals who are deaf, deafblind, and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at (800) 877–8339 and providing the Service with the conference details found through registering at the web link above. To request additional accommodations, please email *dbarreras@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (202) 656–8937.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination 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, Nevada 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 Coordination Unit at the above phone number.

Agenda

I. Welcome & Roll Call
II. Approval of Minutes
III. Committee Discussion
IV. Public Comment
V. Next Steps
VI. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given fewer than 15 calendar days prior to the meeting because of the exceptional circumstances of staffing shortage.

Dated: March 6, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04835 Filed 3–8–23; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nebraska 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 Nebraska Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a meeting on Thursday, March 23, 2023 at 4 p.m.–5 p.m. Central Time. The purpose for the meeting is to discuss the proposal for their project on the effects of the pandemic on education in the state.

DATES: The meetings will take place on: Thursday, March 23, 2023, from 4 p.m.–5 p.m. Central Time.

ADDRESSES:

Registration Link: https://www.zoomgov.com/j/1604029919?pwd=ZEhhSStqOVZQNnRKTGp6Z2E1ZDJ4QT09

Telephone (Audio Only): Dial 833 435 1820 USA Toll Free; Access code: 160 402 9919#

FOR FURTHER INFORMATION CONTACT: Victoria Moreno at *vmoreno@usccr.gov* or by phone at 434–515–0204.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the Zoom link above. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines and the Commission will not refund any incurred charges.

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 Victoria Moreno at *vmoreno@usccr.gov.* All written comments received will be available to the public.

Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at *www.facadatabase.gov.* Persons interested in the work of this Committee are advised to go to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or email address.

Agenda

I. Welcome and Roll Call
II. Chair's Comments
III. Discuss Project Proposal
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: March 6, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04837 Filed 3–8–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the California Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the California Advisory Committee (Committee) will hold a virtual business meeting via ZoomGov on Tuesday, March 21, 2023, from 1 p.m.–2:30 p.m. Pacific. The purpose of the meeting is to review and discuss the latest draft of their report on the civil rights implications of AB5.

DATES: The meeting will take place on:

- Tuesday, March 21, 2023, from 1 p.m.–2:30 p.m. PT

ADDRESSES:

Zoom Link to Join:

- *Tuesday, March 21st: https://www.zoomgov.com/meeting/register/vJIsf-CtrjwoGa_vs2HbfL6gjvtJv6-pu9M*

FOR FURTHER INFORMATION CONTACT: Brooke Peery, Designated Federal Officer (DFO) at *bpeery@usccr.gov* or by phone at (202) 701–1376. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be emailed to Brooke Peery (DFO) at *bpeery@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkUAAQ.*

Please click on the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome & Roll Call
II. Committee Discussion
III. Public Comment
IV. Adjournment

Dated: March 6, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04836 Filed 3–8–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Briefings of the Ohio Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of briefings.

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 Ohio Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a briefing via web conference. The purpose of the briefing is to hear testimony on the source of income discrimination in housing in Ohio. Additional briefings may be scheduled at the Committee discretion, throughout the Spring of 2023.

DATES: *Panel IV:* Wednesday, March 29, 2023, from 9:00 a.m.–11:00 a.m. (ET).

ADDRESSES: The briefing will be held via Zoom.

Registration Link: https://tinyurl.com/cshw9842.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll Free; Meeting ID: 160 517 6462#.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 1–202–618–4158.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the conference registration link or telephone number listed above. Any interested member of the public may join the meetings. An open comment period will be provided to allow members of the public to make a statement as time allows. If joining via phone, 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. Closed captions will be provided. 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 details found through registering at the web link above. To request additional accommodations, please email *mwojnaroski@usccr.gov* at least ten (10) days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received within 30 days following the meeting. Written comments may be emailed to *mwojnaroski@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 206–800–4892.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination 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, Ohio 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 Coordination Unit at the above phone number.

Agenda

I. Welcome Remarks

II. Panelist Presentations

III. Committee Q&A

IV. Public Comment

V. Closing Remarks

VI. Adjournment

Dated: March 6, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04833 Filed 3–8–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–224–2022]

Approval of Subzone Expansion; Swagelok Company; Valley City, Ohio

On December 28, 2022, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Cleveland Cuyahoga County Port Authority grantee of FTZ 40, requesting an expansion of Subzone 40I subject to the existing activation limit of FTZ 40, on behalf of Swagelok Company, in Valley City, Ohio.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (88 FR 44–45, January 3, 2023). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to expand Subzone 40I was approved on March 3, 2023, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 40's 2,000-acre activation limit.

Dated: March 3, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023–04856 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–17–2023]

Foreign-Trade Zone (FTZ) 124, Notification of Proposed Production Activity; Valero Refining-New Orleans, LLC; (Renewable Fuels and By-Products); Norco, Louisiana

Valero Refining-New Orleans, L.L.C. submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Norco, Louisiana within Subzone 124A. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on February 28, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.* The proposed finished product(s) and material(s)/component(s) would be added to the production authority that the Board previously approved for the operation, as reflected on the Board's website.

The proposed finished products include renewable fuels (naphtha; diesel; jet), sustainable jet fuel, propane and butane mix, mixed gas streams, and hydrogen sulfide (duty rate ranges from duty-free to 10.5¢/bbl).

The proposed foreign-status materials and components include: fats (animal; fish); oils (fish; canola; rapeseed; distiller's corn; used cooking); and, yellow grease, a mix of animal fats that may include used cooking oil) (duty rate ranges from duty-free to 8.0%, 0.43¢/kg to 3¢/kg, 1.57¢/kg+5%). The request indicates that certain materials/components are subject to duties under section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is April 18, 2023.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Juanita Chen at *juanita.chen@trade.gov.*

Dated: March 3, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023–04849 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Erick Samuel Chavez Gonzalez, Plut'on 1708, Sate'lite, Cd Ju'arez, Chih, Mexico; Order Denying Export Privileges

On August 12, 2020, in the U.S. District Court for the Western District of Texas, Erick Samuel Chavez Gonzalez (''Chavez Gonzalez'') was convicted of violating 18 U.S.C. 554(a). Specifically, Chavez Gonzalez was convicted of knowingly and willfully attempting to smuggle from the United States to Mexico various rifles and handguns. As a result of his conviction, the Court sentenced Chavez Gonzalez to 37 months in prison, with credit for time served, three years of supervised release, and a $100 special 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. 554, 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 Chavez Gonzalez'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 Chavez Gonzalez to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a submission from Chavez Gonzalez.

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,

[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).

I have decided to deny Chavez Gonzalez's export privileges under the Regulations for a period of seven years from the date of Chavez Gonzalez's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Chavez Gonzalez had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered:*

First, from the date of this Order until August 12, 2027, Erick Samuel Chavez Gonzalez, with a last known address of Plut'on 1708, Sate'lite, Cd Ju'arez, Chih, Mexico, 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 August 12, 2027.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–04820 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DT–P

[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

In the Matter of: Parisa Mohamadi, 2906 Fletcher Parkway Apartment C, El Cajon, California 92020; Order Denying Export Privileges

On September 10, 2019, in the U.S. District Court for the Northern District of Ohio, Parisa Mohamadi (''Mohamadi''), was convicted of two counts of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*) (''IEEPA''). Specifically, Mohamadi was convicted of exporting and causing to be exported goods from the United States to Iran without the required authorizations from the United States Department of the Treasury's Office of Foreign Assets Control. As a result of her conviction, the Court sentenced Mohamadi to 24 months in prison on each count, to run concurrently and with credit for time served, two years of supervised release and a $200 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, IEEPA, 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 Mohamadi's conviction for violating IEEPA, and has provided notice and opportunity for Mohamadi to make a written submission to BIS, as provided in section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''). 15 CFR 766.25.[2] BIS has not received a written submission from Mohamadi.

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 Mohamadi's export privileges under the Regulations for a period of ten years from the date of Mohamadi's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Mohamadi had an interest at the time of her conviction.[3]

Accordingly, it is hereby *ordered:*

First, from the date of this Order until September 10, 2029, Parisa Mohamadi, with a last known address of 2906 Fletcher Parkway Apartment C, El Cajon, California 92020, and when acting for or on her behalf, her

[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).

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 the Export Control Reform Act (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 Mohamadi 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, Mohamadi 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 Mohamadi and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until September 10, 2029.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–04822 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Mohammad Khazrai Shaneivar, 16 Udine Court, Richmond Hill, Ontario, L4C8C6, Canada; Order Denying Export Privileges

On October 1, 2020, in the U.S. District Court for the Northern District of Ohio, Mohammad Khazrai Shaneivar (''Shaneivar''), was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*) (''IEEPA''). Specifically, Shaneivar was convicted of exporting and causing to be exported goods from the United States to Iran without the required authorizations from the United States Department of the Treasury's Office of Foreign Assets Control. As a result of his conviction, the Court sentenced Shaneivar to $100,000 criminal fine in lieu of probation or imprisonment 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, IEEPA, 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 Shaneivar's conviction for violating IEEPA, and has provided notice and opportunity for Shaneivar to make a written submission to BIS, as provided in section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''). 15 CFR 766.25.[2] BIS has received notice from counsel that Shaneiver does not intend to submit a written submission.

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 Shaneivar's export privileges under the Regulations for a period of ten years from the date of Shaneivar's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Shaneivar had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered:*

First, from the date of this Order until October 1, 2030, Mohammad Khazrai Shaneivar, with a last known address of 16 Udine Court, Richmond Hill, Ontario, L4C8C6, 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,

[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).

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 the Export Control Reform Act (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 Shaneivar 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, Shaneivar 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 Shaneivar and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until October 1, 2030.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–04823 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Edgar Ariel Bernal-Gonzalez, 11932 Lake June Road, Balch Springs, TX 75180; Order Denying Export Privileges

On June 10, 2021, in the U.S. District Court for the Southern District of Texas, Edgar Ariel Bernal-Gonzalez (''Bernal-Gonzalez'') was convicted of violating 18 U.S.C. 554(a). Specifically, Bernal-Gonzalez was convicted of smuggling and attempting to smuggle from the United States to Mexico, approximately 50 rounds of 9 mm ammunition, approximately 50 rounds of .38 caliber ammunition, one MEC–GAR Colt 38 magazine, one AK–47 Quad rail system and 12 rubber rifle rail guards. As a result of his conviction, the Court sentenced Bernal-Gonzalez to 10 months of confinement, three years supervised release and $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. 554, 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 Bernal-Gonzalez's conviction for violating 18 U.S.C. 554. As provided in section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''), BIS provided notice and opportunity for Bernal-Gonzalez to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a written submission from Bernal-Gonzalez.

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 Bernal-Gonzalez's export privileges under the Regulations for a period of five years from the date of Bernal-Gonzalez's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Bernal-Gonzalez had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered*:

First, from the date of this Order until June 10, 2026, Edgar Ariel Bernal-Gonzalez, with a last known address of 11932 Lake June Road, Balch Springs, TX 75180, 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:

[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).

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 Bernal-Gonzalez 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, Bernal-Gonzalez 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 Bernal-Gonzalez and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until June 10, 2026.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–04821 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–010]

Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Administrative Review, and Preliminary Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: This notice contains the preliminary results of the U.S. Department of Commerce's (Commerce) administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products (solar products) from the People's Republic of China (China) covering the period of review (POR) February 1, 2021, through January 31, 2022. Commerce preliminarily finds that the sole mandatory respondent under review sold subject merchandise at prices below normal value (NV) during the POR, that two companies under review had no entries, exports, or sales of solar products during the POR, and that it is appropriate to rescind this review with respect to 54 companies/company groupings because all requests to review these companies/company groupings were timely withdrawn. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable March 9, 2023.

FOR FURTHER INFORMATION CONTACT: Krisha Hill, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4037.

SUPPLEMENTARY INFORMATION:

Background

On April 12, 2022, in response to a request from the American Alliance for Solar Manufacturing (the petitioner), Commerce initiated an administrative review of the antidumping duty order on solar products from China [1] with respect to 62 companies/company groupings.[2] Subsequently, the petitioner timely withdrew its review request with respect to 54 companies/company groupings.[3] On September 30, 2022, Commerce extended the deadline for issuing the preliminary results of this review by 120 days, to February 28, 2023.[4]

For details regarding the events that occurred subsequent to initiation of the review, *see* the Preliminary Decision Memorandum.[5] A list of topics included in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The products covered by the *Order* are solar products from China.[6] Merchandise covered by the *Order* is

[1] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 8592 (February 18, 2015) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 21619 (April 12, 2022) (*Initiation Notice*). Sixty-three company or company groupings are listed in the *Initiation Notice.* However, the list includes the name ''Trina Solar Co., Ltd.,'' and the name of this company before the POR began, Changzhou Trina Solar Energy Co., Ltd. Because both names refer to the same company, we actually initiated the administrative review with respect to only 62 companies or company groupings.

[3] *See* Petitioner's Letter, ''Crystalline Silicon Photovoltaic Products from the People's Republic of China: Partial Withdrawal of Request for Administrative Review,'' dated July 11, 2022 (Partial Withdrawal).

[4] *See* Memorandum, ''Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Extension of Deadline for the Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated September 30, 2022.

[5] *See* Memorandum ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China; 2021–2022,'' issued concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum. Commerce revised certain HTSUS subheadings listed in the scope of the *Order* based on a request, and information obtained, from U.S. Customs and Border Protection (CBP). *See* Memorandum, ''Update to the ACE AD/CVD Case Reference File,'' dated concurrently with this notice.

currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501710000, 8501721000, 8501722000, 8501723000, 8501729000, 8501801000, 8501802000, 8501803000, 8501809000, 8507208031, 8507208041, 8507208061, 8507208091, 8541420010, and 8541430010. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the *Order* is dispositive.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), because the petitioner timely withdrew its review request with respect to 54 companies/company groupings, Commerce is rescinding this review with respect to those companies which are named in Appendix II to this notice.

Preliminary Determination of No Shipments

Because we found no record evidence calling into question the no-shipment claims of Hubei Trina Solar Energy Co., Ltd. and Trina Solar (Hefei) Science and Technology Co., Ltd., Commerce preliminarily determines that these companies did not sell or export subject merchandise to, nor was their subject merchandise entered into, the United States during the POR. Consistent with Commerce's practice in non-market economy (NME) administrative reviews,[7] Commerce is not rescinding its review of these two companies but intends to complete this review and issue appropriate instructions to CBP based on the final results of the review.

Preliminary Affiliation and Single Entity Determination

Based on record evidence in this review, as well as Commerce's single entity determination in the 2014–2016 administrative review in this proceeding,[8] Commerce preliminarily finds that the following companies are affiliated, pursuant to section 771(33)(F) of the Tariff Act of 1930, as amended (the Act), and that they should be treated as a single entity, pursuant to 19 CFR 351.401(f)(1)–(2): Trina Solar (Changzhou) Science & Technology Co., Ltd.; Trina Solar Co., Ltd.; Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd. (a.k.a. Yancheng Trina Solar Guoneng Science & Technology Co., Ltd.); Trina Solar Yiwu Technology Co., Ltd.; Trina Solar (Su Qian) Technology Co., Ltd.; Trina Solar (Yancheng Dafeng) Co., Ltd.; Changzhou Trina Hezhong Photoelectric Co., Ltd. (a.k.a. Changzhou Trina Hezhong PV Co., Ltd.); Changzhou Trina Solar Yabang Energy Co., Ltd.; and Turpan Trina Solar Energy Co., Ltd. (collectively Trina). For additional information, *see* the Preliminary Decision Memorandum.

Separate Rates

Commerce preliminary determines that information placed on the record by Trina demonstrates that it is entitled to separate rate status. Because no party requested a review of the China-wide entity, the entity is not under review and the entity's cash deposit rate (*i.e.,* 152.84 percent[9]) is not subject to change.[10] For additional information regarding Commerce's preliminary separate rate determination, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(B) of the Act. We based Trina's dumping margin on a comparison of constructed export prices, which we calculated in accordance with section 772 of the Act, and NV, which we calculated in accordance with section 773(c) of the Act because Commerce has determined that China is an NME country,[11] within the meaning of section 771(18) of the Act. For a full description of the methodology underlying the preliminary results of this review, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

We are assigning the following dumping margin to the firm listed below for the period February 1, 2021, through January 31, 2022:

Exporter	Weighted-average dumping margin (percent)
Trina Solar (Changzhou) Science & Technology Co., Ltd./Trina Solar Co., Ltd./Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd. (a.k.a. Yancheng Trina Solar Guoneng Science & Technology Co., Ltd.)/Trina Solar Yiwu Technology Co., Ltd./Trina Solar (Su Qian) Technology Co., Ltd./Trina Solar (Yancheng Dafeng) Co., Ltd./Changzhou Trina Hezhong Photoelectric Co., Ltd. (a.k.a. Changzhou Trina Hezhong PV Co., Ltd.)/Changzhou Trina Solar Yabang Energy Co., Ltd./Turpan Trina Solar Energy Co., Ltd	16.79

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations performed for these preliminary results of review under administrative protective order within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Public Comment

Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of these preliminary results of review in the **Federal Register**.[12] Rebuttal briefs may be filed no later than seven days after case briefs are due and may respond only to arguments raised in the case briefs.[13] A table of contents, list of authorities used, and an executive

[7] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65694–95 (October 24, 2011).

[8] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014–2016;* 82 FR 32170 (July 12, 2017), under the ''Final Results of Review'' section.

[9] The China-wide entity cash deposit rate has not changed since the *Order* and has been the applicable rate for the entity in each subsequent review, including the most recently completed review. *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014–2016, and Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018; Correction,* 86 FR 18504 (April 9, 2021).

[10] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[11] *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) (citing Memorandum, ''China's Status as a Non-Market Economy,'' dated October 26, 2017), 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).

[12] *See* 19 CFR 351.309(c)(ii).

[13] *See* 19 CFR 351.309(d).

summary of issues should accompany any briefs submitted to Commerce. The summary should be limited to five pages total, including footnotes.[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice in the **Federal Register**. Requests for a hearing should contain: (1) the requesting party's name, address, and telephone number; (2) the number of participants and whether any of those individuals is a foreign national; and (3) a list of the issues the party intends to discuss at the hearing. Oral arguments at the hearing will be limited to issues raised in the case and rebuttal briefs. If a request for a hearing is made, Commerce will announce the date and time of the hearing. Parties should confirm the date and time of the hearing two days before the scheduled hearing date.

All submissions to Commerce, with limited exceptions, must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time on the due date.[15] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[16]

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results of review in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, CBP shall assess, antidumping duties on all appropriate entries of subject merchandise covered by this review.[17] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Commerce intends to calculate importer/customer-specific *ad valorem* assessment rates by dividing the total amount of dumping calculated for all reviewed U.S. sales to the importer or customer by the total entered value of the merchandise sold to the importer/customer.[18] Where the weighted-average dumping margin or an importer/customer-specific *ad valorem* assessment rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. Where either Trina's *ad valorem* weighted-average dumping margin is zero or *de minimis,* or an importer/customer-specific *ad valorem* assessment rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[19]

Pursuant to a refinement to Commerce's assessment practice,[20] where sales of subject merchandise exported by an individually examined respondent were not reported in the U.S. sales data submitted by the respondent, but the merchandise was entered into the United States during the POR, we will instruct CBP to liquidate any entries of such merchandise at the assessment rate for antidumping duties for the China-wide entity. Additionally, where Commerce determines that an exporter under review had no shipments of subject merchandise during the POR, any suspended entries of subject merchandise that entered under that exporter's CBP case number during the POR will be liquidated at the assessment rate for antidumping duties for the China-wide entity.

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the review and for future deposits of estimated antidumping duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be in effect for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on, or after, the date of publication of the notice of the final results of this administrative review in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Trina will be equal to the weighted-average dumping margin calculated for Trina in the final results of this review (except, if the rate is *de minimis,* then the cash deposit rate will be zero); (2) for a previously investigated or reviewed exporter of subject merchandise not listed in the final results of review that has a separate rate, the cash deposit rate will continue to be the exporter's existing cash deposit rate; (3) for all China exporters of subject merchandise that do not have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin assigned to the China-wide entity, which is 154.84 percent; and (4) for a non-China exporter of subject merchandise that does not have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin applicable to the China exporter(s) that supplied that non-China exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred, and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213 and 351.221(b)(4).

[14] *See* 19 CFR 351.309(c)(2) and (d)(2).

[15] *See* 19 CFR 351.303 (for general filing requirements); *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[16] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[17] *See* 19 CFR 351.212(b)(1).

[18] *See* 19 CFR 351.212(b)(1); *see also Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification*).

[19] *See Final Modification,* 77 FR at 8103.

[20] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

Dated: February 28, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Review
IV. Scope of the *Order*
V. Partial Rescission of Administrative Review
VI. Preliminary Determination of No Shipments
VII. Single Entity Treatment
VIII. Discussion of the Methodology
IX. Currency Conversion
X. Recommendation

Appendix II

Companies/Company Groupings for Which the Administrative Review Is Being Rescinded

1. Anji Dasol Solar Energy Science & Technology Co., Ltd.
2. BYD (Shangluo) Industrial Co., Ltd.
3. Canadian Solar International Limited.
4. Canadian Solar Manufacturing (Changshu) Inc.
5. Canadian Solar Manufacturing (Luoyang) Inc.
6. Chint Energy (Haining) Co., Ltd.; Chint Solar (Hong Kong) Company Limited; Chint Solar (Jiuquan) Co., Ltd.; Chint Solar (Zhejiang) Co., Ltd.; Chint New Energy Technology (Haining) Co. Ltd.
7. CSI Cells Co., Ltd.
8. CSI Solar Power (China) Inc.
9. CSI–GCL Solar Manufacturing (Yancheng) Co., Ltd.
10. De-Tech Trading Limited HK.
11. Hefei JA Solar Technology Co., Ltd.
12. Hengdian Group DMEGC Magnetics Co. Ltd.
13. JA Solar Co., Ltd.
14. JA Solar Technology Yangzhou Co., Ltd.
15. Jiangsu Jinko Tiansheng Solar Co., Ltd.
16. Jiawei Solarchina (Shenzhen) Co., Ltd.
17. Jiawei Solarchina Co., Ltd.
18. JingAo Solar Co., Ltd.
19. Jinko Solar Co. Ltd.
20. Jinko Solar Import and Export Co., Ltd.
21. Jinko Solar International Limited.
22. JinkoSolar Technology (Haining) Co., Ltd.
23. Jiujiang Shengchao Xinye Technology Co., Ltd.
24. Jiujiang Shengzhao Xinye Trade Co., Ltd.
25. Lightway Green New Energy Co., Ltd.
26. Longi (HK) Trading Ltd.
27. Longi Solar Technology Co. Ltd.; Lerri Solar Technology Co., Ltd.
28. Luoyang Suntech Power Co., Ltd.
29. Ningbo ETDZ Holdings, Ltd.
30. Ningbo Qixin Solar Electrical Appliance Co., Ltd.
31. Perlight Solar Co., Ltd.
32. Renesola Jiangsu Ltd.
33. ReneSola Zhejiang Ltd.
34. Risen (Luoyang) New Energy Co., Ltd.
35. Risen (Wuhai) New Energy Co., Ltd.
36. Risen Energy Co. Ltd.; Risen Energy (Changzhou) Co., Ltd.
37. Ruichang Branch, Risen Energy (HongKong) Co., Ltd.
38. Shanghai BYD Co., Ltd.
39. Shenzhen Sungold Solar Co., Ltd.
40. Shenzhen Topray Solar Co., Ltd.
41. Shenzhen Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng PhotovoltaicTechnology Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Yingli Energy (China) Company Limited.
42. Sumec Hardware & Tools Co., Ltd.
43. Sunny Apex Development Ltd.
44. Suntech Power Co., Ltd.
45. Taizhou BD Trade Co., Ltd.
46. tenKsolar (Shanghai) Co., Ltd.
47. Wuxi Suntech Power Co., Ltd.
48. Wuxi Tianran Photovoltaic Co., Ltd.
49. Xiamen Yiyusheng Solar Co., Ltd.
50. Yingli Green Energy International Trading Company Limited.
51. Yuhuan Jinko Solar Co., Ltd.
52. Zhejiang Aiko Solar Energy Technology Co., Ltd.
53. Zhejiang Jinko Solar Co., Ltd.
54. Zhejiang Twinsel Electronic Technology Co., Ltd.

[FR Doc. 2023–04854 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–469–818]

Ripe Olives From Spain: Final Results of Countervailing Duty Administrative Review; 2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain exporters/producers of ripe olives from Spain received countervailable subsidies during the period of review (POR) January 1, 2020, through December 31, 2020.

DATES: Applicable March 9, 2023.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg or Theodore Pearson, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1785 or (202) 482–2631, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* on September 6, 2022.[1] On November 7, 2022, we released the final verification reports,[2] and, on November 14, 2022, we invited parties to comment on the *Preliminary Results*.[3] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[4] On December 15, 2022, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), Commerce extended the deadline for issuing the final results until March 3, 2023.[5]

Scope of the Order [6]

The products covered by the *Order* are ripe olives. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by the interested parties in their case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of these issues is provided in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and CVD Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Verification

As provided in section 782(i)(3) of the Act, in September 2022, Commerce verified the subsidy information reported by Agro Sevilla Aceitunas

[1] *See Ripe Olives from Spain: Preliminary Results of Countervailing Duty Administrative Review; 2020,* 87 FR 54460 (September 6, 2022) (*Preliminary Results*).

[2] *See* Memorandum, ''Verification of the Questionnaire Responses of Agro Sevilla Aceitunas S.Coop. And.,'' dated November {7}, 2022; *see also* Memorandum, ''Verification of the Questionnaire Responses of Angel Camacho Alimentacion, S.L. and Its Suppliers,'' dated November {7}, 2022.

[3] *See* Commerce's Letter, ''Briefing Schedule,'' dated November 14, 2022.

[4] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Ripe Olives from Spain,'' concurrently with, and hereby adopted by, this notice.

[5] *See* Memorandum, ''Extension of Deadline for Final Results of the Countervailing Duty Administrative Review 2020,'' dated December 15, 2022.

[6] *See Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 83 FR 37469 (August 1, 2018) (*Order*).

S.Coop. And. (Agro Sevilla), Angel Camacho Alimentación, S.L. (Camacho) and certain suppliers to both companies. We used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by Agro Sevilla, Camacho, and their suppliers.

Changes Since the Preliminary Results

Based on comments received from interested parties and issues originating from verification, we revised the calculation of the net countervailable subsidy rates for Agro Sevilla and Camacho. For a discussion of the issues, *see* the Issues and Decision Memorandum.

Methodology

Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Act of 1930. For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[7] For a full description of the methodology underlying all of Commerce's conclusions, including our reliance, in part, on facts otherwise available, including adverse facts available (AFA), pursuant to sections 776(a) and (b) of the Act, *see* the Issues and Decision Memorandum.

Non-Selected Companies' Rate

We made no changes to the methodology for determining a rate for companies not selected for individual examination from the *Preliminary Results.* However, due to changes in calculations for Agro Sevilla and Camacho, the non-selected rate changed for each of the three non-selected companies for which a review was requested and not rescinded. For these companies, we are applying an *ad valorem* subsidy rate of 8.50 percent.

Final Results of the Administrative Review

We find the following net countervailable subsidy rates for the POR January 1, 2020, through December 31, 2020:

Producer/exporter	Subsidy rate (percent *ad valorem*)
Agro Sevilla Aceitunas S.Coop. And	8.83
Angel Camacho Alimentación, S.L. and its cross-owned affiliates[8]	8.08
Review-Specific Average Rate Applicable to the Following Companies[9]	
Aceitunas Guadalquivir, S.L	8.50
Alimentary Group Dcoop S.Coop. And	8.50
Aceitunas Torrent, S.L	8.50

Disclosure

We intend to disclose calculations and analysis performed for these final results of review within five days after the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Assessment Requirements

In accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, we also intend to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown above for the above-listed companies with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review. For all non-reviewed firms, CBP will continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

The final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: March 3, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Subsidies Valuation
V. Use of Facts Otherwise Available and Adverse Inferences
VI. Non-Selected Rate
VII. Analysis of Programs
VIII. Analysis of Comments
- Comment 1: Whether Commerce's Substantial Dependence Finding is Lawful and Supported by Substantial Evidence
- Comment 2: Whether Commerce Should Apply AFA to All of Camacho's Growers Because Two Growers Failed Verification
- Comment 3: Whether Agro Sevilla's Non-Responsive Growers Should Receive an AFA Rate Because They Are Affiliated with Agro Sevilla
- Comment 4: Whether Commerce Should Include Two of Camacho's Suppliers in the BPS Program Calculation Since They Were Primarily Suppliers and Only Grew a Small Portion of Their Olives
- Comment 5: Whether Commerce Should Correct a Ministerial Error Regarding One of Agro Sevilla's First-Tier Suppliers

IX. Recommendation

[FR Doc. 2023–04851 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[8] Commerce found the following companies to be cross-owned with Angel Camacho Alimentación, S.L.: Grupo Angel Camacho, S.L., Cuarterola S.L., and Cucanoche S.L.

[9] This rate is based on the rates for the respondents that were selected for individual review, excluding rates that are zero, *de minimis,* or based entirely on facts available. *See* section 705(c)(5)(A) of the Act.

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2022–0042]

First-Time Filer Expedited Examination Pilot Program

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) and its Council for Inclusive Innovation (CI^2) are developing strategies to create a more equitable and diverse innovation ecosystem. As one strategy, the USPTO is implementing the First-Time Filer Expedited Examination Pilot Program, designed to increase accessibility to the patent system for inventors who are new to the patent application process, including those in historically underserved geographic and economic areas. The program expedites the first Office action for program participants. Expediting the first Office action reduces time-based barriers for inventors who may otherwise be unable to participate in the patent system, thereby advancing opportunity in the innovation ecosystem. The program requires participants to be reasonably trained in the patent application process so they can engage effectively with the Office and maximize the benefit of expedited examination. The pilot program website identifies a collection of free training resources for anyone interested in learning more about the patent application filing process. This notice outlines the conditions, eligibility requirements, and guidelines of the program.

DATES: The USPTO will accept petitions to make special under the First-Time Filer Expedited Examination Pilot Program beginning March 9, 2023, until either March 11, 2024, or the date the USPTO grants 1,000 petitions to participate in the program, whichever occurs earlier.

The USPTO may exercise its discretion to terminate this pilot program at any time. In the event of any such termination, the USPTO will notify the public. The USPTO will publish on its website an ongoing count of the number of petitions granted for participation in the program.

FOR FURTHER INFORMATION CONTACT: Questions or comments regarding this pilot program may be directed to: Parikha Mehta, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at 571–272–3248 or *Parikha.Mehta@uspto.gov,* or Brannon Smith, Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at 571–270–1601 or *Brannon.Smith@uspto.gov.*

Questions regarding electronic application filing may be directed to the Electronic Business Center at 866–217–9197 during its operating hours of 6 a.m. to midnight ET, Monday–Friday, or at *ebc@uspto.gov.*

Questions regarding a filed petition to make special under this pilot may be directed to the Office of Petitions at 571–272–3282 during its operating hours of 8:30 a.m. to 5 p.m. ET, Monday–Friday.

SUPPLEMENTARY INFORMATION: Under current USPTO policy, examiners normally take up nonprovisional patent applications filed under 35 U.S.C. 111(a) for examination in the order they were filed. *See* section 708 of the Manual of Patent Examining Procedure (MPEP) (9th ed., rev. 10.2019, June 2020). An application can be advanced out of turn for examination (that is, accorded special status) when the applicant successfully petitions to make special under 37 CFR 1.102(c) or (d) or requests prioritized examination under 37 CFR 1.102(e). *See* 37 CFR 1.102(c)–(e) and MPEP sections 708.02, 708.02(a), and 708.02(b).

Generally, petitions to make special under 37 CFR 1.102(c) and (d) must comply with all requirements of the accelerated examination program set forth in MPEP § 708.02(a) unless the petition is based on the inventor's age or health. *See* Changes to Practice for Petitions in Patent Applications to Make Special and for Accelerated Examination, 71 FR 36323 (June 26, 2006), 1308 *Off. Gaz. Pat. Office* 106 (July 18, 2006).

The USPTO is implementing a new First-Time Filer Expedited Examination Pilot Program under the Council for Inclusive Innovation, in alignment with Executive Order 13985 and as previously announced in the 2022 U.S. Department of Commerce Cabinet-Level Equity Action Plan. This program aligns with and supports the Executive Order by creating opportunities for underserved communities. The program enables micro entity first-time filers who meet the requirements detailed in Part I to have their applications examined out of turn. This program is established under 37 CFR 1.102(d) without requiring either the 37 CFR 1.17(h) fee for a petition to make special or all conditions of the accelerated examination program. *See* MPEP § 708.02(a)(I). No other fees or requirements are waived for participants in this program.

Part I. Program Eligibility Requirements

A. Applicant and Inventor Eligibility

To qualify for this program, the applicant and the inventor must meet the following requirements as of the filing date of the petition to make special:

1. The applicant must certify that the inventor or, where there are joint inventors, each joint inventor has not been named as the sole inventor or a joint inventor on any other U.S. nonprovisional application.

2. The applicant must certify that the applicant and the inventor or, where there are joint inventors, the applicant and each joint inventor qualify for micro entity status under the gross income basis requirement. *See* 37 CFR 1.29 and MPEP section 509.04. Note that the applicant must separately and properly establish micro entity status by filing USPTO Form SB/15A (Certification of Micro Entity Status—Gross Income Basis) no later than the date that the petition to participate in this pilot is filed. For more information regarding micro entity status requirements, see the USPTO Micro Entity Status web page (*https://www.uspto.gov/PatentMicroentity*).

3. The applicant must certify that the inventor, or, where there are joint inventors, each joint inventor, named on the application is reasonably trained on the basics of the USPTO's patent application process. For applicants who are unsure whether they meet this requirement, exemplary patent application training resources that could be used to meet this requirement are available at the pilot program web page (*https://www.uspto.gov/FirstTimePatentFiler*).

B. Eligible Applications

This program is available for original, noncontinuing, nonprovisional utility applications filed under 35 U.S.C. 111(a). The application must be filed electronically via Patent Center. The abstract, specification, and claim(s) must be provided on filing in DOCX format.

The petition to make special under this program should not be filed until the application is complete under 37 CFR 1.51(b). To be complete under 37 CFR 1.51(b), the application must include a specification, drawing(s) if necessary, at least one claim, a properly executed inventor's oath or declaration under 37 CFR 1.63, and payment of all

appropriate fees (that is, basic filing, search, and examination fees, and an application size fee if required). If the application is not complete under 37 CFR 1.51(b) on the date the petition to make special under this program is filed, the petition will be dismissed without further opportunity to request participation in the program.

Applications claiming the benefit of the filing date of one or more provisional applications under 35 U.S.C. 119(e) are eligible for this program. Applications claiming the benefit of the filing date of any previously filed nonprovisional U.S. applications or international applications designating the United States under 35 U.S.C. 120, 121, 365(c), or 386(c) (for example, continuation, continuation-in-part, divisional, and bypass applications) are not eligible for this program. In addition, applications claiming a right of foreign priority under 35 U.S.C. 119(a)–(d) or (f) to one or more foreign applications are not eligible for this program. This ensures that the benefits of the program are reserved for inventors who are new to the patent application process. Other expedited programs under petitions to make special and prioritized examination are still available as provided by 37 CFR 1.102(c)–(e) for applications that are otherwise ineligible for this program.

Applications entering the national stage under the Patent Cooperation Treaty (PCT) as set forth in 35 U.S.C. 371 are not eligible for this program. National stage applications may be advanced out of turn under 37 CFR 1.496 or the Patent Prosecution Highway program.

Applications in this pilot program may not have special status under any other category or pilot program under 37 CFR 1.102 (for example, if the application has been granted special status for age of inventor, it is not eligible for participation in this pilot).

C. Claim Requirements

The application must meet the following claim requirements for a petition to make special under this program to be granted, and for the remainder of prosecution (that is, until abandonment or issuance as a patent):

1. There are no more than three independent claims.

2. There are no more than 20 claims total, and

3. There are no multiple dependent claims.

An applicant may file a petition to make special under this program in a previously filed application, if an Office action has not yet been issued in that application. In this situation, if the claims do not already conform to the program requirements, the applicant should file a preliminary amendment in compliance with 37 CFR 1.121 canceling any excess claims and any multiple dependent claims. This should be done no later than the date the petition to make special is filed. Applicants may choose to wait to file their petition to make special under this program until after the claims have been amended to conform with the program requirements, but the petition must nevertheless be filed prior to a first Office action as detailed in Part I(E) of this notice. Therefore, the petition should be filed as soon as the application conforms with the program requirements.

D. Must File Specific PTO Form Electronically To Participate

To participate in this program, an applicant must file a petition to make special using form PTO/SB/464, titled ''Certification and Petition for the First-Time Filer Expedited Examination Pilot Program'' (available at *https://www.uspto.gov/PatentForms*). The PTO/SB/464 form contains all required certifications detailed in Part (I)(A) of this notice. The form must be filed electronically via Patent Center. Modified versions of form PTO/SB/464 will not be accepted. If the petition is not properly signed, it will be dismissed. *See* 37 CFR 1.33(b) for signature requirements. If there are multiple joint inventors filing the application as the applicant (that is, the applicant consists of joint inventor-applicants), either a single copy of the form must be signed by a patent practitioner or each joint inventor-applicant must sign a separate copy of the form. Multiple forms must be submitted if more than one signature is required.

Under 5 CFR 1320.3(h), form PTO/SB/464 does not collect ''information'' within the meaning of the Paperwork Reduction Act of 1995.

E. Time for Filing the Petition To Make Special

The Certification and Petition for the First-Time Filer Expedited Examination Pilot Program (that is, form PTO/SB/464) must be filed before a first Office action (including an action containing only a restriction requirement) is issued in the application.

Part II. Procedures After the Petition To Make Special Is Filed

A. Petition Decision

The USPTO Office of Petitions will review and decide petitions to make special under this program after the corresponding application has undergone initial pre-examination processing. Petition review will not be delayed or held back in view of outstanding notices to file missing items. If the application does not meet all requirements noted in Part I at the time the petition is reviewed, the petition will be dismissed. The petition decision will identify the specific deficiencies for which the petition is being dismissed. In the event of a dismissal, applicant may be able to correct certain deficiencies and file a new petition to make special under this program, as detailed in Part II(A)(i).

i. Correctable Deficiencies

If the USPTO determines that a petition to make special under this program does not comply with the requirements set forth in Part I of this notice, the USPTO will dismiss the petition. If each identified deficiency is correctable, the applicant will be given a single opportunity to correct each identified deficiency and file a new petition to participate in the pilot program. This means that the applicant must file a reply via Patent Center that includes appropriate corrections and a new, properly signed petition form PTO/SB/464 within two months of the mailing notification date of the deficiency notice. This two-month time period for replying is not extendable under 37 CFR 1.136(a). Deficiencies for which applicants may be given one opportunity to correct include:

- Not using form PTO/SB/464
- Not filing the petition via Patent Center
- Not signing the petition according to 37 CFR 1.33(b)
- Filing more than 20 claims total
- Filing more than three independent claims
- Filing any multiple dependent claims
- Not properly establishing micro entity status using form PTO/SB/15A

If the applicant fails to submit a paper correcting the deficiencies identified in the petition decision, accompanied by a properly signed petition form within the two-month reply period, there will be no further opportunity for applicant to petition to make special under this program; the application will instead be examined in regular turn.

ii. Non-Correctable Deficiencies

The petition will be dismissed without any opportunity for correction if any of the following deficiencies exist:

- The initial petition was not filed before a first Office action was issued in the application.

• The inventor or, where there are joint inventors, at least one joint inventor has been named as the sole inventor or a joint inventor on a previously filed nonprovisional application.
• The application was not filed electronically using Patent Center.
• The specification, claim(s), and abstract on filing were not submitted in DOCX format.
• The application does any of the following:
○ Claims the benefit of the filing date of one or more prior filed applications that are nonprovisional applications and/or international applications designating the United States,
○ Claims a right to priority to one or more foreign applications, and
○ Is entering the national stage under the Patent Cooperation Treaty (PCT) as set forth in 35 U.S.C. 371.
• The application was not complete under 37 CFR 1.51(b) as of the filing of the petition to make special under this program.
• The application was previously granted special status.

iii. Special Status After the Petition Is Granted

If a petition to make an application special under this program is granted, the application will be accorded special status and placed on an examiner's special docket until the first Office action (including an action that contains only a restriction requirement). After the examiner issues the first Office action, special status for the application will conclude under this program, and any subsequent reply filed by the applicant will place the application on the examiner's regular amended docket.

Amendments that do not meet the claim requirements of Part (I)(C) of this notice will be considered non-responsive, as further detailed in Part (II)(C) of this notice.

B. Adding Joint Inventors After a Petition Has Been Granted

If any joint inventor is added to the application after a petition has been granted under this program, the applicant must certify (for example, on a separate letter) that the added joint inventor(s) meet the criteria in Part (I)(A).

C. Claim Amendments During Prosecution

A reply to an Office action must be fully responsive to the rejections, objections, and requirements made by the examiner. A reply may include amendments to the claims. If an applicant amends the claims during prosecution such that the amended claims do not conform to the claim requirements in Part (I)(C) of this notice, the amendment may be treated by the examiner as nonresponsive.

In this situation, if the amendment was a *bona fide* reply, the examiner may notify the applicant of the initial deficiency by issuing a notice of nonresponsive amendment, which will have a shortened statutory period for reply of two months. Any subsequent nonresponsive amendment filed by the applicant will typically be treated as non-*bona fide,* and the time period set in the initial notice of nonresponsive amendment will continue to run.

For example, if the applicant responds to the first Office action by filing an amendment with four independent claims, 21 total claims, no multiple dependent claims, and the appropriate excess claim fees under 37 CFR 1.16(h) and (i), the examiner may send a notice of nonresponsive amendment identifying two deficiencies in the amendment: more than three independent claims and more than 20 claims total. The examiner's notice will have a shortened statutory period for reply of two months, extendable under 37 CFR 1.136(a), but not extendable beyond the maximum time period of six months set by statute. *See* 35 U.S.C. 133. If the applicant responds to the examiner's notice by timely filing an appropriate amendment that cancels one of the independent claims such that there are now three independent claims, 20 claims total, and no multiple dependent claims, the amendment will conform to all requirements of Part (I)(C) and the deficiencies identified in the original notice of nonresponsive amendment will be considered corrected.

However, if the applicant timely responds to the examiner's notice with an amendment that only cancels one of the dependent claims (that is, there are now four independent claims, 20 claims total, and no multiple dependent claims), this reply may be treated as non-*bona fide* because there are still more than three independent claims. In this situation, the time period for filing a responsive reply (that is, an amendment conforming to all requirements of Part (I)(C)) will continue to run from the date of the examiner's initial notice of nonresponsive amendment. If there is sufficient time remaining for the applicant's reply to be filed within the time period set forth in the initial notice of nonresponsive amendment (or within any extension of time pursuant to 37 CFR 1.136(a)), the examiner will notify the applicant of the deficiency by issuing another notice of nonresponsive amendment without setting a new time period for reply. If the applicant does not file a responsive reply within the remaining time period for reply (or within any extension of time pursuant to 37 CFR 1.136(a)), the application will be abandoned.

D. Extensions of Time Permitted for Replies to Office Actions

Extensions of time under 37 CFR 1.136(a) are permitted for replies to Office actions, but are not extendable beyond the maximum time period of six months set by statute. *See* 35 U.S.C. 133.

Note that responses to notices of defective petitions are not eligible for extensions of time, as detailed under Part (II)(A)(i) of this notice. The availability of extensions of time during pre-examination and appeal are not impacted by this program.

E. Additional Support

The USPTO provides additional support and resources for inventors and entrepreneurs at *https://www.uspto.gov/CES.*

F. Withdrawal From the Program

There is no provision for withdrawal from this program. An applicant may abandon the application granted special status under the program in favor of a continuing application. However, any continuing application would not be eligible for special status under this program, for the reasons detailed in Part I of this notice. Requests for deferred examination under 37 CFR 1.103(d) are considered to be requests for withdrawal from the program and will not be granted.

Part III. Voluntary Demographic Survey

The USPTO currently intends to survey pilot program participants to collect limited inventor demographic information. Participation in the survey would be strictly voluntary, and the information collected would only be used for USPTO process improvement purposes. Survey responses would not impact pilot program eligibility for applicants, would not be part of the application file or otherwise accessible by examiners, and would not impact examination decisions in pilot program participants' applications. The USPTO would notify the public before implementing any such survey.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–04695 Filed 3–8–23; 8:45 am]

BILLING CODE 3510–16–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2023–0019]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau or CFPB) is requesting the extension of the Office of Management and Budget's (OMB's) approval for an existing information collection titled ''Consumer Response Company Response Survey'' approved under OMB Control Number 3170–0069.

DATES: Written comments are encouraged and must be received on or before May 8, 2023 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2023–0019 in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Anthony May, PRA Officer, at (202) 841–0544, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Consumer Response Company Response Survey.

OMB Control Number: 3170–0069.

Type of Review: Extension without change of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 66,700.

Estimated Total Annual Burden Hours: 4,669.

Abstract: The Bureau will use this information collection to garner consumer feedback through an optional survey at the end of the consumer complaint process. Through the existing survey, consumers have the option to provide feedback on the company's response to and handling of their complaint. The results of this feedback are shared with the company that responded to the complaint to inform its complaint handling. The Bureau also uses this feedback as one of several inputs to inform its work to assess the accuracy, completeness, and timeliness of company responses to consumer complaints.

This information collection asks three questions about the company's response to and handling of any complaint and requires a narrative description in support of any provided answers. Positive feedback about the company's handling of the consumer's complaint would be reflected by affirmative answers to each question and by the narrative in support of each answer. The Company Response Survey allows consumers to offer both positive and negative feedback on their complaint experience.

Request for Comments: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB's approval. All comments will become a matter of public record.

Anthony May,

Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.

[FR Doc. 2023–04796 Filed 3–8–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Inland Waterways Users Board Meeting Notice

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of open Federal Advisory Committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the Federal Advisory Committee meeting of the U.S. Army Corps of Engineers, Inland Waterways Users Board (Board). This meeting is open to the public. For additional information about the Board, please visit the committee's website at *https://www.iwr.usace.army.mil/Missions/Navigation/Inland-Waterways-Users-Board/.*

DATES: The Army Corps of Engineers, Inland Waterways Users Board will conduct a meeting from 9 a.m. to 2:30 p.m. EST on April 13, 2023.

ADDRESSES: The Inland Waterways Users Board meeting will be conducted at the Senator John Heinz History Center, 1212 Smallman Street, Pittsburgh, Pennsylvania 15222, 412–454–6000. The online virtual portion of the Inland Waterways Users Board meeting can be accessed at *https://usace1.webex.com/meet/ndc.nav,* Public Call-in: USA Toll-Free 844–800–2712, USA Caller Paid/International Toll: 1–669–234–1177 Access Code: 199 117 3596, Security Code 1234.

FOR FURTHER INFORMATION CONTACT: Mr. Mark R. Pointon, the Designated Federal Officer (DFO) for the committee, in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–GN, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–428–6438; and by email at *Mark.Pointon@usace.army.mil.* Alternatively, contact Mr. Steven D. Riley, an Alternate Designated Federal Officer (ADFO), in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–NDC, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–659–3097; and by email at *Steven.D.Riley@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This committee meeting is being held under the provisions of Chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), section 552b 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 title 41, Code of Federal Regulations (CFR).

Purpose of the Meeting: The Board is chartered to provide independent advice and recommendations to the Secretary of the Army on construction and rehabilitation project investments on the commercial navigation features of the inland waterways system of the United States. At this meeting, the Board will receive briefings and presentations regarding the investments, projects, and status of the inland waterways system of the United States and conduct discussions and deliberations on those matters. The Board is interested in written and verbal comments from the public relevant to these purposes.

Agenda: At this meeting the agenda will include the status of the Inland Waterways Trust Fund (IWTF) and review of reported IWTF revenues, transfers and balances; Fiscal Year (FY) 2023 Work Plan funding for Navigation, and status of the FY 2024 Budget; update of Remote Lock Operations; follow up of Low Water on the waterways; updates of inland waterways projects for the Upper Ohio River Navigation (Montgomery Lock), Mississippi River-Illinois Waterway Navigation and Ecosystem Sustainability Program (NESP), McClellan-Kerr Arkansas River Navigation System (MKARNS) Three Rivers, Arkansas, and 12-foot Channel Deepening Project, status of the ongoing construction activities for the Monongahela River Locks and Dams 2, 3, and 4, Chickamauga Lock and the Kentucky Lock projects.

Availability of Materials for the Meeting. A copy of the agenda or any updates to the agenda for the April 13, 2023, meeting will be available. The final version will be available at the meeting. All materials will be posted to the website for the meeting.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.1 65, and subject to the availability of space, this meeting is open to the public. Registration of members of the public who wish to participate in the meeting will begin at 8:30 a.m. on the day of the meeting. Participation is on a first-to-arrive basis. Any interested person may participate in the meeting, file written comments or statements with the committee, or make verbal comments during the public meeting, at the times, and in the manner, permitted by the committee, as set forth below.

Special Accommodations: Individuals requiring any special accommodations related to the public meeting or seeking additional information about the procedures, should contact Mr. Mark Pointon, the committee DFO, or Mr. Steven Riley, an ADFO, at the email addresses or telephone numbers listed in the **FOR FURTHER INFORMATION CONTACT** section, at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the Board about its mission and/or the topics to be addressed in this public meeting. Written comments or statements should be submitted to Mr. Pointon, the committee DFO, or Mr. Riley, a committee ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section in the following formats: Adobe Acrobat or Microsoft Word. The comment or statement must include the author's name, title, affiliation, address, and daytime telephone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the committee DFO or ADFO at least five (5) business days prior to the meeting so that they may be made available to the Board for its consideration prior to the meeting. Written comments or statements received after this date may not be provided to the Board until its next meeting. Please note that because the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection.

Verbal Comments: Members of the public will be permitted to make verbal comments during the public meeting only at the time and in the manner allowed herein. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three business (3) days in advance to the committee DFO or ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section. The committee DFO and ADFO will log each request to make a comment, in the order received, and determine whether the subject matter of each comment is relevant to the Board's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three (3) minutes during this period, and will be invited to speak in the order in which their requests were received by the DFO and ADFO.

Thomas P. Smith,

Chief, Operations and Regulatory Division, Directorate of Civil Works, U.S. Army Corp of Engineers.

[FR Doc. 2023–04790 Filed 3–8–23; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Navy

Board of Visitors, Marine Corps University; Notice of Federal Advisory Committee Meeting

AGENCY: Department of the Navy (DoN), 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 Board of Visitors, Marine Corps University (''the Board'') will take place.

DATES: The meeting is open to the public and will be held on Monday, March 20, 2023 from 9:30 a.m. to 4:30 p.m., and Tuesday, March 21, 2023 from 9:30 a.m. to 2:30 p.m. Eastern Time Zone.

ADDRESSES: The meeting will be held at Marine Corps National Museum of the Marine Corps, Marine Corps Heritage Foundation Conference Room in Triangle, Virginia. The address is: 1775 Semper Fidelis Way, Triangle, VA 22172.

FOR FURTHER INFORMATION CONTACT: Dr. Kim Florich, Director of Faculty Development and Outreach, Marine Corps University Board of Visitors, 2076 South Street, Quantico, Virginia 22134, telephone number 703–432–4682 or email *kimberly.florich@usmcu.edu.*

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 United States Code (U.S.C.), Appendix, as amended), the Government in the Sunshine Act (5 U.S.C. 552b, as amended), and the General Services Administration's Federal Advisory Committee Management Final Rule (41 Code of Federal Regulations (CFR) Part 102–3).

Due to circumstances beyond the control of the Designated Federal Officer, the Board of Visitors, Marine Corps University was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its March 20, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of the Meeting: The mission of the Board is to meet all requirements of appropriate regional accrediting associations as well as provide the Secretary of Defense and the Secretary of the Navy independent advice and recommendations on matters pertaining to the U.S. Marine Corps professional military education programs; all aspects of the academic and administrative policies of the Marine Corps University (MCU); and higher educational standards and cost effective operations of the MCU. The Board reviews, develops, and provides recommendations on all aspects of the academic and administrative policies of the University; examines all aspects of professional military education operations; and provides such oversight and advice, as is necessary, to facilitate high educational standards and cost effective operations. The Board focuses primarily on the internal procedures of the Marine Corps University.

Agenda: The Board meeting will begin March 20, 2023 at 9:30 a.m., Eastern Time, with opening remarks by Dr. Rebecca Johnson, the Designated Federal Officer. The meeting will continue on March 21, 2023 beginning at 9:30 a.m. and ending at 2:30 p.m., Eastern Time. The Board will receive remarks from the Board Chair. The full schedule is as follows. Meeting Agenda with exact times to accompany this Notice.

March 20, 2023

- Admin Items/Photos: Travel claims/DTS/ITAs/Photos MCU Administrative Services/Academic Affairs Support
- Call to Order

Dr. Rebecca Johnson, Provost and Designated Federal Officer (DFO)
Dr. Jim Henderson, BOV Chair
BGen Maura Hennigan, President MCU

- Institutional and Programmatic Accreditation

Mr. Richard Jaques, Director, Academic Support Division/Deputy Vice President for Academic Affairs and Ms. Kate Kuehn, IRAP Director

- BREAK/Complete Photos/Giftshop
- MCU Budget Review Ms. Stacy Patzman, Comptroller
- No Host Lunch in Tun Tavern
- MCU Talent Mgt/Staffing Requirements (BOV Recommendation)

Mr. Keil Gentry, Vice-President Business Affairs

- Tour of NMMC Mr. Keil Gentry, VP Business Affairs
- Return to Meeting Room/Adjourn for the Day March 21, 2023
- Call to Order: Dr. Rebecca Johnson, Provost and DFO Dr. Jim Henderson, BOV Chair
- Update on Senior Enlisted Education: SgtMaj Clifford ''Wayne'' Wiggins, Director, College of Enlisted Military Education
- BREAK
- Naval Education Updates: Dr. Rebecca Johnson, Provost and DFO
- Lunch
- Futures Working Group Update: Dr. Kerry Fosher, Director Research, and Mr. Rob Peterson, Deputy VPOP
- Marine Corps University Foundation Overview Mr. Jon Sachrison/MCUF Chief Operating Officer
- BOV Recommendations and Fall 2023 Meeting Discussion
- Meeting Adjourned: Dr. Rebecca Johnson, Provost and DFO

If time permits, the Chair may receive comments from the public. The meeting will conclude with closing remarks by the Board Chair and Designated Federal Officer.

Meeting Accessibility: Pursuant to the FACA and 41 CFR 102–3.140, the meeting on Monday, March 20, 2023 and Tuesday, March 21, 2023 Eastern Time is open to the public via this Google Meet link: *meet.google.com/odh-iiui-uyu.*

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the FACA, the public or interested organizations may submit written comments or statements to the Board in response to the stated agenda of the meeting or in regard to the Board's mission in general. Written comments or statements should be submitted to Dr. Kim Florich, the Designated Federal Officer, via electronic mail (the preferred mode of submission) at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. The Designated Federal Officer must receive written comments or statements being submitted in response to the agenda set forth in this notice by March 14, 2023 to be considered by the Board. The Designated Federal Officer will review all timely submitted written comments or statements with the Board Chair, and ensure the comments are provided to all members of the Board before the meeting. Written comments or statements received after this date may not be provided to the Board until its next scheduled meeting. Pursuant to 41 CFR 102–3.140d, the Board is not obligated to allow any member of the public to speak or otherwise address the Board during the meeting. Members of the public will be permitted to make verbal comments during the meeting only at the time and in the manner described below. If a member of the public is interested in making a verbal comment at the meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three (3) business days in advance to the Designated Federal Officer, via electronic mail (the preferred mode of submission) at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section. The Designated Federal Officer will log each request, in the order received, and in consultation with the Board Chair determine whether the subject matter of each comment is relevant to the Board's mission and/or the topics to be addressed in the public meeting. Members of the public who have requested to make a comment and whose comments have been deemed relevant under the process described above will be invited to speak in the order in which the Designated Federal Officer received their requests. The Board Chair may allot a specific amount of time for comments. Please note that all submitted comments and statements will be treated as public documents and will be made available for public inspection.

Dated: March 3, 2023.

A.R. Holt,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2023–04789 Filed 3–8–23; 8:45 am]

BILLING CODE 3810–FF–P

ELECTION ASSISTANCE COMMISSION

Voluntary Voting System Guidelines; Request for Comments

AGENCY: United States Election Assistance Commission.

ACTION: Notice; request for public comment.

SUMMARY: The U.S. Election Assistance Commission (EAC) is seeking public comments as a key component of its annual review of the Voluntary Voting

System Guidelines (VVSG). The public comment period will last for 90 days. This will allow all stakeholders to provide comments concerning the current iteration of the VVSG, presently version 2.0, to the EAC. These public comments will be posted on the EAC website. Substantive comments will be reviewed and considered for inclusion in an annual report detailing proposed changes to the VVSG 2.0. This process is defined in detail in the EAC's VVSG Lifecycle policy: *https://www.eac.gov/sites/default/files/TestingCertification/VVSG_Lifecycle_Policy_9_22.pdf.*

DATES: Comments must be received on or before 5 p.m. EST on June 7, 2023.

ADDRESSES:

Submission of Comments: Comments on updates to VVSG 2.0 should be submitted electronically via *https://www.regulations.gov* (docket ID: EAC–2023–0001). Written comments on the proposed information collection can also be sent to the U.S. Election Assistance Commission, 633 3rd Street NW, Suite 200, Washington, DC 20001, Attn: Testing & Certification.

Obtaining a copy of VVSG 2.0: To obtain a copy of the VVSG 2.0 Requirements (1) Download a copy at *https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf;* or (2) write to the EAC (including your address and phone number) at U.S. Election Assistance Commission, 633 3rd Street NW, Suite 200, Washington, DC 20001, Attn: Testing & Certification.

FOR FURTHER INFORMATION CONTACT: Paul Aumayr, phone (301) 960–1216, email: *paumayr@eac.gov;* U.S. Election Assistance Commission, 633 3rd Street NW, Suite 200, Washington, DC 20001.

SUPPLEMENTARY INFORMATION: OMB Number pending.

On April 5th, 2022, the EAC Commissioners unanimously voted to adopt the VVSG Lifecycle Policy. The policy creates a transparent and predictable path for future updates to the VVSG. This was a significant step in the development of future versions of VVSG and will let the standards evolve with the needs of election officials and evolving voting system technology. The VVSG Lifecycle Policy outlines the process for an annual review of the VVSG standards. The annual reviews will provide the basis for changes to the requirements as well as when it is necessary to draft a new VVSG.

The EAC Testing and Certification Program Director will provide an annual report to the Executive Director at the end of the fiscal year detailing proposed changes to the VVSG that have been collected over the prior fiscal year from various stakeholders and via public comment. This report will be shared with the EAC Technical Guidelines Development Committee, the EAC Standards Board, and the EAC Board of Advisors.

Camden Kelliher,

Associate Counsel, U.S. Election Assistance Commission.

[FR Doc. 2023–04783 Filed 3–8–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas & Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–556–000.
Applicants: Empire Pipeline, Inc.
Description: § 4(d) Rate Filing: Fuel Tracker (Empire Tracking Supply Storage 2023) to be effective 4/1/2023.
Filed Date: 3/2/23.
Accession Number: 20230302–5138.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: RP23–557–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20230302 Negotiated Rate to be effective 3/3/2023.
Filed Date: 3/2/23.
Accession Number: 20230302–5171.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: RP23–560–000.
Applicants: Adelphia Gateway, LLC.
Description: Compliance filing: Adelphia Operational Purchase and Sales Report March 2023 to be effective N/A.
Filed Date: 3/3/23.
Accession Number: 20230303–5059.
Comment Date: 5 p.m. ET 3/15/23.

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.

Filings in Existing Proceedings

Docket Numbers: RP23–377–002.
Applicants: WBI Energy Transmission, Inc.
Description: Compliance filing: 2023 Rate Case—Compliance Filing Native File Format 2 to be effective N/A.
Filed Date: 3/3/23.
Accession Number: 20230303–5077.
Comment Date: 5 p.m. ET 3/15/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at:*http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 3, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04852 Filed 3–8–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator and Foreign Utility Company Status

	Docket Nos.
Moss Landing Energy Storage 3, LLC	EG23–29–000
Chesapeake Solar Project, LLC	EG23–30–000
East Point Energy Center, LLC	EG23–31–000
Diversion Wind Energy Holdings LLC	EG23–32–000
Wagon Wheel Wind Project Holdings LLC	EG23–33–000
Wagon Wheel Wind Project, LLC	EG23–34–000
Diversion Wind Energy LLC	EG23–35–000

	Docket Nos.
Paris Farm Solar, LLC	EG23–36–000
Waco Solar, LLC	EG23–37–000
Rodeo Ranch Energy Storage, LLC	EG23–38–000
Hecate Energy Albany 2 LLC	EG23–39–000
Hecate Energy Albany 1 LLC	EG23–40–000
GRP TE Lessee, LLC	EG23–41–000
Kapolei Energy Storage I, LLC	EG23–42–000
Remy Jade Generating, LLC	EG23–43–000
PGR 2022 Lessee 2, LLC	EG23–44–000
Cathcart Solar, LLC	EG23–45–000
Fresh Air Energy XXXVII, LLC	EG23–46–000
Thigpen Farms Solar, LLC	EG23–47–000
Fresh Air Energy XXIII, LLC	EG23–48–000
Diablo Winds, LLC	EG23–49–000
Carson Hybrid Energy Center LLC	EG23–50–000
Enery Holdings LLC	EG23–51–000
Gambit Energy Storage LLC	EG23–52–000
Parc du Banc de Guérande SAS	FC23–2–000

Take notice that during the month of February 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: March 3, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04857 Filed 3–8–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–483–002.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment of Amended ISA, SA No. 5071; Queue No. AB1–132 in Docket No. ER23–483 to be effective 1/22/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5095.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–784–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment to ISA, Service Agreement No. 4225; Queue AF2–103 in ER23–784 to be effective 3/10/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5106.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1228–000.

Applicants: Entergy Services, LLC, Entergy Arkansas, LLC.

Description: § 205(d) Rate Filing: Entergy Services, LLC submits tariff filing per 35.13(a)(2)(iii: MSS–4 Replacement Tariff to be effective 5/1/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5001.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1229–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3923R2 Seven Cowboy Wind Project GIA to be effective 2/28/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5005.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1230–000.

Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Mid-Atlantic Interstate Transmission, LLC submits tariff filing per 35.13(a)(2)(iii: MAIT submits one Engineering and Construction Agreement, SA No. 6634 to be effective 5/3/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5030.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1231–000.

Applicants: ITC Midwest LLC, Interstate Power and Light Company.

Description: § 205(d) Rate Filing: ITC Midwest LLC submits tariff filing per 35.13(a)(2)(iii: Update to O&T Agreement Exhibits and Appendices (2023) to be effective 5/4/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5041.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1232–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 3464; Non-Queue NQ75 to be effective 5/2/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5063.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1233–000.

Applicants: ITC Midwest LLC.

Description: § 205(d) Rate Filing: Concurrence IPL Amended Exhibits and Attachments (2023) to be effective 5/4/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5065.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1234–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA, Service Agreement No. 6800; Queue No. AF2–325 to be effective 2/1/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5114.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1235–000.

Applicants: Clearwater Energy Resources LLC.

Description: § 205(d) Rate Filing: Clearwater Energy Resources LLC-Shared Interconnection Rights Agreement to be effective 12/22/2022.

Filed Date: 3/3/23.

Accession Number: 20230303–5119.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1236–000.

Applicants: SR McNeal, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 3/4/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5122.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1237–000.

Applicants: SR Snipesville III, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 3/4/2023.

Filed Date: 3/3/23.

Accession Number: 20230303–5127.

Comment Date: 5 p.m. ET 3/24/23.

Docket Numbers: ER23–1238–000.
Applicants: ORNI 36 LLC.
Description: Baseline eTariff Filing: Petition for Approval of Initial Market-Based Rate Tariff to be effective 3/4/2023.
Filed Date: 3/3/23.
Accession Number: 20230303–5153.
Comment Date: 5 p.m. ET 3/24/23.
Docket Numbers: ER23–1239–000.
Applicants: USG Nevada LLC.
Description: Baseline eTariff Filing: Petition for Approval of Initial Market-Based Rate Tariff to be effective 3/4/2023.
Filed Date: 3/3/23.
Accession Number: 20230303–5155.
Comment Date: 5 p.m. ET 3/24/23.
Docket Numbers: ER23–1240–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 5680; Queue No. AC1–120/AC1–121 (amend) to be effective 5/3/2023.
Filed Date: 3/3/23.
Accession Number: 20230303–5173.
Comment Date: 5 p.m. ET 3/24/23.
Docket Numbers: ER23–1241–000.
Applicants: IP Oberon, LLC.
Description: Baseline eTariff Filing: Application for Market Based Rate Authority to be effective 5/3/2023.
Filed Date: 3/3/23.
Accession Number: 20230303–5186.
Comment Date: 5 p.m. ET 3/24/23.
Docket Numbers: ER23–1242–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–03–03_SA 2838 METC–AEP IA Certificate of Concurrence to be effective 12/21/2019.
Filed Date: 3/3/23.
Accession Number: 20230303–5188.
Comment Date: 5 p.m. ET 3/24/23.
Docket Numbers: ER23–1243–000.
Applicants: Public Service Company of Colorado.
Description: Tariff Amendment: 2023–3–3 PSCoES PLGIA 658–PSCo NOC to be effective 2/8/2023.
Filed Date: 3/3/23.
Accession Number: 20230303–5193.
Comment Date: 5 p.m. ET 3/24/23.
Docket Numbers: ER23–1244–000.
Applicants: Public Service Company of Colorado.
Description: Tariff Amendment: 2023–3–3 PSCoES PLGIA 657–PSCo NOC to be effective 2/8/2023.
Filed Date: 3/3/23.
Accession Number: 20230303–5200.
Comment Date: 5 p.m. ET 3/24/23.

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: March 3, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04850 Filed 3–8–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1220–000]

High Point Solar LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of High Point Solar LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 23, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://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. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: March 3, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04855 Filed 3–8–23; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments 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 April 7, 2023.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *HNB Bancorp, Inc., Hannibal, Missouri, a subsidiary of the The R. Dean Phillips Bank Trust, Las Vegas, Nevada;* to merge with Northeast Missouri Bancshares, Inc., and thereby indirectly acquire The Mercantile Bank of Louisiana, Missouri, both of Louisiana, Missouri. This notice replaces and supersedes FR Doc 2023–03754 published on 02–23–2023.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04781 Filed 3–8–23; 8:45 am]

BILLING CODE 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 23, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Jeffrey V. Hammes, Bourbonnais, Illinois;* to acquire voting shares of Romy Hammes, Inc., and thereby indirectly acquire voting shares of Peoples Bank Kankakee City, both of Bourbonnais, Illinois.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04779 Filed 3–8–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Genitourinary Syndrome of Menopause

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for supplemental evidence and data submissions.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Genitourinary Syndrome of Menopause,* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: *Submission Deadline* on or before April 10, 2023.

ADDRESSES:

Email submissions: epc@ahrq.hhs.gov.

Print submissions:

Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857

Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857

FOR FURTHER INFORMATION CONTACT: Jenae Benns, Telephone: 301–427–1496 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *Genitourinary Syndrome of Menopause.* AHRQ is conducting this systematic review pursuant to Section 902 of the Public Health Service Act, 42 U.S.C. 299a.

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on Genitourinary Syndrome of Menopause, including those that describe adverse events. The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/genitourinary-syndrome/protocol.*

This is to notify the public that the EPC Program would find the following information on Genitourinary Syndrome of Menopause helpful:

- A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*
- *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements: study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.

■ *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the ClinicalTrials.gov trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.

■ Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

Key Questions (KQ)

KQ 1: What is the effectiveness and harms of screening strategies to identify GSM in postmenopausal women? Does screening impact patient reported symptoms or improve quality of life?

KQ 2: What is the effectiveness and comparative effectiveness of hormonal, non-hormonal, and energy-based interventions when used alone or in combination for treatment of GSM symptoms? Which treatments show improvement for which symptoms?

KQ 3: What are the harms (and comparative harms) of hormonal, non-hormonal, and energy-based interventions for GSM symptoms?

KQ 4: What is the appropriate follow-up interval to assess improvement, sustained improvement, or regression of symptoms of GSM in women treated with hormonal, non-hormonal, and energy-based interventions?

KQ 5: What is the effectiveness, comparative effectiveness, and harms of endometrial surveillance among women who have a uterus and are using hormonal therapy for GSM?

POPULATION, INTERVENTION, COMPARATOR, OUTCOME, TIMING, SETTING/STUDY DESIGN (PICOTS)

	Inclusion	Exclusion
Population:		
KQ1:	Postmenopausal women.	
KQ2–4:	Postmenopausal women, premenopausal women in hypoestrogenic state, or gender diverse individuals on hormonal therapy, with one or more symptom of GSM.	Individuals with genitourinary symptoms for reasons other than GSM.
KQ5:	Patients with a uterus using hormonal therapy primarily for GSM symptoms	Patients using hormonal therapy for reasons other than GSM.
Interventions:		
KQ1:	Screening evaluations and/or questionnaires	Physical exam.
KQ2–4:	*Hormonal Interventions:* Systemic estrogen for GSM, vaginal estrogen therapy, including vaginal cream, tablets, inserts or ring, selective estrogen receptor modulator (SERM), intravaginal dehydroepiandrosterone (DHEA), vaginal testosterone, compounded and bioidentical hormonal therapies; phytoestrogens.	Menopausal hormone therapy only for reasons other than GSM.
	Energy-based interventions: CO_2 laser, Erbium: YAG, radio-frequency laser	Laser therapy for anatomic areas other than the vagina.
	Non-hormonal interventions: Over-the-counter non-hormone vaginal lubricants and moisturizers, hyaluronic acid, herbal therapies/supplemental alternatives, vitamin D, vitamin E, probiotics, oxytocin vaginal gel, pelvic floor physical therapy to treat vaginal or sexual symptoms of GSM.	Pelvic floor physical therapy for urinary incontinence.
	For KQ4. Assess different durations of follow-up.	
KQ5:	Endometrial surveillance with ultrasound or biopsy.	
Comparison:		
KQ1:	Usual care.	
KQ2–4:	*Effectiveness:* Placebo, inactive control, sham.	
	Comparative Effectiveness: Another hormonal, non-hormonal, or energy-based intervention.	
	For KQ4. Assess different durations of follow up.	
KQ5:	Usual care, or different type or level of surveillance.	
Outcomes:		
KQ1:	Diagnosis of GSM, potential harms: misdiagnosis as another condition with similar presentation such as inflammatory dermatologic conditions, malignancy, infections, or presence of symptoms prior to menopause. Progressing to unnecessary diagnostics for the index patient such as vaginal or endometrial biopsy.	
KQ 1, 2&4	Change in symptoms:	Serum hormone concentration, Stress incontinence.
	Genitourinary symptoms: urinary frequency, urinary urgency, nocturia, dysuria, recurrent urinary tract infections.	
	Other urinary symptoms (outcomes evaluated for interventions other than PFMT): urinary urge incontinence, overactive bladder.	
	Genital signs and symptoms: urethral caruncle, urethral prolapse, vaginal atrophy or atrophic vaginitis, vaginal dryness, vaginal/vulvar irritation, vaginal soreness, vaginal lubrication, vaginal pain.	
	Sexual symptoms: dyspareunia, orgasmic dysfunction, low libido, decreased arousal, sexual desire, sexual function, bleeding associated with sexual activity.	

POPULATION, INTERVENTION, COMPARATOR, OUTCOME, TIMING, SETTING/STUDY DESIGN (PICOTS)—Continued

	Inclusion	Exclusion
KQ3&5:	*Psychological symptoms:* depression, anxiety, quality of life, partner satisfaction. *Safety outcomes:* breast cancer, breast cancer recurrence or progression, breast tenderness, cardiovascular risk, endometrial cancer (KQ5), post-menopausal bleeding (KQ5), endometrial hyperplasia (KQ5), endometrial thickness (KQ5). *Adverse events:* worsening or onset of urinary, genital, or sexual symptoms: vaginal burning, vaginal bleeding, vaginal discharge, vaginal scarring, vaginal stenosis; pelvic pain; dyspareunia; urethral strictures; meatal stricture/stenosis.. *Systemic adverse events:* chronic pain, stroke; VTE (DVT or PE); death; hot flashes; headache; breast pain; cramps; bloating; nausea; vomiting.	
Timing:		
All KQ	Intervention: any. Outcomes: any.	
Setting:		
All KQ	Any.	
Study design:		
KQ1	RCTs and prospective observational studies with concurrent comparison group and analytic techniques to control for sample selection bias; systematic reviews of these study designs that assessed ROB of included studies using validated tools.	
KQ2	RCTs or systematic review of RCTs that assessed ROB of included studies using validated tools.	
KQ3	RCTs and prospective observational studies with concurrent comparison group and analytic techniques to control for sample selection bias; systematic reviews of these study designs that assessed ROB of included studies using validated tools.	
KQ4	RCTs or systematic review of RCTs that assessed ROB of included studies using validated tools.	
KQ5	RCTs and prospective observational studies with concurrent comparison group and analytic techniques to control for sample selection bias; systematic reviews of these study designs that assessed ROB of included studies using validated tools.	
Language	English only (due to resource limitations).	
Geographic Location.	Any.	
Study size	N = 20 or more participants analyzed per study arm for RCTs.	
Publication date	Any.	

Abbreviations: CO_2 = carbon dioxide; DHEA = dehydroepiandrosterone; DVT = deep venous thromboembolism; GSM = Genitourinary Syndrome of Menopause; KQ = key question; PE = pulmonary embolism; PFMT = pelvic floor muscle training; RCT = randomized controlled trial; SERM = selective estrogen receptor modulator; VTE = venous thromboembolism.

Dated: March 3, 2023.

Marquita Cullom,

Associate Director.

[FR Doc. 2023–04800 Filed 3–8–23; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[Docket No. 0970–0558]

Proposed Information Collection Activity; Generic for Administration for Children and Families Program Monitoring Activities (Office of Management and Budget)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) intends to request from the Office of Management and Budget (OMB) an extension of approval for an umbrella generic clearance for information collections related to ACF program office monitoring activities. ACF programs promote the economic and social well-being of families, children, individuals, and communities. The Generic for ACF Program Monitoring Activities allows ACF program offices to collect standardized information from recipients that receive federal funds to ensure oversight, evaluation, support purposes, and stewardship of federal funds. There are no changes proposed to the terms of the generic. Burden estimates have been updated.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *OPREinfocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: Program monitoring is a post-award process through which ACF assesses a recipient's programmatic performance and business management performance. Monitoring activities are necessary to ensure timely action by ACF to support grantees and protect federal interests. Program offices use information collected under this generic clearance to monitor funding recipient activities and to provide support or take appropriate action, as needed. The information gathered is or will be used primarily for internal purposes, but aggregate data may be included in public materials such as Reports to Congress or program office documents. Following standard OMB requirements, ACF will submit a request for each individual data collection activity under this generic clearance. Each request will include the individual form(s) or instrument(s), a justification specific to the individual information collection, and any supplementary documents. OMB is requested to review requests within 10 days of submission.

Respondents: ACF funding recipients.

Annual Burden Estimates: This request will extend approval of currently approved monitoring forms. Currently approved forms and related burden can be found here: *https://www.reginfo.gov/public/do/PRAICList?ref_nbr=202009-0970-001.*

Burden estimates for the next 3 years have been updated to reflect trends in use over the past 3 years. These are based on averages and actual individual requests will vary based on program office need.

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)
New Program Monitoring Forms	1,600	2.5	10	40,000

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

John M. Sweet, Jr,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–04878 Filed 3–8–23; 8:45 am]

BILLING CODE 4184–79–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; State Plan for Independent Living Instrument and Instructions OMB Control Number 0985–0044

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under section 506(c)(2)(A) of the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the State Plan for Independent Living Instrument and Instructions.

DATES: Submit written comments on the collection of information by April 10, 2023.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Peter Nye, Administration for Community Living, Washington, DC 20201, (202) 795–7606 or *OILPPRAComments@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance. The Administration for Community Living (ACL) is requesting approval to collect data for the State Plan for Independent Living Instrument and Instructions.

Legal authority for the State Plan for Independent Living (SPIL) is contained in chapter 1 of title VII of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act ([the Act], Pub. L. 113–128). Section 704 of the Rehabilitation Act requires that, to be eligible to receive financial assistance under chapter 1, ''a State shall submit to the Department, and obtain approval of, a State plan containing such provisions as the Department may require.'' ACL approval of the SPIL is required for states to receive Federal funding for both the Independent Living Services State grants and Centers for Independent Living (CIL) programs. Federal statute and regulations require the collection of this information every three years. The current three-year approval period for the SPIL expires March 31, 2023. The SPIL Instrument is the template for SPILs; the SPIL Instructions explain the Instrument and give tips about how to draft SPILs.

The Office of Independent Living Programs (OILP) is proposing minor revisions based on OILP and the technical assistance provider revising the Instrument and Instructions to resolve issues that SILCs have reported having with their SPILs, and to increase the Instrument's and Instructions' clarity, conciseness, and precision. For example,

- The revised Instrument and Instructions correct grammatical and punctuation errors.
- The revised Instructions add lines for each core service.
- The revised Instrument and Instructions clarify the definition, and example, of state match.

These updates were recommended by the technical assistance provider and analyzed by all the independent living project officers who work directly with SPILs and the issues that they plan for.

The SPIL is jointly developed by the chairperson of the Statewide Independent Living Council and the directors of the CILs in the state, after receiving public input from individuals throughout the State, and signed by the chairperson of the SILC, acting on behalf of—and at the direction of—the SILC, the director of the designated State entity, and not less than 51 percent of the directors of the CILs in the State. ACL reviews the SPIL for compliance with the Rehabilitation Act and 45 CFR part 1329 and approves the SPIL. The SPIL serves as a primary planning document for continuous monitoring of, and technical assistance to, the state independent living (IL) programs to ensure appropriate planning, financial support and coordination, and other assistance to appropriately address, statewide, needs for the provision of IL services in the state.

The proposed data collection tools may be found on the ACL website for review at *https://www.acl.gov/about-acl/public-input.*

Comments in Response to the 60-Day Federal Register Notice

A notice published in the **Federal Register** 87 FR 72487–72488 on November 25, 2022.

There were 35 received during the 60-day FRN.

ACL's responses to these comments are included below.

Comment from	Section	Public comment	ACL response
Stephanie Jensen	Instructions ..... Definitions	''Equity and Independent Living Philosophy need to be underlined''.	ACL is underlining these terms in the Definitions.
Ann McDaniel	Instructions ..... Definitions	Add the following definition of independent living and delete the note ''Different centers and different cultures may implement independent living and the philosophy differently.'' ''Independent Living means maximizing the ability of people with disabilities to:. • ''Control their own lives; • ''Participate in the community; • ''Live independently (as opposed to in institutions); and • ''Have economic security.''	ACL supports this definition, so ACL is adding it. ACL agrees with NCIL's assessment that ''Independent Living is Independent Living and that too many CILs currently do things that are not consistent with the purpose of Title VII and the IL Philosophy.'' Therefore, ACL is deleting the statement that ''Different centers and different cultures may implement independent living and the philosophy differently.''
Stephanie Jensen	Instructions ..... Definitions	''There needs to be a line space after Pacific Islander and before Nonresidential''.	ACL supports adding a blank line, so ACL is adding a blank line.
Ann McDaniel	Instructions ..... Definitions	Rephrase the ''state match'' definition to refer to the ''Instructions'' as opposed to the ''Narrative''.	ACL is rephrasing in reaction to this comment because the definition means to refer to the Instructions (as opposed to the narrative).
Ann McDaniel	Instructions ..... Definitions	Divide the definition of ''Unserved and underserved groups or populations'' into a definition of ''Unserved'' and a definition of ''Underserved''.	ACL believes this division would be too prescriptive. The regulations require the state IL networks to determine (via the SPILs) what is unserved and what is underserved. This issue will require further discussion with state IL networks; ACL will further discuss this issue with state IL networks sometime in the future.
Sandra Fariña	Instructions ..... Definitions	Provide specific guidance ''as to how the IL Network will determine 'served, unserved, and underserved' populations''.	ACL received several comments asking ACL to define ''unserved'' and ''underserved.'' Instead of adding definitions, ACL is keeping the current definition (which comes from the federal regulations) and is continuing to defer to state IL networks to identify and define unserved and underserved populations. ACL acknowledges that this issue deserves further discussion with the IL community, and ACL will further discuss this issue with the IL community at some later time.
Ann McDaniel	Instructions ..... SPIL Development	Rephrase the public-input requirement to ''States are required to gather public input prior to development of the SPIL and feedback/comment prior to its submission and on any proposed revisions to the approved state plan before drafting.''.	ACL supports this rephrasing because it clarifies that ''submission'' means submission of the SPIL and clarifies what the public input is supposed to be about.
Ann McDaniel	Instructions [no such section exists yet].	Add a SPIL-appeals process (before SPIL submittal).	ACL is concerned about this issue but does not want to require appeals processes or written records of objections. Instead, ACL is adding the following statement to the Instructions Section 9 Signatures. ''If a required signatory objects to the SPIL, then that required signatory needs to tell the program officer before SPIL submission.''
Ann McDaniel	Instructions ..... SPIL Amendments	Formatting of the SPIL Amendments section needs to be consistent.	ACL agrees, so ACL is formatting this section to be consistent.
Mark Leeper	Section 1: Goals, Objectives and Activities.	Specify that the ''goals and objectives should relate to the funding that is available to the IL Network . . . .''.	ACL thinks that adding this text would be superfluous, so ACL is not adding this text.
Mark Leeper	Section 1: Goals, Objectives and Activities.	''In many states, those creating the SPIL have struggled to make these goals and objectives specific to the funding that the SPIL can directly control''; that has caused confusion and conflicts about CILs reporting ''to the DSE and/or SILC on activities that are funded with Part C dollars and that are already being reported in CIL PPRs . . . .''.	The SPIL is supposed to reflect all the funding for IL in the state, including Part B, Part C, and other funds that pertain to the SPIL outcomes. Therefore, ACL is not revising in reaction to this comment.

Comment from	Section	Public comment	ACL response
Mark Leeper	Section 1: Goals, Objectives and Activities.	''SPIL goals and objectives or workplans should focus on funds available to the state through Part B or other sources and avoid redundant and confusing attention to funds already managed through other mechanisms''.	The SPIL is supposed to reflect all the funding for IL in the state, including Part B, Part C, and other funding that supports the goals in the SPIL. Therefore, ACL is not revising in reaction to this comment.
Mark Leeper	Section 1: Goals, Objectives and Activities.	''The SPIL should describe the IL network and offer clear, measurable results of what is done with funding that is available to the network but is not described and monitored by some other process.''.	The SPIL is supposed to reflect all the funding for IL in the state, including Part B, Part C, and other funding that supports the goals in the SPIL. Therefore, ACL is not revising in reaction to this comment.
Ann McDaniel	Instructions 1.4 Evaluation	Add the following immediately after ''Compliance of CILs receiving Part B funds . . .'' ''*The process for that oversight must be negotiated and included in Section 4.5 of the SPIL*.''.	ACL is adding this sentence because ACL often receives questions about this issue.
Ann McDaniel	Instructions 1.5 Financial Plan ...	Clarify that the note refers to deviations from the financial plan ''regarding Chapter 1, Part B funds'' and that ''Deviations of less than 25% may be reported with a technical amendment.''.	ACL is adding these revisions because they clarify what requires a substantial amendment and what does not.
Ann McDaniel	Instructions 1.5 Financial Plan ...	In the 1.5 Financial Plan table, delete the struck-through text in the ''Non-Federal Funds'' cell.	ACL is deleting this struck-through text (because it is unnecessary).
Ann McDaniel	Instructions 1.5 Financial Plan ...	''Instructions for the narrative section should indicate that justification for using more than 30% of the Part B funds for the SILC Resource Plan should be included here.''.	ACL is not including such a statement because that the Instrument and Instructions adequately give that instruction elsewhere.
Stephanie Jensen	Instrument 1.5 Financial Plan.	''separate lines for Part B Match, other match, and State funds will make the math easier because a step is eliminated''.	ACL agrees with this assessment; this assessment does not make any revision necessary.
Stephanie Jensen	Instrument 1.5 Financial Plan.	''it is good that it is clear that the line for Innovation and Expansion Funds . . . cannot be $0.''.	ACL agrees with this assessment; this assessment does not make any revision necessary.
Ann McDaniel	Instructions 2.1 Narrative	In 2.1 Narrative, ''Specify what entities, if any, other than CILs are providing IL services in the state and how the DSE ensures such services are consumer controlled . . .''.	ACL is not adding such a statement because entities other than CILs that provide IL services are not required to be consumer controlled.
Ann McDaniel	Instructions 3.1 Existing Centers	Add ''a method . . . to indicate which counties are . . . served, unserved, and underserved . . .''.	ACL is not adding a method because the state IL network is supposed to determine (according to its standards) which counties are served, unserved, and underserved.
Sandra Fariña	4.1 DSE Responsibilities.	''Require all responsible parties listed within the SPIL to agree to the assigned data collection and defined responsibilities to promote compliance with the ILS PPR.''.	The terms and conditions of grants to CILs require them to submit program performance reports to the SILC. If a state IL network wants and/or needs more assurance of this kind, then that state IL network can impose this kind of assurance. (The SPIL is not supposed to be an assurance document.) Therefore, ACL is not adding something in reaction to this comment.
Stephanie Jensen	Instructions 4.4 Grant Process & Distribution of Funds.	Italicize ''Describe the processes, policies, and procedures . . .'' and the following bullet points.	ACL is italicizing this text.
Stephanie Jensen	Instructions 4.5 Oversight Process for Part B Funds.	''The oversight process for the DSE'' needs to be in the same font size as the rest of the subsection.	ACL is correcting this error.
Stephanie Jensen	Instructions 4.5 Oversight Process for Part B Funds.	The first italicized text needs to be on its own line	ACL is correcting this error.
Stephanie Jensen	Instructions 4.5 Oversight Process for Part B Funds.	''*Other oversight activities*'' needs to be its own bullet point.	ACL is correcting this error.
Cheryl Peabody ...	Instructions 5.2 SILC Resource Plan.	''detailed instructions'' on ''how to acknowledge I&E funds allocations reporting in the [SILC] Resource Plan'' would be helpful.	ACL means to offer more guidance on how to report I&E funds; such guidance would be outside the scope of the SPIL Instrument and Instructions. Therefore, ACL is not adding instructions to the SPIL Instrument and Instructions.
Stephanie Jensen	Instructions 5.2 SILC Resource Plan.	''It is good that there is a place to describe the SILC authorities that the SILC will be engaging in during the SPIL. Section 5.2 seems to be a good place.''.	ACL agrees with this comment and understands that it requires no revision, so ACL is not revising in reaction to this comment.

Comment from	Section	Public comment	ACL response
Ann McDaniel	Instructions 5.2 SILC Resource Plan.	In 5.2 SILC Resource Plan, rephrase the ''Narrative'' instruction to ''Provide a brief description of how the SILC Authorities will be conducted by the SILC during . . .''.	ACL agrees that this rephrasing is more accurate and easier to understand.
Sandra Fariña	5.2 SILC Resource Plan.	''Describe what process(es) will be used to disburse funds for the SILC Resource Plan . . . .''.	Adding such description would be outside the SPIL's proper scope: The DSE and SILC are supposed to choose processes that comply with state policies.
Sandra Fariña	5.2 SILC Resource Plan.	''Provide guidance on acceptable forms of resource development that the SILC may engage in.''.	ACL is adding a statement about this issue and a citation of the regulatory requirement.
Ann McDaniel	Instrument 5.2 SILC Resource Plan.	Add a chart of authorities that Section 705(c)(2) of the Act allows the SILC to elect to engage in.	ACL is not adding such a chart because the information that this chart would request is adequately requested elsewhere in the SPIL.
Ann McDaniel	Instructions 5.3 Maintenance of SILC.	In 5.2 SILC Resource Plan, ''provide a list of the Authorities with space for the SILC to mark which they are electing to conduct . . .''.	ACL agrees that adding this list would be helpful; ACL is adding it as a list as opposed to a chart.
Ann McDaniel	Instructions 9 Signatures.	''[clarify] that a signature space be included for every CIL eligible . . .''.	ACL is adding this clarification because it is helpful.
Sandra Fariña	[none in particular].	''Identify opportunities for the SILC and its IL partners to engage in training and technical assistance . . .''.	ACL requires all IL networks to do training and technical assistance; that is not supposed to be part of the SPIL Instrument and Instructions. Therefore, ACL is not adding something in reaction to this comment.

Estimated Program Burden: ACL estimates the burden of this collection of information as follows: 56 Statewide Independent Living Councils (SILCs) will respond to the requirement for a SPIL every three years. Each state's, outlying area's, or the District of Columbia's SILC will take approximately 60 hours to develop the SPIL for a total of approximately 3,360 hours. This estimate is based on amounts of time SILCs have reported previously spending to complete the SPIL. ACL does not expect the changes to the Instrument and Instructions to take more or less time than the currently approved information collection. Therefore, there is no change to the estimated burden.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Statewide Independent Living Councils	56	1	60	3,360
Total	56	1	60	3,360

Dated: March 3, 2023.

Alison Barkoff,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2023–04802 Filed 3–8–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–0150]

Revocation of Two Authorizations of Emergency Use of In Vitro Diagnostic Devices for Detection and/or Diagnosis of COVID–19; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the revocation of the Emergency Use Authorizations (EUAs) (the Authorizations) issued to Babson Diagnostics, Inc., for the Babson Diagnostics aC19G1, and Twist Bioscience Corporation for the SARS–CoV–2 NGS Assay. FDA revoked these Authorizations under the Federal Food, Drug, and Cosmetic Act (FD&C Act) as requested by each Authorization holder. The revocations, which include an explanation of the reasons for each revocation, are reprinted at the end of this document.

DATES: The Authorization for the Babson Diagnostics aC19G1 is revoked as of February 14, 2023. The Authorization for the SARS–CoV–2 NGS Assay is revoked as of February 14, 2023.

ADDRESSES: Submit written requests for a single copy of the revocations to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a Fax number to which the revocations may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the revocations.

FOR FURTHER INFORMATION CONTACT: Kim Sapsford-Medintz, Office of Product Evaluation and Quality, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 3216, Silver Spring, MD 20993–0002, 301–796–0311 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb–3) as amended by the Project BioShield Act of 2004 (Pub. L. 108–276) and the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (Pub. L. 113–5) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. On June 23, 2020, FDA issued the Authorization to Babson Diagnostics, Inc., for the Babson Diagnostics aC19G1, subject to the terms of the Authorization. Notice of the issuance of this Authorization was published in the **Federal Register** on November 20, 2020 (85 FR 74346), as required by section 564(h)(1) of the FD&C Act. On March 23, 2021, FDA issued the Authorization to Twist Bioscience Corporation for the SARS–CoV–2 NGS Assay, subject to the terms of the Authorization. Notice of the issuance of this Authorization was published in the **Federal Register** on July 23, 2021 (86 FR 39040), as required by section 564(h)(1) of the FD&C Act. Subsequent updates to the Authorizations were made available on FDA's website. The authorization of a device for emergency use under section 564 of the FD&C Act may, pursuant to section 564(g)(2) of the FD&C Act, be revoked when the criteria under section 564(c) of the FD&C Act for issuance of such authorization are no longer met (section 564(g)(2)(B) of the FD&C Act), or other circumstances make such revocation appropriate to protect the public health or safety (section 564(g)(2)(C) of the FD&C Act).

II. Authorization Revocation Requests

In a request received by FDA on February 7, 2023, Babson Diagnostics, Inc., requested the revocation of, and on February 14, 2023, FDA revoked, the Authorization for the Babson Diagnostics aC19G1. Because Babson Diagnostics, Inc., notified FDA that it is no longer offering the Babson Diagnostics aC19G1and requested FDA revoke the Babson Diagnostics aC19G1, FDA has determined that it is appropriate to protect the public health or safety to revoke this Authorization.

In a request received by FDA on January 27, 2023, Twist Bioscience Corporation requested withdrawal of, and on February 14, 2023, FDA revoked, the Authorization for the SARS–CoV–2 NGS Assay. Because Twist Bioscience Corporation notified FDA that it will no longer be using the SARS–CoV–2 NGS Assay and requested FDA withdraw the Authorization for the SARS–CoV–2 NGS Assay, FDA has determined that it is appropriate to protect the public health or safety to revoke this Authorization.

III. Electronic Access

An electronic version of this document and the full text of the revocations are available on the internet at *https://www.regulations.gov/.*

IV. The Revocations

Having concluded that the criteria for revocation of the Authorizations under section 564(g)(2)(C) of the FD&C Act are met, FDA has revoked the EUA of Babson Diagnostics, Inc., for the Babson Diagnostics aC19G1 and of Twist Bioscience Corporation for the SARS–CoV–2 NGS Assay. The revocations in their entirety follow and provide an explanation of the reasons for each revocation, as required by section 564(h)(1) of the FD&C Act.



February 14, 2023

Jane Hughie
Director, QA/RA
Babson Diagnostics
1205 Sheldon Cove, Suite 2-J
Austin, TX 78753

Re: Revocation of EUA200682

Dear Jane Hughie:

This letter is in response to the request from Babson Diagnostics, Inc., received via email on February 7, 2023, that the U.S. Food and Drug Administration (FDA) revoke the EUA for the Babson Diagnostics aC19G1 issued on June 23, 2020, and amended on September 23, 2021. Babson Diagnostics, Inc., indicated that they no longer offer the Babson Diagnostics aC19G1 and requested that the EUA be revoked.

The authorization of a device for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3) may, pursuant to section 564(g)(2) of the Act, be revoked when circumstances make such revocation appropriate to protect the public health or safety (section 564(g)(2)(C) of the Act). Because Babson Diagnostics, Inc. has requested FDA revoke the EUA for the Babson Diagnostics aC19G1, FDA has determined that it is appropriate to protect the public health or safety to revoke this authorization. Accordingly, FDA hereby revokes EUA200682 for the Babson Diagnostics aC19G1, pursuant to section 564(g)(2)(C) of the Act. As of the date of this letter, the Babson Diagnostics aC19G1 is no longer authorized for emergency use by FDA.

Notice of this revocation will be published in the *Federal Register*, pursuant to section 564(h)(1) of the Act.

Sincerely,

/s/

Jeffrey E. Shuren, M.D., J.D.
Director
Center for Devices and Radiological Health
Food and Drug Administration

U.S. FOOD & DRUG ADMINISTRATION

February 14, 2023

Shakil Ahmed
Sr. Director, Regulatory Affairs and Quality Assurance
Twist Bioscience Corporation
681 Gateway Blvd.
South San Francisco, CA 94080

Re: Revocation of EUA202029

Dear Shakil Ahmed:

This letter is in response to the request from Twist Bioscience Corporation, received via email on January 27, 2023, that the U.S. Food and Drug Administration (FDA) withdraw the EUA for the SARS-CoV-2 NGS Assay issued on March 23, 2021, amended on June 25, 2021, and September 23, 2021, and reissued on July 28, 2022. Twist Bioscience Corporation indicated that they no longer plan to continue marketing the SARS-CoV-2 NGS Assay and requested that the EUA be withdrawn. FDA understands that no SARS-CoV-2 NGS Assay reagents associated with this EUA are available to the United States market.

The authorization of a device for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3) may, pursuant to section 564(g)(2) of the Act, be revoked when circumstances make such revocation appropriate to protect the public health or safety (section 564(g)(2)(C) of the Act). Because Twist Bioscience Corporation has requested FDA withdraw the EUA for the SARS-CoV-2 NGS Assay, FDA has determined that it is appropriate to protect the public health or safety to revoke this authorization. Accordingly, FDA hereby revokes EUA202029 for the SARS-CoV-2 NGS Assay, pursuant to section 564(g)(2)(C) of the Act. As of the date of this letter, the SARS-CoV-2 NGS Assay is no longer authorized for emergency use by FDA.

Notice of this revocation will be published in the *Federal Register*, pursuant to section 564(h)(1) of the Act.

Sincerely,

/s/

Jeffrey E. Shuren, M.D., J.D.
Director
Center for Devices and Radiological Health
Food and Drug Administration

Dated: March 6, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–04845 Filed 3–8–23; 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 Information Collection Request Title: Ryan White HIV/AIDS Program: Expenditures Forms, OMB No. 0915–xxxx—New

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 May 8, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or by mail at: the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer, at (301) 594–4394.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Ryan White HIV/AIDS Program: Expenditures Forms—OMB No. 0915–xxxx—New.

Abstract: HRSA administers the Ryan White HIV/AIDS Program (RWHAP) which is authorized under title XXVI of the Public Health Service Act. The RWHAP Allocations and Expenditures Reports (A&E Reports) allow HRSA to monitor and track the use of grant funds for compliance with program and grants policies, and requirements as outlined in the legislation. To avoid duplication and reduce recipient reporting burden, HRSA created an electronic grantee contract management system (GCMS) that includes data required for various reports, including the Expenditures Reports and other HRSA data reports, such as the RWHAP Services Report. Recipients can access GCMS year-round to upload or manually enter data on their service provider contractors or subrecipients, the RWHAP core medical and support services provided, and their funding amounts. Data required for Allocations Reports and other reports are automatically prepopulated from GCMS. Expenditures Report data are not auto-populated in the GCMS and are still manually entered into the data reporting system.

A&E Reports: Recipients funded under RWHAP Parts A, B, C, and D are required to report financial data to HRSA at the beginning (Allocations Report) and at the end (Expenditures Report) of their grant budget period. The A&E Reports request information recipients already collect, including the use of RWHAP grant funds for core medical and support services; and on various program components, such as administration, planning and evaluation, and clinical quality management. RWHAP Parts A and B recipients funded under the Ending the HIV Epidemic in the U.S. (EHE) initiative are also required to report allocations and expenditures of the grant budget period in the EHE A&E Reports. This allows HRSA to track and report progress toward meeting the EHE goals.

The reports are similar in content; however, in the first report, recipients document the allocation of their RWHAP or EHE grant award at the beginning of their grant budget period. In the second report, recipients document actual expenditures of their RWHAP or EHE grant award (including any carryover dollars) at the end of their grant budget period.

HRSA is proposing the following updates to the RWHAP Expenditure Reports.

RWHAP Part A Expenditures Report:

- Revising row and column headers and other language for clarity and alignment with RWHAP requirements;
- Combining the columns for RWHAP Part A Formula and Supplemental Expenditure amounts and updating the title;
- Moving the Prior Fiscal Year (FY) Carryover column row after the Current FY column and updating the title;
- Moving the RWHAP Part A Minority AIDS Initiative (MAI) Award Amount row after the RWHAP Part A Supplemental Award Amount row;
- Re-ordering the MAI rows in the ''RWHAP Part A and MAI Service Category Expenditures'' table as follows: 3. RWHAP Part A Supplemental Award, 4. RWHAP Part A MAI Award Amount, 5. RWHAP Part A MAI Carryover Amount;
- Updating calculations and language in the Legislative Requirements Checklist; and
- Adding a requirement for Financial Officer/Designee to certify subrecipient aggregated administrative expenditures.

RWHAP Part B Expenditures Report:

- Revising rows and column headers and other language for clarity and alignment with RWHAP requirements;
- Adding the following rows to Table 1: 4b. RWHAP Part B HIV Care Consortia Planning & Evaluation and 4c. RWHAP Part B HIV Care Consortia Clinical Quality Management (CQM);
- Blacking out selected cells in the following rows, columns, or tables:
- 5. Total (including carryover) Percent column:
  - (4a–4c) RWHAP Part B HIV Care Consortia Admin, P&E, and CQM
  - (6) RWHAP Part B Clinical Quality Management
  - (7) RWHAP Part B Recipient Planning & Evaluation Activities
  - (8) Recipient Administration
  - (9) Column Totals
  - (10) Total RWHAP Part B Expenditures (excluding carryover);
- 2. RWHAP Part B Health Insurance Premium & Cost Sharing Assistance and 3. RWHAP Part B Home and Community-based Health Services' amounts and percent:
  - (1) Base Award
  - (2) AIDS Drug Assistance Program (ADAP) Earmark + ADAP Supplemental
  - (3) Emerging Communities Award
  - (4) Total Prior FY Carryover
  - (5) Total (Including Carryover);
- 4b. RWHAP Part B HIV Care Consortia Planning & Evaluation and 4c. RWHAP Part B HIV Care Consortia CQM:
  - (1) Base Award: Prior FY Carryover
  - (2) ADAP Earmark + ADAP Supplemental: Prior FY Carryover, Current FY and Percent
  - (3) Emerging Communities Award: Prior FY Carryover
  - (4) Total Prior FY Carryover: Amount and Percent;
- MAI Expenditure by Program Component:
  - (3) Clinical Quality Management: Prior FY Carryover amount & percent
  - (4) Recipient Planning & Evaluation Activities: Prior FY Carryover amount & percent
  - (5) Recipient Administration: Prior FY Carryover amount & percent
  - (6) Total MAI Expenditures; percent
- Adding a new row: (10) Total RWHAP Part B Expenditures (excluding carryover);
- Displaying previously blacked out cells in the following two rows under the Expenditures Categories table:
- d. Health Insurance Premium and Cost Sharing Assistance for Low-Income Individuals and e. Home and Community-Based Health Services
  - (2) Direct Services
  - (3) Emerging Communities
  - (4) Prior FY Carryover;
- Updating calculations and language in the Legislative Requirements Checklist;
- Removing Consortia Administration and Emerging Communities Administration from the Legislative Requirement from Legislative Requirement
- Removing the following services under the Legislative Requirements Checklist's Core Medical Services:
  - Health Insurance Premium & Cost Sharing Assistance
  - Home and Community-based Health Services; and
- Adding requirement for a Financial Officer/Designee to certify subrecipient aggregated administrative expenditures
  - Adding a row for the recipient to certify that administrative expenses

for the RWHAP Part B does not exceed allowable cap

RWHAP Part C Expenditures Report:

• There are no proposed changes to the RWHAP Part C Expenditures Report.

RWHAP Part D Expenditures Report:

• There are no proposed changes to the RWHAP Part D Expenditures Report.

HAB EHE Expenditures Reports:

• There are no proposed changes to the HAB EHE Expenditures Reports.

Need and Proposed Use of the Information: Accurate allocation, expenditure, and service contract records of the recipients receiving RWHAP and EHE funding are critical to the implementation of the RWHAP legislation and EHE initiative appropriation language and thus are necessary for HRSA to fulfill its monitoring and oversight responsibilities.

Likely Respondents: RWHAP Part A, Part B, Part C, and Part D recipients.

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
Part A Expenditures Report	52	1	52	4	208
Part B Expenditures Report	54	1	54	6	324
Part C Expenditures Report	346	1	346	4	1,384
Part D Expenditures Report	116	1	116	4	464
EHE Expenditures Report	47	1	47	4	188
Total	615		615		2,568

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–04824 Filed 3–8–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Freedom of Information Act Predisclosure Notice

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: This notice informs submitters who reported COVID–19 data in 2020 for the High-Impact Area Distribution that HRSA received a Freedom of Information Act (FOIA) request for data reported to HHS that was used in determining COVID–19 High-Impact Area Distribution payments under the Provider Relief Fund. Specifically, the request seeks certain information pertaining to providers who did not receive COVID–19 High-Impact Area Distribution payments. This notice seeks input from these providers so that HRSA can respond to the FOIA request.

DATES: Comments must be received on or before March 23, 2023.

ADDRESSES: Comments should be submitted to the HRSA FOIA Office via email at *hotspotpdn@hrsa.gov.*

FOR FURTHER INFORMATION CONTACT: Brian A. May, FOIA Officer, 5600 Fishers Lane, Room 13N112, Rockville, Maryland 20857; 301–443–1467, *hotspotpdn@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The FOIA, 5 U.S.C. 552, compels federal agencies to release records in its possession, unless the agency reasonably foresees that disclosure would harm an interested protected by one (or more) of the nine exemptions or disclosure is prohibited by law. FOIA also requires that agencies provide FOIA requesters with reasonably segregated portions of records, which means that agencies must release any portion of the records where an exemption does not apply, unless technically unable to reasonably do so.

Explanation of the Action

The HRSA FOIA Office received a FOIA request for data reported to HHS in 2020 that was used in determining COVID–19 High-Impact Area Distribution payments under the Provider Relief Fund. HHS made the first round of COVID–19 High Impact Area Distribution payments to 395 hospitals that reported they had 100 or more COVID–19 admissions during the period of January 1, 2020. and April 10, 2020. HHS did not make payments to hospitals that reported they had fewer than 100 COVID–19 admissions during the period of January 1, 2020, and April 10, 2020. The FOIA request specifically seeks data on the hospitals that reported they had fewer than 100 COVID–19 admissions during the period of January 1, 2020, and April 10, 2020, and therefore, did not receive a payment in the first round of the COVID–19 High Impact Area Distribution.

This notice *only* applies to hospitals that reported in the first round of reporting to HHS that they had fewer than 100 COVID–19 admissions during the period of January 1, 2020, and April 10, 2020, and, as a result, did not receive a payment in round 1 of the COVID–19 High-Impact Area Distribution. Comments from any entity that does not satisfy these conditions will not be reviewed.

Necessity of the Action

Executive Order No. 12600, 52 FR 23781 (1987), and the HHS FOIA regulations at 45 CFR 5.42(a) require HRSA coordinate predisclosure notifications for records that were

submitted to HHS, for which HRSA was deemed a custodian of the requested data given HRSA's oversight of the Provider Relief Fund. HRSA has reason to believe that information in the records could reasonably be considered confidential commercial information and exempt from disclosure under FOIA Exemption 4. FOIA Exemption 4 allows agencies to withhold trade secrets and commercial or financial information obtained from a person (business entities including hospitals are considered people under the FOIA) and is privileged or confidential. Both the Executive Order and HHS FOIA regulations permit agencies to notify a voluminous number of submitters by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it. See Executive Order 12600 or 45 CFR 5.42(a)(1). This notice satisfies this requirement. Additionally, HRSA will send predisclosure notices directly to hospitals for whom HRSA has contact information.

HRSA determined that, for those hospitals that did not receive a payment in the first round of the COVID–19 High Impact Area Distribution, the following responsive data could reasonably be considered confidential commercial information and exempt from disclosure under FOIA Exemption 4:

(1) number of COVID–19 admissions; and

(2) intensive care unit hospital beds for each facility (and associated Centers for Medicare & Medicaid Services' Certification Number (CCN))

HRSA must analyze the releasability of the data prior to making a release decision. Because organizations submitted data to HHS that was identified in the FOIA request, HRSA is notifying submitters of their full rights through this predisclosure notice. HHS's FOIA regulations provide affected entities with 10 working days from the date of this notice to object to disclosure of part or all of the information contained in these records.

A person who submits records to the government may designate part or all of the information in such records that they may consider exempt from disclosure under Exemption 4 of the FOIA. The designation must be in writing. See 45 CFR 5.41.

So that HRSA can determine how providers actually and customarily treat the disclosure of these data, please respond to the following questions with respect to the (1) number of COVID–19 admissions and (2) intensive care unit hospital beds for each facility (and associated CCN) and send your organization's response to *hotspotpdn@hrsa.gov* in the timeframe referenced in the dates section of this notice. Please include your organization's CCN and facility name in your response to ensure that it is attributed correctly.

(1) Do you customarily keep the requested information private or closely held? What steps have you taken to protect the confidentiality of the requested data, and to whom has it been disclosed?

(2) What facts support your belief that this information is commercial or financial in nature?

(3) Did the government provide you with an express or implied assurance of confidentiality when you shared the information with the government? If so, please explain.

(4) Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information? If so, please explain.

(5) How would disclosure of this information harm an interest protected by Exemption 4 (such as by causing foreseeable harm to your economic or business interests)?

Intended Effects of the Action

In the event that a submitter fails to respond to the notice within the time specified, it will be considered to have no objection to disclosure of the information. Submitted objections will be given the appropriate consideration; however, responses are not an agreement that HRSA will withhold the information. If HRSA decides to release the information over objection, HRSA will inform submitters, in writing, along with HRSA's reasons for the decision to release. HRSA will include with such notice a description of the information to be disclosed or copies of the records as HRSA intends to release them. HRSA will also provide submitters with a specific date that HRSA intends to disclose the records, which must be at least 5 working days after the date of the intent to release notice. HRSA will not consider any information received after the date of a disclosure decision.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–04858 Filed 3–8–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel Member Conflict: Epidemiology and Population Health, March 28, 2023, 12:00 p.m. to March 28, 2023, 08:00 p.m., National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on February 27, 2023, 88 FR 12388 Doc. 2023–03969.

This meeting is being amended to change the meeting start time from 12:00 p.m. to 11:00 a.m. The meeting is closed to the public.

Dated: March 3, 2023.

David W Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–04798 Filed 3–8–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Extension of Agency Information Collection Activity Under OMB Review: Cybersecurity Measures for Surface Modes

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-Day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0074, abstracted below, to OMB for an extension of the currently approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. Specifically, the collection involves the submission of data concerning the designation of a Cybersecurity Coordinator; the reporting of cybersecurity incidents to the Cybersecurity and Infrastructure Security Agency; the development of a cybersecurity contingency/recovery plan to address cybersecurity gaps; and the completion of a cybersecurity assessment.

DATES: Send your comments by April 10, 2023. A comment to OMB is most

effective if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' and by using the find function.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh, TSA PRA Officer, Information Technology, TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011; telephone (571) 227–2062; email *TSAPRA@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION: TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on November 14, 2022, 87 FR 68185.

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), 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 OMB control number. The ICR documentation will be available at *https://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Cybersecurity Measures for Surface Modes.

Type of Request: Extension.

OMB Control Number: 1652–0074.

Form(s): TSA Optional Forms. TSA Surface Cybersecurity Vulnerability Assessment Form.

Affected Public: Owner/Operators with operations identified in 49 CFR part 1580 (Freight Rail), 49 CFR part 1582 (Mass Transit and Passenger Rail), and 49 CFR part 1584 (Over-the-Road Bus).

Abstract: Under the authorities of 49 U.S.C. 114, TSA may take immediate action to impose measures to protect transportation security without providing notice or an opportunity for comment.[1] On December 17, 2021, TSA issued the Security Directive (SD) 1580–21–01 series, *Enhancing Rail Cybersecurity,* and the SD 1582–21–01 series, *Enhancing Public Transportation and Passenger Railroad Cybersecurity,* which remain in effect as revised, mandating TSA-specified Owner/Operators of ''higher risk'' railroads and rail transit systems, respectively, to implement an array of cybersecurity measures to prevent disruption and degradation to their infrastructure; these security directives became effective December 31, 2021. In addition, on October 18, 2022, TSA issued the SD 1580/1582–2022–01 series, *Rail Cybersecurity Mitigation Actions and Testing,* which applies to Owner/Operators of the ''Higher Risk'' freight railroads identified in 49 CFR 1580.101 and additional TSA-designated freight and passenger railroads. This security directive, which is complementary to the requirements in the previous directives, took effect on October 24, 2022. On October 26, 2022, OMB approved TSA's request for an emergency approval, revising this information collection. *See* ICR Reference Number: 202210–1652–001. The collection covers both mandatory reporting under the security directives and collection of information voluntarily submitted under Information Circular (IC) 2021–01, *Enhancing Surface Transportation Cybersecurity,* which recommended voluntary implementation of actions and reporting by Owner/Operators not covered by the security directives. The OMB approval allowed for the additional institution of mandatory reporting requirements and collection of information voluntarily submitted. *See* ICR Reference Number: 202111–1652–003. TSA is now seeking renewal of this information collection for the maximum three-year approval period.

The cybersecurity threats to surface transportation infrastructure that necessitate these collections are within TSA's statutory responsibility and authority for ''security in all modes of transportation . . . including security responsibilities . . . over modes of transportation that are exercised by the Department of Transportation.'' *See* 49 U.S.C. 114(d).

The requirements in the security directives and the recommendations in the IC allow TSA to execute its security responsibilities within the surface transportation industry, through awareness of potential security incidents and suspicious activities.

A. SD 1580/82–2022–01 Series

This security directive series includes the following information collection:

1. Submission of a Cybersecurity Implementation Plan to TSA for approval that identifies how the Owner/Operator will meet the required security outcomes in the SD;

2. Submission of an Annual Audit Plan for the required Cybersecurity Assessment Program; and

3. Documentation provided to TSA upon request as necessary to establish compliance.

B. SD 1580–21–01, SD 1582–21–01, and IC 2021–01 Series

These security directives and the IC remain in effect and include the following information collection requirements for the security directives and voluntary collection under the IC:

1. Provide contact information for a designated Cybersecurity Coordinator to TSA.

2. Report cybersecurity incidents to the Cybersecurity and Infrastructure Security Agency.

3. Submit a cybersecurity incident response plan to TSA.

4. Complete and submit a cybersecurity vulnerability assessment using a form provided by TSA.

TSA will use the collection of information to ensure compliance with TSA's cybersecurity measures required by the security directives and the recommendations under the IC.

Owner/Operators can complete and submit the required information via email or other electronic options provided by TSA. Documentation of compliance must be provided upon request. As the measures in the IC are voluntary, the IC does not require Owner/Operators to report on their compliance.

Portions of the responses that are deemed Sensitive Security Information

[1] TSA issues security directives for surface transportation operators under the statutory authority of 49 U.S.C. 114(l)(2)(A). This provision, from section 101 of the Aviation and Transportation Security Act (ATSA), Public Law 107–71 (115 Stat. 597; Nov. 19, 2001), states: ''Notwithstanding any other provision of law or executive order (including an executive order requiring a cost-benefit analysis), if the Administrator determines that a regulation or security directive must be issued immediately in order to protect transportation security, the Administrator shall issue the regulation or security directive without providing notice or an opportunity for comment and without prior approval of the Secretary.''

(SSI) are protected in accordance with procedures meeting the transmission, handling, and storage requirements of SSI set forth in 49 CFR part 1520.[2]

Number of Respondents: 781.

Estimated Annual Burden Hours: An estimated 96,163 hours annually.

Dated: March 6, 2023.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2023–04859 Filed 3–8–23; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0133]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Reduced Fee

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until May 8, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0133 in the body of the letter, the agency name and Docket ID USCIS–2018–0002. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2018–0002.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2018–0002 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Reduced Fee.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–942; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the data collected on this form to verify that the applicant is eligible for a reduced fee for the immigration benefit being requested.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–942 is 4,491 and the estimated hour burden per response is 0.67 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,009 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $19,087.

Dated: March 1, 2023.

Jerry L. Rigdon,

Acting Branch Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–04791 Filed 3–8–23; 8:45 am]

BILLING CODE 9111–97–P

[2] In addition, all data in TSA systems are statutorily required to comply with the Federal Information Security Modernization Act 2014 (FISMA) following the National Institute of Standards and Technology Special Publication 800.37 REV2 or Risk Management Framework, and other federal information security requirements including Federal Information Processing Standards 199 and Executive Order 14028. All systems, networks, servers, clouds and endpoints under the FISMA boundary are hardened to meet the Department of Defense Security Technical Implementation Guidelines, as well as DHS Policy (4300.A) and TSA policy (TSA IA Handbook).

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0025]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Waiver of Rights, Privileges, Exemptions and Immunities

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until April 10, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2008–0015. All submissions received must include the OMB Control Number 1615–0025 in the body of the letter, the agency name and Docket ID USCIS–2008–0015.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on December 23, 2022, at 87 FR 78989, allowing for a 60-day public comment period. USCIS did not receive any comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2008–0015 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Waiver of Rights, Privileges, Exemptions and Immunities.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–508; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the data collected on Form I–508 to determine whether or not a nonimmigrant under section 101(a)(15)(A), (E), or (G) of the Act is eligible to retain his or her status as an immigrant, adjust status to an LPR, or obtain a reentry permit. The I–508F is no longer required to be submitted by French Nationals.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–508 is 1,928 and the estimated hour burden per response is 0.617 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,189 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $15,424.

Dated: March 1, 2023.

Jerry Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–04793 Filed 3–8–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0079]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Replacement/Initial Nonimmigrant Arrival-Departure Document

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until April 10, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0011. All submissions received must include the OMB Control Number 1615–0079 in the body of the letter, the agency name and Docket ID USCIS–2007–0011.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on December 20, 2022, at 87 FR 77854, allowing for a 60-day public comment period. USCIS did not receive any comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0011 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Replacement/Initial Nonimmigrant Arrival-Departure Document.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–102; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Nonimmigrants temporarily residing in the United States can use this form to request a replacement of a lost, stolen, or mutilated arrival-departure record, or to request a new arrival-departure record, if one was not issued when the nonimmigrant was last admitted but is now in need of such a record. U.S. Citizenship and Immigration Services (USCIS) uses the information provided by the requester to verify eligibility, as well as his or her status, process the request, and issue a new or replacement arrival-departure record. If the application is approved, USCIS will issue an Arrival-Departure Record.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–102 is 3,907 and the estimated hour burden per response is 0.617 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,409 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,126,779.

Dated: March 1, 2023.

Jerry Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–04792 Filed 3–8–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0032.

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Waiver of Grounds of Inadmissibility Under Sections 245A or 210 of the Immigration and Nationality Act

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until May 8, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0032 in the body of the letter, the agency name and Docket ID USCIS–2006–0047. Submit comments via the

Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2006–0047.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2006–0047 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Waiver of Grounds of Inadmissibility Under Sections 245A or 210 of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–690; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Applicants for lawful permanent residence under INA 210 or 245A who are inadmissible under certain grounds of inadmissibility at INA 212(a) would use Form I–690 to seek a waiver of inadmissibility. USCIS uses the information provided through Form I–690 to adjudicate waiver requests from individuals who are inadmissible to the United States. Based upon the instructions provided, a respondent can gather and submit the required documentation to USCIS for consideration of an inadmissibility waiver.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–690 is 30 and the estimated hour burden per response is 2 hours and 53 minutes; the estimated total number of respondents for the information collection I–690 Supplement 1, Applicants With a Class A Tuberculosis Condition is 11 and the estimated hour burden per response is 2 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 108 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $4,523.00.

Dated: March 3, 2023.

Jerry Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–04795 Filed 3–8–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0014]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Declaration of Financial Support

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until May 8, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0014 in the body of the letter, the agency name and Docket ID USCIS–2006–0072. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2006–0072.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION

Comments

You may access the information collection instrument with instructions

or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2006–0072 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Declaration of Financial Support.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–134; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. U.S. Citizenship and Immigration Services (USCIS) and consular officers of the Department of State (DOS) use Form I–134 to determine whether, at the time of the beneficiary's application, petition, or request for certain immigration benefits, that the beneficiary has sufficient financial support to pay for expenses for the duration of their temporary stay in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–134 is 2,500 and the estimated hour burden per response is 2 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 5,000 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $10,625.

Dated: March 3, 2023.

Jerry Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–04794 Filed 3–8–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7077–N–05]

Privacy Act of 1974; System of Records

AGENCY: Office of Administration, HUD.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD) is issuing a public notice of its intent to modify the Multifamily Housing Privacy Act system of records for the Comprehensive Servicing and Monitoring System (CSMS). The modification will clarify the location of records; the system manager; authority for maintenance of the system; and routine uses of records in the system.

DATES: Comments will be accepted on or before April 10, 2023. This proposed action will be effective immediately upon publication. Routine uses will become effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number or by one of the following methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

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

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001; telephone number 202–708–3054 (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: The Department of Housing and Urban Development (HUD), Office of Finance and Budget maintains the ''Comprehensive Servicing and Management System'' (CSMS). CSMS is a mixed financial system that is used for property management and loan servicing. HUD is publishing this revised notice to; update system location; system manager; authorities; safeguards; routine uses; to reflect updated information in the sections being revised. The modification of the system of records will have no undue impact on the privacy of individuals and updates follow the records collected.

1. Location—Added the location of backup records.

2. System Manager—Identified new system manager expected to operate under this system.

3. Authorities—Clarified authorities governing Social Security number collection. requirements, which is the United States Housing and Community Development Act of 1987, 42 U.S.C. 3543(a).

4. Administrative and Technical Safeguards—Clarified or updated information about the applicable

safeguards to records. Describes role-based access and annual certification.

5. Routine Use—Incorporated three newly established routine uses pertaining to sharing of information externally for data breach remediation purposes; and matching program for use by the Department of the Treasury, Bureau of the Fiscal Service (Fiscal Service), Do Not Pay Business Center (DNP), to detect suspected instances of programmatic fraud, waste, and abuse. Streamlined and added specific routine uses that are applicable to this system of record rather than relying on HUD's previously published blanket routine uses notice.

SYSTEM NAME AND NUMBER:

HUD/DEPT–03 Comprehensive Servicing and Management System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at Dynaxis, 1911 Tech Rd, Silver Spring, MD 20904; at a secure data center at the Disaster Recovery Site, 8180 Green Meadows Drive North, Lewis Center, OH 43035–0001.

SYSTEM MANAGER(S):

Cynthia Tilton, Office of Multifamily Asset Management and Portfolio Oversight, HUD HQ 451 7th St. SW, Washington, DC 20410.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Housing Act, 12 U.S.C 1701 *et seq.,* authorizes the loan programs that are serviced by CSMS; the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.;* The Housing and Community Development Amendments of 1981, 12 U.S.C. 2294a; the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 Section 904 as amended, 42 U.S.C. 3544; the United States Housing and Community Development Act of 1987, Section 165, 42 U.S.C. 3543(a), permits the participants to submit their SSNs as a condition of eligibility.

PURPOSES OF THE SYSTEM:

CSMS is a loan servicing, property management, and accounting system. The purpose of the system is to bill and collect funds owed to HUD/FHA, to provide program information about loan repayment and status, to manage investment of reserve for replace funds, to process and reimburse property managers or vendors for expenses incurred in managing multifamily properties owned by the Department, to track lease information for tenants living in HUD-owned properties, and to account for all transactions on this portfolio. CSMS is a subsidiary ledger to the FHA's general ledger. CSMS provides servicing for loans acquired through the payment of an insurance claims and loans from the Mark to Market and Demonstration preservation programs.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Mortgagors, billing agents, vendors who are local businesses involved in property management or inspection and tenants, federal employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Property names; Addresses; Phone numbers; Email addresses; Borrower's TIN/Social Security Numbers; Financial information (institutional information, routing, account numbers and account type; Reserve for Replacement escrow accounts; accounting data including debits and credits to HUD accounts based on transaction events; Collection history; Mortgagee-in-Possession activity; loan termination data; HUD-Owned Property/Tenant: Names; addresses; Email addresses; Social Security Number; Marital status; Gender; Bid packages; Closing activities; Vendor/business partner (financial information, TIN/SSN, routing, account numbers, small business identifier.

RECORD SOURCE CATEGORIES:

Records in the system are obtained from HUD employees and their contractors who deal directly with the mortgagors, billing agents, vendors, and tenants. Information is also obtained from Integrated Real Estate Management System. All other data is collected from FHA Subsidiary ledger.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

(A) To a congressional office from the record of an individual, in response to an inquiry from the congressional office made at the request of that individual.

(B) To Federal agencies, non-Federal entities, their employees, and agents (including contractors, their agents or employees; employees or contractors of the agents or designated agents); or contractors, their employees or agents with whom HUD has a contract, service agreement, grant, cooperative agreement, or computer matching agreement for the purpose of: (1) Detection, prevention, and recovery of improper payments; (2) detection and prevention of fraud, waste, and abuse in major Federal programs administered by a Federal agency or non-Federal entity; and (3) detection of fraud, waste, and abuse by individuals in their operations and programs, but only to the extent that the information shared is necessary and relevant to verify pre-award and prepayment requirements prior to the release of Federal funds or to prevent and recover improper payments for services rendered under programs of HUD or of those Federal agencies and non-Federal entities to which HUD provides information under this routine use.

(C) To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities, including, but not limited to, State and local governments and other research institutions or their parties, and entities and their agents with whom HUD has a contract, service agreement, grant, cooperative agreement, or other agreement, for the purposes of statistical analysis and research in support of program operations, management, performance monitoring, evaluation, risk management, and policy development, or to otherwise support the Department's mission. Records under this routine use may not be used in whole or in part to make decisions that affect the rights, benefits, or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form.

(D) To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service, grant, cooperative agreement, or other agreement with HUD, when necessary to accomplish an agency function related to a system of records. Disclosure requirements are limited to only those data elements considered relevant to accomplishing an agency function.

(E) To appropriate federal, state, local, tribal, or other governmental entities, with the approval of the Chief Privacy Officer, when HUD is aware of a need to use relevant data for purposes of testing new technology.

(F) To appropriate agencies, entities, and persons when (1) HUD suspects or has confirmed that there has been a breach of the system of records, (2) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HUD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(G) To another Federal agency or Federal entity when HUD determines

that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) 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 national security, resulting from a suspected or confirmed breach.

(H) To appropriate Federal, State, local, tribal, or other governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law.

(I) To a court, magistrate, administrative tribunal, or arbitrator in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, mediation, or settlement negotiations, or in connection with criminal law proceedings; when HUD determines that use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where HUD has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

(J) To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

(K) To the IRS for reporting of payments, forgiveness of debt, and property sales under section 6109 of the Internal Revenue Code.

(L) To banks holding escrow monies for the purpose of establishing interest bearing accounts and reporting of interest payments to the IRS under section 6109 of the Internal Revenue Code.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic and paper records.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Borrowers Name and TIN/SSN.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

Destroy 6 years after final payment or cancellation, but longer retention is authorized if required for business use. Destroy 3 years after lease termination, lapse, reassignment, rejection of application, cancellation of lease, or conclusion of litigation, as applicable.

CSMS Disposition information is:

- HUD Schedule 10, item 7, NC1–207–78–12, item 7
- GRS 3.2, item 51, DAA–GRS–2013–0006–0008
- GRS 5.2, item 20, DAA–GRS–2017–0003–0002
- GRS 3.2, item 30, DAA–GRS–2013–0006–0003
- GRS 3.2, item 40 and 41, Item 40_DAA–GRS–2013–0006–0005 and Item 41_DAA–GRS–2013–0006–0006
- GRS 3.1, item 10 and 11, DAA–GRS–2013–0005–0006 and DAA–GRS–2013–0005–0007
- GRS 3.1, item 51, DAA–GRS–2013–0005–003

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to CSMS is by password and user ID and limited to authorized users. Paper records are maintained in locked drawer or in file cabinets at 11911 Tech Road, Silver Spring, MD 20904. Role-based access levels or assignment roles are restricted to those who have a need-to-know. When first gaining access to CSMS and on an annual basis, all users must agree to the systems ''Rules of Behavior'' which specify handling of personal information and any physical records.

RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether this System of Records contains information on themselves should address written inquiries to the Department of Housing Urban and Development, 451 7th Street SW, Washington, DC. For verification, individuals should provide full name, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).'' If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).'' More information regarding HUD's procedures for accessing records in accordance with the Privacy Act can be found at 24 CFR 16.4, ''Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974.''

CONTESTING RECORD PROCEDURES:

The HUD rule for accessing, contesting, and appealing agency determinations by the individual concerned are published in 24 CFR part 16.8 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Department of Housing Urban Development Office of Multifamily Housing, 451 7th Street SW, Washington, DC 20410–0001. For verification purposes, individuals should provide full name, office or organization where currently assigned, if applicable, and current address and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 24 CFR part 16 in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. executed on (Date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

FR–7009–N–01, 2/20/2018, 83 FR 7208.

LaDonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2023–04830 Filed 3–8–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7077–N–04]

Privacy Act of 1974; System of Records

AGENCY: Office of Administration, HUD.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD), Office of the Chief Human Capital Officer (OCHCO) is issuing a public notice of its intent to establish a Privacy Act System of Records titled ''Hardship Reassignment''. The purpose of this system of records is to allow HUD to collect and maintain records on individuals requesting a reassignment due to a hardship.

DATES: Comments will be accepted on or before April 10, 2023. This proposed action will be effective immediately upon publication. Routine uses will become effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number or by one of the following method—Docket Number not yet identified.

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

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

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001; telephone number 202–708–3054 (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: The new system of records titled, ''Hardship Reassignment Program.'' This system of records covers HUD's collection and maintenance of records on individuals who request and/or receive a reassignment, due to a hardship; in accordance with 5 CFR 335.102, 5 CFR 302.102(a), and 5 CFR 210.102(b)(12) and HUD's Hardship Reassignment Policy and Procedures Handbook (560.1). These procedures are intended to accommodate, if possible, an employee's request to permanently relocate due to family difficulties. These procedures do not impede the program office's ability to make employee assignments. Additionally, this policy does not require program offices (or selecting officials) to place employees in vacant positions solely based on a hardship. The filling of vacant positions is always at management's discretion.

SYSTEM NAME AND NUMBER:

Hardship Reassignment Program, HUD/OCHCO–04.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the following locations: U.S. Department of Housing and Urban Development Headquarters location, 451 7th Street SW, Washington, DC 20410–0001.

SYSTEM MANAGER(S):

Sophia Spadacino, Acting Branch Chief, Office of the Chief Human Capital Officer (OCHCO), Employee Health and Wellness Division (EHWD), Reasonable Accommodation Branch (RAB), 451 Seventh Street SW, Washington, DC 20410–0001.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The following legal authority (statute section, Executive Order, etc.) authorizes the maintenance of the records in the system: 5 CFR 335.102, 5 CFR 302.102(a), and 5 CFR 210.102(b)(12) and HUD's Hardship Reassignment Policy and Procedures Handbook (650.1).

PURPOSES OF THE SYSTEM:

The purpose of this system is to allow HUD to collect and maintain records on employees requesting or receiving a relocation due to a hardship, while documenting such determinations to otherwise comply with mandates and Executive Orders. Other purposes for the use of this system are to monitor, process, track and report the processing of approved requests; to locate individuals for personnel research, and to document security violations and supervisory actions taken. Additionally, these records may be used to help streamline and make more efficient the investigations and adjudications processes, while ensuring compliance with applicable laws and regulations, including confidentiality requirements protecting the information individuals submit in support of their hardship reassignment request.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

HUD employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, home address, email address, home telephone numbers, office telephone numbers, work address, employment status, history, salary employee location, grade preference, family information such as medical records to include disability information.

RECORD SOURCE CATEGORIES:

HUD Employees.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

A. To a congressional office from the record of an individual, in response to an inquiry from the congressional office made at the request of that individual.

B. To appropriate agencies, entities, and persons when: (1) HUD suspects or has confirmed that there has been a breach of the system of records; (2) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HUD (including its information systems, program and operations), the Federal Government, or national security; and (3) The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

C. To another Federal agency or Federal entity, when HUD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1)

responding to suspected or confirmed breach, or (2) 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 national security, resulting from a suspected or confirmed breach.

D. To appropriate Federal, State, local, tribal, or other governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws and when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law.

E. To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

F. To officials of labor organizations recognized under the Civil Service Reform Act when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

G. To the Office of Personnel Management (OPM), the Merit Systems Protection Board (and its office of the Special Counsel), the Federal Labor Relations Authority (and its General Counsel), or the Equal Employment Opportunity Commission when requested in performance of their authorized duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic Records and Paper records.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrievable by Full name.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

Destroy upon verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later. NARA records schedule citation: DAA–GSR–2017–0003–0002

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

For Paper Records: Comprehensive paper records are kept in locked metal file cabinets in locked rooms in HUD Headquarters, in the Reasonable Accommodations Branch, which is the office responsible for the Hardship Reassignment. Access to these records is limited to only those persons who have a need for them in the performance of their official duties. All physical access to the building where the system of records is maintained is controlled and monitored by security personnel who perform security checks on a routine basis.

For Electronic Records: Comprehensive electronic records are maintained and stored in an electronic encryption database system. These records can only be accessed based off the user's rights and privileges to the system. Electronic records are stored on the Shared Drive under P209 HUD LAN File Server environment, which runs on the Department's network. This environment complies with the security and privacy controls and procedures as described in the Federal Information Security Management Act (FISMA), National Institute of Standards and Technology (NIST) Special Publications, and Federal; Information Processing Standards (FIPS). A valid HSPD–12 ID Credential, access to HUD's LAN, a valid UserID and Password and a Personalized Identification Number (PIN) is required to access the Hardship Reassignment Program. These records are restricted to only those persons with a role in the Reasonable Accommodations Branch, having a need to access them in the performance of their official duties.

For Electronic Records (cloud based): Comprehensive electronic records are secured and maintained on a cloud-based software server and operating system that resides in Federal Risk and Authorization Management Program (FedRAMP) and Federal Information Security Management Act (FISMA) Moderate dedicated hosting environment. All data located in the cloud-based server is firewalled and encrypted at rest and in transit. The security mechanisms for handing data at rest and in transit are in accordance with HUD encryption standards.

RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether this System of Records contains information on themselves should address written inquiries to the Department of Housing Urban and Development, 451 7th Street SW, Washington, DC. For verification, individuals should provide full name, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4 in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).'' If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).'' More information regarding HUD's procedures for accessing records in accordance with the Privacy Act can be found at 24 CFR 16.4, ''Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974.''

CONTESTING RECORD PROCEDURES:

The HUD rule for accessing, contesting, and appealing agency determinations by the individual concerned are published in 24 CFR part 16.8 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Department of Housing Urban Development Office of the Chief Human Capital Officer, 451 7th Street SW, Washington, DC 20410–0001. For verification purposes, individuals should provide full name, office or organization where currently assigned, if applicable, and current address and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 24 CFR part 16, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. executed on (Date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. executed on (Date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

N/A.

HISTORY:

N/A.

LaDonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2023–04829 Filed 3–8–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[FR–6365–N–01]

Section 8 Housing Assistance Payments Program—Annual Adjustment Factors, Fiscal Year 2023

AGENCY: Office of the Assistant Secretary for Policy Development and Research, Department of Housing and Urban Development, HUD.

ACTION: Notice of fiscal year (FY) 2023 annual adjustment factors (AAFs).

SUMMARY: The United States Housing Act of 1937 requires that certain assistance contracts signed by owners participating in the Department's Section 8 housing assistance payment programs provide annual adjustments to monthly rentals for units covered by the contracts. For owners subject to a Reserve for Replacement deposit requirement, HUD also requires that the amount of the required deposit be adjusted each year by the AAF. This notice announces FY 2023 AAFs for such adjustments. The factors are based on a formula using residential rent and utility cost changes from the most recent annual Bureau of Labor Statistics (BLS) Consumer Price Index (CPI) survey.

DATES: *Effective Date:* March 9, 2023.

FOR FURTHER INFORMATION CONTACT: Ryan Jones, Director, Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, 202–708–1380, for questions relating to the Section 8 Moderate Rehabilitation program (not the Section 8 Moderate Rehabilitation Single Room Occupancy program); Norman A. Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, 202–402–5015, for questions regarding the Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) program; Jennifer Lavorel, Director, OAMPO Program Administration Office, Office of Multifamily Housing, 202–402–2231, for questions relating to all other Section 8 programs; and Adam Bibler, Director, Program Parameters and Research Division, Office of Policy Development and Research, 202–402–6057, for technical information regarding the development of the schedules for specific areas or the methods used for calculating the AAFs. The mailing address for these individuals is: Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410. 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: AAFs are applied at the anniversary of Housing Assistance Payment (HAP) contracts for which rents are to be adjusted using the AAF for those calendar months commencing after the effective date of this notice. The amount that an owner is required to deposit to the Reserve for Replacement account is also adjusted annually by the most recently published AAF, at the HAP contract anniversary. AAFs are distinct from, and do not apply to the same properties as, Operating Cost Adjustment Factors (OCAFs). OCAFs are annual factors used to adjust rents for project-based rental assistance contracts issued under Section 8 of the United States Housing Act of 1937 and renewed under section 515 or section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA). HUD has published OCAFs for 2023 in the **Federal Register** at 87 FR 68513. The AAFs are also distinct from Renewal Funding Inflation Factors which help determine renewal funding for public housing agencies operating the Housing Choice Voucher program. A separate **Federal Register** notice, to be published following the passage of FY 2023 HUD appropriations, will contain the 2023 Renewal Funding Inflation Factors.

Tables showing AAFs will be available electronically from the HUD data information page at *http://www.huduser.gov/portal/datasets/aaf.html.*

I. Applying AAFs to Various Section 8 Programs

AAFs established by this notice are used to adjust contract rents for units assisted in certain Section 8 housing assistance payment programs during the initial (*i.e.,* pre-renewal) term of the HAP contract. There are two categories of Section 8 programs that use the AAFs:

Category 1: The Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation programs; and

Category 2: The Section 8 Loan Management Set-Aside (LMSA) and Property Disposition (PD) programs.

Each Section 8 program category uses the AAFs differently. The specific application of the AAFs is determined by the law, the HAP contract, and appropriate program regulations or requirements.

AAFs are not used in the following cases:

Renewal Rents. AAFs are not used to determine renewal rents after expiration of the original Section 8 HAP contract (either for projects where the Section 8 HAP contract is renewed under a restructuring plan adopted under 24 CFR part 401; or renewed without restructuring under 24 CFR part 402). In general, renewal rents are established in accordance with the statutory provision in MAHRA, as amended, under which the HAP is renewed. After renewal, annual rent adjustments will be provided in accordance with MAHRA.

Budget-based Rents. AAFs are not used for budget-based rent adjustments. For projects receiving Section 8 subsidies under the LM program (24 CFR part 886, subpart A) and for projects receiving Section 8 subsidies under the PD program (24 CFR part 886, subpart C), contract rents are adjusted, at HUD's option, either by applying the AAFs or by budget-based adjustments in accordance with 24 CFR 886.112(b) and 24 CFR 886.312(b). Budget-based adjustments are used for most Section 8/202 projects.

Housing Choice Voucher and Project-Based Voucher Programs. AAFs are not used to adjust rents in the Tenant-Based or the Project-Based Voucher programs.

Reserve for Replacement. The amount that an owner is required to deposit to the Reserve for Replacement account is adjusted annually by the AAF at the HAP contract anniversary.

II. Adjustment Procedures

This section of the notice provides a broad description of procedures for adjusting the contract rent. Technical details and requirements are described

in HUD notices H 2002–10 (Section 8 New Construction and Substantial Rehabilitation, Loan Management, and Property Disposition) and PIH 97–57 (Moderate Rehabilitation). HUD publishes two separate AAF Tables, Table 1 and Table 2. The difference between Table 1 and Table 2 is that each AAF in Table 2 is 0.01 less than the corresponding AAF in Table 1. Where an AAF in Table 1 would otherwise be less than 1.0, it is set at 1.0, as required by statute; the corresponding AAF in Table 2 will also be set at 1.0, as required by statute. Because of statutory and structural distinctions among the various Section 8 programs, there are separate rent adjustment procedures for the two program categories:

Category 1: Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation Programs

In the Section 8 New Construction and Substantial Rehabilitation programs, the published AAF factor is applied to the pre-adjustment contract rent. In the Section 8 Moderate Rehabilitation program (both the regular program and the single room occupancy program), the published AAF is applied to the pre-adjustment base rent.

For Category 1 programs, the Table 1 AAF factor is applied before determining comparability (rent reasonableness). Comparability applies if the pre-adjustment gross rent (pre-adjustment contract rent plus any allowance for tenant-paid utilities) is above the published Fair Market Rent (FMR).

If the comparable rent level (plus any initial difference) is lower than the contract rent as adjusted by application of the Table 1 AAF, the comparable rent level (plus any initial difference) will be the new contract rent. However, the pre-adjustment contract rent will not be decreased by application of comparability.

In all other cases (*i.e.,* unless the contract rent is reduced by comparability):

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

Category 2: Section 8 Loan Management Program (24 CFR Part 886, Subpart A) and Property Disposition Program (24 CFR Part 886, Subpart C)

Category 2 programs are not currently subject to comparability. Comparability will again apply if HUD establishes regulations for conducting comparability studies under 42 U.S.C. 1437f(c)(2)(C).

The applicable AAF is determined as follows:

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

Category 3: Reserve for Replacement

The amount of the deposit to the Reserve for Replacement account must be increased annually using the most recently published ''Regional AAF with Highest Utility Excluded'' for the region in which the project is located. This adjustment must be made without regard to vacancies.

III. When To Use Reduced AAFs (From AAF Table 2)

In accordance with Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)), the AAF is reduced by 0.01:

In Section 8 programs, for a unit occupied by the same family at the time of the last annual rent adjustment (and where the rent is not reduced by application of comparability (rent reasonableness)).

The law provides that:

For any unit occupied by the same family at the time of the last annual rental adjustment, where the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for a unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0.

Legislative history for this statutory provision states that ''the rationale [for lower AAFs for non-turnover units is] that operating costs are less if tenant turnover is less . . . .'' [1] The Congressional Record also states the following:

Because the cost to owners of turnover-related vacancies, maintenance, and marketing are lower for long-term stable tenants, these tenants are typically charged less than recent movers in the unassisted market. Since HUD pays the full amount of any rent increases for assisted tenants in section 8 projects, HUD should expect to benefit from this 'tenure discount.' Turnover is lower in assisted properties than in the unassisted market, so the effect of the current inconsistency with market-based rent increases is exacerbated. 140 Cong. Rec. 8659, 8693 (1994).

IV. How To Find the AAF

AAF Table 1 and Table 2 are posted on the HUD User website at *http://www.huduser.gov/portal/datasets/aaf.html.* There are two numeric columns in each AAF table. The first column is used to adjust contract rent for rental units where the highest cost utility is included in the contract rent, *i.e.,* where the owner pays for the highest cost utility. The second column is used where the highest cost utility is not included in the contract rent, *i.e.,* where the tenant pays for the highest cost utility.

The applicable AAF is selected as follows:

- Determine whether Table 1 or Table 2 is applicable. In Table 1 or Table 2, locate the AAF for the geographic area where the contract unit is located.
- Determine whether the highest cost utility is or is not included in contract rent for the contract unit.
- If highest cost utility is included, select the AAF from the column for ''Highest Cost Utility Included.'' If highest cost utility is not included, select the AAF from the column for ''Highest Cost Utility Excluded.''

V. Methodology

AAFs are rent inflation factors. Two types of rent inflation factors are calculated for AAFs: gross rent factors and shelter rent factors. The gross rent factor accounts for inflation in the cost of both the rent of the residence and the utilities used by the unit; the shelter rent factor accounts for the inflation in the rent of the residence but does not reflect any change in the cost of utilities. The gross rent inflation factor is designated as ''Highest Cost Utility Included'' and the shelter rent inflation factor is designated as ''Highest Cost Utility Excluded.''

AAFs are calculated using CPI data on ''rent of primary residence'' and ''fuels and utilities.'' [2] The CPI inflation index for rent of primary residence measures the inflation of all surveyed units regardless of whether utilities are included in the rent of the unit or not. In other words, it measures the inflation of the ''contract rent'' which includes units with all utilities included in the rent, units with some utilities included in the rent, and units with no utilities included in the rent. In producing a

[1] *See* Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1995, Hearings Before a Subcommittee of the Committee on Appropriations 103d Cong., 2d Sess. 591 (1994).

[2] CPI indexes ''SEHA'' and ''SAH2'' respectively.

gross rent inflation factor and a shelter rent inflation factor, HUD decomposes the contract rent CPI inflation factor into parts to represent the gross rent change and the shelter rent change. This is done by applying data from the Consumer Expenditure Survey (CEX) on the percentage of renters who pay for heat (a proxy for the percentage of renters who pay shelter rent) and, also, American Community Survey (ACS) data on the ratio of utilities to rents.[3] The BLS does not produce local inflation estimates for Puerto Rico. Therefore, HUD uses analogous estimates from the Puerto Rico Department of Labor and Human Resources (DTRH), Bureau of Statistics.

Survey Data Used To Produce AAFs

The rent inflation factor and fuel and utilities inflation factor for each large metropolitan area and Census region are based, respectively, on changes in the CPI index for rent of primary residence and the CPI index for fuels and utilities from 2020 to 2021. The CEX data used to decompose the contract rent inflation factor into gross rent and shelter rent inflation factors come from a special tabulation of 2021 CEX survey data produced for HUD. The utility-to-rent ratio used to produce AAFs comes from 2020 ACS median rent and utility costs.

Geographic Areas

Beginning with the data collection for 2018, BLS revised the sample for the CPI to be based on Core Based Statistical Areas (CBSAs). Previously, the sample was based on Metropolitan Statistical Areas (MSAs) as defined in 1998. In addition, the population required to be designated a Class A CPI city was increased from 1.5 million to 2.5 million. The following major metropolitan areas were eliminated under the new sample design: Pittsburgh PA, Cincinnati-Hamilton OH-KY-IN, Cleveland-Akron OH, Milwaukee-Racine WI, Kansas City MO-KS, and Portland-Salem OR-WA. With the change in metropolitan area definitions and the designation of Class A cities, the number of CPI cities declined from 28 metropolitan areas to 23 metropolitan areas (Riverside-San Bernardino has been split off from the Los Angeles survey area). This decline has resulted in fewer metropolitan component areas receiving local CPI adjustments. The 2018 CPI data with new metropolitan area definitions was first used with the FY 2020 AAFs. This change did not impact Puerto Rico which applies an island-wide CPI to all metropolitan and nonmetropolitan areas.

Each metropolitan area that uses a local CPI update factor is listed alphabetically in the tables and each HUD Metro FMR Area (HMFA) is listed alphabetically within its respective CBSA. Each AAF applies to a specific geographic area and to units of all bedroom sizes. AAFs are provided:

- For metropolitan areas at the MSA or HMFA level, and counties that are currently designated as nonmetropolitan, but are part of the metropolitan area defined in the local CPI survey.
- For the four Census regions (to be used for those metropolitan areas that are not covered by a CPI metropolitan survey, and non-metropolitan areas).

AAFs use the same Office of Management and Budget (OMB) metropolitan area definitions, as revised by HUD, that are used for the FY 2023 FMRs.

Area Definitions

To make certain that they are using the correct AAFs, users should refer to the Area Definitions Table section at *http://www.huduser.gov/portal/datasets/aaf.html.* The Area Definitions Table lists CPI areas in alphabetical order by State, and the associated Census region is shown next to each State name. Areas with AAFs that are determined by local CPI surveys are listed first. All metropolitan areas with local CPI survey areas have separate AAF schedules and are shown with their corresponding county definitions or as metropolitan counties. In the six New England States, the listings are for counties or parts of counties as defined by towns or cities. The remaining counties use the CPI for the Census region and are not separately listed in the Area Definitions Table at *http://www.huduser.gov/portal/datasets/aaf.html.*

Puerto Rico uses its own AAFs calculated from the inflation estimates from the Puerto Rico Department of Labor and Human Resources (DTRH), Bureau of Statistics, and adjusted by the ACS. The Virgin Islands uses the South Region AAFs, and the Pacific Islands use the West Region AAFs.

Solomon J. Greene,

Principal Deputy Assistant Secretary for Policy Development and Research.

[FR Doc. 2023–04813 Filed 3–8–23; 8:45 am]

BILLING CODE 4210–67–P

[3] The formulas used to produce these factors can be found in the Annual Adjustment Factors overview and in the FMR documentation at *www.HUDUSER.gov.*

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_WY_FRN_M04500169919]

Filing of Plats of Survey, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The Bureau of Land Management (BLM) is scheduled to file plats of survey 30 calendar days from the date of this publication in the BLM Wyoming State Office, Cheyenne, Wyoming. These surveys, which were executed at the request of the U.S. Forest Service and the BLM are necessary for the management of these lands.

DATES: Protests must be received by the BLM prior to the scheduled date of official filing by April 10, 2023.

ADDRESSES: You may submit written protests to the Wyoming State Director at WY926, Bureau of Land Management, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

FOR FURTHER INFORMATION CONTACT: Sonja Sparks, BLM Wyoming Chief Cadastral Surveyor, by telephone at 307 775–6225 or by email at *s75spark@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact this office during normal business hours. The Service is available 24 hours a day, 7 days a week, to leave a message or question with this office. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plats of survey of the following described lands are scheduled to be officially filed in the BLM Wyoming State Office, Cheyenne, Wyoming.

Sixth Principal Meridian, Wyoming

T. 42 N, R. 107 W,
Group No. WY1047, dependent resurvey, accepted February 15, 2023
T. 42 N, R. 108 W,
Group No. WY1047, dependent resurvey, accepted February 15, 2023
T. 45 N, R. 87 W,
Group No. WY1064, dependent resurvey and survey, accepted February 15, 2023

A person or party who wishes to protest one or more plats of survey identified in this notice must file a written notice of protest within 30 calendar days from the date of this publication with the Wyoming State Director at the above address. Any notice of protest received after the scheduled date of official filing will be untimely and will not be considered. A

written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director within 30 calendar days after the notice of protest is filed. If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the next business day following dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Copies of the preceding described plat and field notes are available to the public at a cost of $4.20 per plat and $0.15 per page of field notes. Requests can be made to *blm_wy_survey_records@blm.gov* or by telephone at 307–775–6222.

(Authority: 43 U.S.C., Chapter 3)

Dated: February 27, 2023.

Sonja S. Sparks,

Chief Cadastral Surveyor of Wyoming.

[FR Doc. 2023–04831 Filed 3–8–23; 8:45 am]

BILLING CODE 4331–26–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

Privacy Act of 1974; System of Records

AGENCY: National Indian Gaming Commission (NIGC or Commission), Interior.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the NIGC is issuing public notice of its intent to modify an existing system of records entitled, Management Contract Individuals Record System. This system of records is used to maintain information that is collected in the course of conducting background investigations on individuals who are contracted to manage Tribal gaming operations and enterprises.

DATES: This modified system is effective upon publication in the **Federal Register**, except for its routine uses, which are effective April 10, 2023. Please submit any public comment pertaining to this notice on or before April 10, 2023.

ADDRESSES: Comments may be submitted to Tim Osumi, Senior Agency Official for Privacy using any of the following methods:

Mail: 1849 C Street NW, Mail Stop #1621, Washington, DC 20240.

Email: privacy@nigc.gov.

FOR FURTHER INFORMATION CONTACT: Tim Osumi, Senior Agency Official for Privacy at NIGC Office of Privacy, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240; or by telephone at (202) 264–0676; or by email at *tim.osum@nigc.gov.*

SUPPLEMENTARY INFORMATION: Congress established the NIGC under the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 *et seq.*) (IGRA) to regulate gaming on Indian lands. The scope of this notice covers information necessary to ensure proper oversight of contract managers of Indian gaming operations and enterprises on Indian lands. The IGRA requires the Chair to (1) obtain background information on each person having a direct financial interest in, or management responsibility for, a management contract, (2) conduct background investigations of such persons, and (3) make a determination as to the person's eligibility and suitability for Indian gaming. The Commission stores this information in the current system of records. The following is a summary of the systemic modifications that are being proposed in this notice. For more details, please refer to the specific section referenced.

- *System Manager* has been updated.
- *System Location* has been updated.
- *Categories of Records in the System* has been updated to include three new categories: 11 (financial statements); 12 (criminal charges); and 13 (fingerprints). In addition, the descriptions of all existing categories have been modified for greater precision.
- *Record Source Categories* has been updated to include one new category: public information and information resources. Also, the categories for investigative reports compiled by tribes, Office of Personnel Management, contractors, or credit bureaus have been eliminated.
- *Routine Uses of Records* has been updated to include two new uses that will allow the agency to share information with outside entities as part of a coordinated response to a suspected or confirmed information breach.
- *Policies and Practices for Storage of Records* has been updated to account for the agency's transition from paper to electronic recordkeeping.
- *Policies and Practices for Retention and Disposal of Records* has been updated to include relevant records retention and disposition schedules that have been approved since the last public notice.
- *Administrative, Technical, and Physical Safeguards* has been updated to account for the agency's transition from paper to electronic recordkeeping and the Information Technology measures that are in place to protect the records.

SYSTEM NAME AND NUMBER:

Management Contract Individuals Record System—NIGC–2.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The records are in electronic format and located in electronic folders on a cloud tenant environment.

SYSTEM MANAGER(S):

Background Investigator Manager, National Indian Gaming Commission, 90K Street NE, Suite 200, Washington, DC 20002. tel: 202–632–7003

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

25 U.S.C. 2711.

PURPOSE(S) OF THE SYSTEM:

The records are used by Commission members and staff to review and verify eligibility and suitability of persons with a financial interest in, or management responsibility for, a management contract at an Indian gaming facility.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons with a financial interest in, or management responsibility for, a management contract as defined under 25 CFR part 502. Persons who are directors of a corporation that is party to a management contract.

CATEGORIES OF RECORDS IN THE SYSTEM:

Copies of applications; background and financial information collected by staff and copies of reports of background investigations. Such information includes: (1) Full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, and gender; (2) A current photograph, driver's license number, and a list of all languages spoken or written; (3) Business and employment positions held, and business and residence addresses; the city, state and country of residences; (4) The names and current addresses of at least three personal references; (5) Current business

and residence telephone numbers; (6) A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses; (7) A description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses; (8) The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit relating to gaming; (9) For each gaming offense and for each felony for which there is an ongoing prosecution or a conviction, the name and address of the court involved, the charge, and the dates of the charge and of the disposition; (10) For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within ten years of the date of the application, the name and address of the court involved, and the dates of the prosecution and the disposition; (11) A complete financial statement showing all sources of income for the previous three years, and assets, liabilities, and net worth as of the date of the submission; (12) For each criminal charge (excluding minor traffic charges) regardless of whether or not it resulted in a conviction, if such criminal charge is within ten years of the date of the application and is not otherwise listed pursuant to 9 or 10 of this section, the name and address of the court involved, the criminal charge, and the dates of the charge and the disposition; (13) Fingerprint card submissions for each person for whom background information is provided under this section; (14) Whatever other information the NIGC deems relevant.

RECORD SOURCE CATEGORIES:

Individual applications and supplemental information provided by such applicants; background investigation reports compiled by the NIGC; information provided by persons interviewed as part of a background investigation; Federal, state, foreign, tribal, and local law enforcement and regulatory agencies; Commission staff and members; public records and information sources.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. To disclose relevant information to Federal, State, tribal, or local law enforcement or regulatory agencies to verify information supplied by applicants in connection with determining eligibility and suitability.

2. To disclose relevant information to tribes that engage management contractors to manage their Indian gaming operations.

3. In the event that records in this system indicate a violation or potential violation of law, criminal, civil, or regulatory in nature, the relevant records may be referred to the agency charged with responsibility for investigating or prosecuting such violation.

4. To disclose relevant information to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

5. To disclose relevant information to a Federal, State, local, or tribal agency (or their agents) that is involved in civil, criminal or regulatory investigations or prosecutions or investigations of activities while associated with a gaming operation to protect the integrity of Indian gaming.

6. To disclose relevant information to Indian tribal officials who have need for the information in the performance of their official duties.

7. To appropriate agencies, entities, and persons when:

(a) NIGC suspects or has confirmed that there has been a breach of the system of records;

(b) NIGC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NIGC (including its information systems, programs, and operations), the Federal Government, or national security; and,

(c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NIGC's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

8. To another Federal agency or Federal entity, when the NIGC determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(a) Responding to 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 national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The records are maintained in electronic format in an electronic folder system.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Individual applicant name, associated gaming operation or enterprise, management contractor.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All records in the system are temporary records and retained and disposed of in compliance with records retention and disposition schedules that have been approved by the National Archives and Records Administration, including: NIGC Schedule DAA–600–2017–0008 Item 4 requires that background investigation final reports have a 10 year retention period; NIGC Schedule DAA–600–2017–0008 Item 5 requires that background investigation billing records have a 10 year retention period; NIGC Schedule DAA–600–2017–0008 Item 6 requires that background investigation submitted documents and working files have a 7 year retention period.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The system is only accessible to authorized users using strong password protection. It utilizes firewalls, intrusion detection prevention system (IDPS), a virtual protocol network (VPN) and encrypted communications to protect its perimeter. Access to the system is limited to NIGC personnel who have a need to know for the performance of their duties. Information within the system is compartmentalized and granular access is dependent on a permission structure that is role-based. All persons authorized to access the system are required to complete training that includes information about the legal requirements for proper handling of privacy information including criminal history records information (CHRI).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information in this system of records about themselves are required to meet the requirements of NIGC regulations that implement the Privacy Act of 1974, at 25 CFR part 515.

CONTESTING RECORD PROCEDURES:

Requests for correction or amendment must identify the record to be changed and the corrective action sought in accordance with NIGC's Privacy Act regulations at 25 CFR part 515.

NOTIFICATION PROCEDURES:

Any individual who wants to know whether this system of records contains a record about themselves, can make a request in accordance with NIGC's

Privacy Act regulations at 25 CFR part 515 to: Attn: Privacy & Records Information Management Office, National Indian Gaming Commission, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Under 5 U.S.C. 552a(k)(2) the Commission is claiming exemptions from certain provisions of the Act for portions of its records. The exemptions and the reasons for them are described in the regulations 25 CFR 515.13.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on March 15, 2004 (69 FR 12182).

E. Sequoyah Simermeyer,

Chairman, National Indian Gaming Commission.

[FR Doc. 2023–04672 Filed 3–8–23; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

Privacy Act of 1974; Notice of New System of Records

AGENCY: National Indian Gaming Commission, Department of the Interior.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the National Indian Gaming Commission (NIGC) is issuing notice of its intent to establish a new system of records entitled, ''Payroll, Attendance, Retirement, and Leave Records—NIGC–3.'' This system of records will allow the NIGC to manage human resources and payroll functions and will be included in the NIGC's inventory of record systems.

DATES: This new system will become effective upon publication, except for its routine uses, which will become effective April 10, 2023. Please submit any public comment pertaining to this notice on or before April 10, 2023.

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

Mail: Privacy & Records Management Specialist, National Indian Gaming Commission, 1849 C Street NW, Mail Stop #1621, Washington DC 20240.

Email: privacy@nigc.gov.

Fax: 202–632–7066.

FOR FURTHER INFORMATION CONTACT: Tim Osumi, Senior Agency Official for Privacy, National Indian Gaming Commission, 1849 C Street NW, Mail Stop #1621, Washington DC 20240, *tim.osumi@nigc.gov,* 202–264–0676.

SUPPLEMENTARY INFORMATION: The NIGC is publishing this system of records notice for its employees' payroll and personnel related records that are hosted and/or processed by the Department of the Interior (DOI) Interior Business Center (IBC). The NIGC has entered into an agreement with the DOI IBC for such purpose. The DOI IBC is a Federal agency shared services provider that provides payroll and personnel processing services to internal and external customers, including other Federal agency customers, such as the NIGC. The IBC uses a system—the Federal Personnel and Payroll System (FPPS)—to perform these services. FPPS and its supporting systems manage payroll, time and attendance, and human capital management functions, meet regulatory requirements, and prepare reports to other Federal agencies. The NIGC payroll, attendance, retirement, and leave records described in this system of records notice form a part of the information contained in the FPPS. Associated personnel records also contained in the FPPS are covered under OPM/GOVT–1, General Personnel Records, a government-wide system of records notice published by the Office of Personnel Management.

Although DOI hosts and processes payroll and personnel transactions on behalf of the NIGC, the NIGC retains ownership and control over its own records and is responsible for meeting requirements under the Privacy Act for the collection, maintenance and sharing of its records. Individuals seeking access to, notification or correction of their records owned and maintained by the NIGC must submit their requests to the NIGC in accordance with this system of records notice.

SYSTEM NAME AND NUMBER:

Payroll, Attendance, Retirement, and Leave Records—NIGC–3.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

This system is centrally-managed at NIGC headquarters, 90 K Street, Suite 200, Washington, DC 20002. Records are also located at other federal agency payroll service provider locations.

SYSTEM MANAGER:

HR Coordinator, National Indian Gaming Commission, 90K Street NE, Suite 200, Washington, DC 20002. Tel: 202–632–7003.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 CFR part 293, subpart B, Personnel Records Subject to the Privacy Act; 5 CFR part 297, Privacy Procedures for Personnel Records; Executive Order 9397 as amended by Executive Order 13478, relating to Federal agency use of Social Security numbers; and 5 CFR part 515, NIGC Privacy Act Procedures.

PURPOSE(S) OF THE SYSTEM:

The primary purpose of the system is to manage personnel and payroll functions, to ensure proper payment for salary and benefits, track time and attendance, retirement, leave, and other absences for reporting and compliance purposes; and facilitate reporting requirements to other Federal agencies, for payroll and tax purposes.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by the system include current and former NIGC employees and applicants for Federal employment. This system may also include limited information regarding employee spouses, dependents, emergency contacts, beneficiaries, or estate trustees who meet the definition of ''individual'' as defined in the Privacy Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system maintains records including:

Employee biographical and employment information: Employee name, other names used, citizenship, gender, date of birth, age, group affiliation, marital status, Social Security number (SSN), truncated SSN, legal status, place of birth, records related to position, occupation, duty location, security clearance, financial information, medical information, disability information, education information, driver's license, race, ethnicity, personal or work telephone number, personal or work email address, military status and service, home or mailing address, Taxpayer Identification Number (TIN), bank account information, professional licensing and credentials, family relationships, involuntary debt (garnishments or child support payments), employee common identifier (ECI), organization code, user identification and any other employment information.

Third-party information: Spouse information, emergency contact, beneficiary information, savings bond co-owner name(s) and information, and family members and dependents information.

Salary and benefits information: Salary data, retirement data, tax data,

deductions, health benefits, allowances, insurance data, Flexible Spending Account, Thrift Savings Plan information and contributions, pay plan, payroll records, awards, court order information, back pay information, debts owed to the government as a result of overpayment, refunds owed, or a debt referred for collection on a transferred employee.

Timekeeping information: Time and attendance records, and leave records.

This system may also contain correspondence, documents and other information required to administer payroll, leave, and related functions.

RECORD SOURCE CATEGORIES:

Information is obtained from individuals on whom the records are maintained, official personnel records of individuals on whom the records are maintained, supervisors, timekeepers, previous employers, the Internal Revenue Service and state tax agencies, the Department of the Treasury, other Federal agencies, courts, state child support agencies, employing agency accounting offices, and third-party benefit providers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information maintained in this system may be disclosed to authorized entities outside NIGC for purposes determined to be relevant and necessary as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To the Department of Justice (DOJ), including Offices of the U.S. Attorneys, or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

(a) NIGC;

(b) Any other Federal agency appearing before the Office of Hearings and Appeals;

(c) Any NIGC employee or former employee acting in his or her official capacity;

(d) Any NIGC employee or former employee acting in his or her individual capacity when NIGC or DOJ has agreed to represent that employee; or

(e) The United States Government or any agency thereof, when DOJ determines that NIGC is likely to be affected by the proceeding.

2. To the Department of the Interior or other Federal agency as required for payroll purposes, for preparation of payroll and other checks and electronic funds transfers to Federal, State, and local government agencies, non-governmental organizations, and individuals.

3. To the Department of the Treasury, Internal Revenue Service, and state and local tax authorities for which an employee is or was subject to tax regardless of whether tax is or was withheld in accordance with Treasury Fiscal Requirements, as required.

4. To the Office of Personnel Management or its contractors in connection with programs administered by that office, including, but not limited to, the Federal Long Term Care Insurance Program, the Federal Dental and Vision Insurance Program, the Flexible Spending Accounts for Federal Employees Program, and the electronic Human Resources Information Program.

5. To another Federal agency to which an employee has transferred.

6. To any criminal, civil, or regulatory law enforcement authority (whether Federal, state, territorial, local, tribal or foreign) when a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature.

7. To a congressional office in response to a written inquiry that an individual covered by the system, or the heir of such individual if the covered individual is deceased, has made to the office.

8. To Federal, State, local or tribal agencies where necessary to enable the employee's agency to obtain information relevant to the hiring or retention of that employee, or the issuance of a security clearance, contract, license, grant or other benefit.

9. To appropriate Federal and state agencies to provide reports including data on unemployment insurance.

10. To the Social Security Administration to credit the employee or emergency worker account for Old-Age, Survivors, and Disability Insurance (OASDI) and Medicare deductions.

11. To insurance carriers to report employee election information and withholdings for health insurance.

12. To charitable institutions when an employee designates an institution to receive contributions through salary deduction.

13. To the Department of the Treasury, Internal Revenue Service, or to another Federal agency or its contractor, to disclose debtor information solely to aggregate information for the Internal Revenue Service to collect debts owed to the Federal Government through the offset of tax refunds.

14. To any creditor Federal agency seeking assistance for the purpose of that agency implementing administrative or salary offset procedures in the collection of unpaid financial obligations owed the United States Government from an individual.

15. To any Federal agency where the individual debtor is employed or receiving some form of remuneration for the purpose of enabling that agency to collect debts on the employee's behalf by administrative or salary offset procedures under the provisions of the Debt Collection Act of 1982.

16. To the Department of the Treasury, Internal Revenue Service, and state and local authorities for the purpose of locating a debtor to collect a claim against the debtor.

17. To the Federal Retirement Thrift Investment Board's record keeper, which administers the Thrift Savings Plan, to report deductions, contributions, and loan payments.

18. To the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, for the purposes of locating individuals to establish paternity; establishing and modifying orders of child support; identifying sources of income; and for other child support enforcement actions as required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

19. To an expert, consultant, or contractor (including employees of the contractor) of NIGC that performs services requiring access to these records on NIGC's behalf to carry out the purposes of the system, including employment verifications, unemployment claims, processing services, leave and earning statements, and 1095–C Affordable Care Act statements.

20. To the Office of Personnel Management Employee Express, which is an employee self-service system, to initiate personnel and payroll actions and to obtain payroll information.

21. To the Department of Labor for processing claims for employees injured on the job or claiming occupational illness.

22. To Federal agencies and organizations to support interfaces with other systems operated by the Federal agencies for which the employee is employed or located for the purpose of avoiding duplication, increasing data integrity and streamlining government operations.

23. To another Federal agency to provide information needed in the

performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

24. To the National Archives and Records Administration (NARA) to conduct records management inspections under the authority of 44 U.S.C. 2904 and 2906.

25. To the Office of Management and Budget (OMB) during the coordination and clearance process in connection with legislative affairs as mandated by OMB Circular A–19.

26. To Federal, state, territorial, local, tribal, or foreign agencies that have requested information relevant or necessary to the hiring, firing or retention of an employee or contractor, regarding the issuance of a security clearance, license, contract, grant or other benefit.

27. To state, territorial, and local governments, and tribal organizations to provide information needed in response to court order and/or discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

28. To the Department of the Treasury to recover debts owed to the United States.

29. To the news media and the public, with the approval of the Public Affairs Officer in consultation with the General Counsel and the Senior Agency Official for Privacy, where there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of NIGC or is necessary to demonstrate the accountability of NIGC's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

30. To the Executive Office of the President in response to an inquiry from that office made at the request of the subject of a record or a third party on that person's behalf, or for a purpose compatible with the reason for which the records are collected or maintained.

31. To the Office of Personnel Management, the Merit System Protection Board, Federal Labor Relations Authority, or the Equal Employment Opportunity Commission when requested in the performance of their authorized duties.

32. To state offices of unemployment compensation to assist in processing an individual's unemployment, survivor annuity, or health benefit claim, or for records reconciliation purposes.

33. To Federal Employees' Group Life Insurance or Health Benefits carriers in connection with survivor annuity or health benefits claims or records reconciliations.

34. To any source from which additional information is requested by NIGC relevant to a NIGC determination concerning an individual's pay, leave, or travel expenses, to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and to identify the type of information requested.

35. To the Social Security Administration and the Department of the Treasury to disclose pay data on an annual basis, and as necessary to execute their statutory responsibilities for the effective administration of benefits programs, payroll and taxes.

36. To a Federal agency or in response to a congressional inquiry when additional or statistical information is requested relevant to a Federal benefit or program, such as the NIGC Transit Fare Subsidy Program.

37. To the Department of Health and Human Services for the purpose of providing information on new hires and quarterly wages as required under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

38. To appropriate agencies, entities, and persons when:

(a) NIGC suspects or has confirmed that there has been a breach of the system of records;

(b) NIGC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NIGC (including its information systems, programs, and operations), the Federal Government, or national security; and

(c) The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NIGC's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

39. To another Federal agency or Federal entity, when NIGC determines that 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 national security, resulting from a suspected or confirmed breach.

40. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

41. To a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of discovery, pursuant to appropriate court order or other judicial process in the course of criminal, civil or administrative litigation.

42. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the Department of Justice determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

43. To the Department of the Interior or other Federal agency operating as a shared service provider under a cross-servicing agreement with NIGC for purposes relating to the processing and maintenance of these records, to reconstitute the system in case of system failure or helpdesk request, and to ensure the integrity and effective management of the system of records.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in manual, microfilm, microfiche, electronic, imaged and computer printout form. Original input documents are stored in standard office filing equipment and/or as imaged documents on magnetic media at all locations which prepare and provide input documents and information for data processing. Paper records are maintained in file folders stored within locking filing cabinets or locked rooms in secured facilities with controlled access. Electronic records are stored in computers, removable drives, storage devices, electronic databases, and other electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by employee name, SSN, TIN, ECI, birth date, organizational code, or assigned person number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained in accordance with General Records Schedule (GRS) 1.0 ''Finance'' and GRS 2.0 ''Human Resources.'' The records are temporary records. Paper records are disposed of by shredding or pulping, and records maintained on electronic media are degaussed or erased in accordance with

the applicable records retention schedule and NARA guidelines.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to records in the system is limited to authorized personnel who have a need to access the records in the performance of their official duties, and each person's access is restricted to only the functions and data necessary to perform that person's job responsibilities. Paper or micro format records are maintained in locked file cabinets in secured rooms under the control of authorized personnel. Computer servers on which electronic records are stored are located in secured facilities with physical, technical and administrative levels of security to prevent unauthorized access to the information network and information assets. Security controls include encryption, firewalls, audit logs, and network system security monitoring. Electronic data is protected through user identification, passwords, database permissions and software controls. System administrators and authorized users are trained and required to follow established internal security protocols and must complete all security, privacy, and records management training, and sign system Rules of Behavior. Information technology systems adhere to: National Institute of Standards and Technology privacy and security; the Paperwork Reduction Act of 1995, Public Law 104–13; the Federal Information Security Modernization Act of 2014, Public Law 113–283, as codified at 44 U.S.C. 3551, et seq.; and the Federal Information Processing Standard 199, Standards for Security Categorization of Federal Information and Information Systems.

RECORD ACCESS PROCEDURES:

Requests must meet the requirements of NIGC regulations that implement the Privacy Act of 1974, at 25 CFR part 515; specifically, 25 CFR 515.3.

CONTESTING RECORD PROCEDURES:

Requests for correction or amendment must identify the record to be changed and the corrective action sought. Such requests must satisfy the NIGC Privacy Act procedures in NIGC's Privacy Act regulations at 25 CFR part 515, particularly 25 CFR 515.6.

NOTIFICATION PROCEDURES:

Any individual who wants to know whether this system of records contains a record about themselves, can make a request pursuant to the NIGC Privacy Act regulations at 25 CFR 515.3.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

E. Sequoyah Simermeyer,

Chairman, National Indian Gaming Commission.

[FR Doc. 2023–04670 Filed 3–8–23; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

Privacy Act of 1974; System of Records

AGENCY: National Indian Gaming Commission (NIGC or Commission), Interior.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the NIGC is issuing public notice of its intent to modify an existing system of records entitled, Indian Gaming Individuals Record System. This system of records includes information submitted to the NIGC so that it may review and verify eligibility determinations of key employees and primary management officials for tribal licenses in Indian gaming enterprises.

DATES: This modified system is effective upon publication in the **Federal Register**, except for its routine uses, which are effective April 10, 2023. Please submit any public comment pertaining to this notice on or before April 10, 2023.

ADDRESSES: Comments may be submitted to Tim Osumi, Senior Agency Official for Privacy using any of the following methods:

Mail: 1849 C Street NW, Mail Stop #1621, Washington, DC 20240.

Email: privacy@nigc.gov.

FOR FURTHER INFORMATION CONTACT: Tim Osumi, Senior Agency Official for Privacy at NIGC Office of Privacy, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240; or by telephone at (202) 264–0676; or by email at *tim.osum@nigc.gov.*

SUPPLEMENTARY INFORMATION: Congress established the NIGC under the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 *et seq.)* (IGRA) to regulate gaming on Indian lands. The scope of this notice covers information necessary to ensure proper oversight of tribal licensing of key employees and primary management officials in gaming enterprises on Indian lands. The IGRA requires a tribe to notify the Commission of the results of background checks for primary management officials and key employees of Indian gaming enterprises and the issuance of tribal licenses to them (25 U.S.C. 2710(b)(2)(F)(I) and (III)). Further, under the IGRA, the Commission has 30 days to object to issuance of a license by a tribe (25 U.S.C. 2710(c)(1)). Commission rules implement these legislative provisions by (1) requiring tribes to obtain certain information from applicants for key employee and primary management official positions in gaming operations; (2) requiring tribes to forward to the Commission the required information for each key employee and primary management official; (3) reviewing and verifying the submitted information; and (4) conducting supplementary background investigations to the extent the Commission deems necessary. The Commission stores this information in the current system of records. The following is a summary of the systemic modifications that are being proposed in this notice. For more details, please refer to the specific section referenced.

- *System Manager* has been updated.
- *System Location* has been updated.
- *Categories of Records in the System* has been updated to include four new categories: 10 (criminal charges); 11 (previous licensing agency); 12 (photograph); and 14 (fingerprints). In addition, the descriptions of all existing categories have been modified for greater precision.
- *Record Source Categories* has been updated to include three new categories: fingerprint cards; criminal records history information; and, NIGC—tribal correspondence relating to tribal applicant decisions.
- *Routine Uses of Records* has been updated to include two new uses that will allow agency to share information with, and coordinate a response to, a suspected or confirmed information breach.
- *Policies and Practices for Storage of Records* has been updated to account for the agency's transition from paper to electronic recordkeeping.
- *Policies and Practices for Retention and Disposal of Records* has been updated to include relevant records retention and disposition schedules that have been approved since the last public notice.
- *Administrative, Technical, and Physical Safeguards* has been updated to account for the agency's transition from paper to electronic recordkeeping and the Information Technology measures that are in place to protect the records.

SYSTEM NAME AND NUMBER:

Indian Gaming Individuals Record System—NIGC–1.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

National Indian Gaming Commission headquarters at 90 K Street NW, Washington, DC.

SYSTEM MANAGER(S):

Criminal Justice Information Services System Owner, National Indian Gaming Commission, 90K Street NE, Suite 200, Washington, DC 20002. tel: 202–632–7003, email: *cso@nigc.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

25 U.S.C. 2710(b)(2)(F).

PURPOSE(S) OF THE SYSTEM:

The system is used by Commission members and staff to review and verify eligibility determinations of key employees and primary management officials for tribal licenses in Indian gaming enterprises.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Key employees and primary management officials as defined under 25 CFR 502.

CATEGORIES OF RECORDS IN THE SYSTEM:

Summary information from applications for licensing at gaming enterprises on Indian lands; information collected by the staff and members of the Commission; summary information from reports of background investigations; fingerprint card information; criminal history information provided by the Federal Bureau of Investigation; and copies of tribal eligibility determinations. Such information may include: (1) Last name, first name, middle name, other names used (oral or written), signature, social security number, date of birth, place of birth, citizenship, current address, race, gender, height, weight, eye color, hair color, languages spoken; (2) Current, and for the previous five years: business and employment positions held; ownership interests in those businesses; business and residence addresses, and driver's license numbers; (3) the names and current addresses of at least three personal references; (4) current business and residence telephone numbers; (5) a description of any previous business relationships with Indian tribes, including ownership interests in those businesses; (6) a description of any existing and previous business relationships with the gaming industry generally, including ownership of interests in those businesses; (7) the name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit relating to gaming, whether or not such license or permit was granted; (8) for each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition if any; (9) for each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within 10 years of the date of application, the name and address of the court involved and the date and disposition; (10) For each criminal charge excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of application, the criminal charge, the name and address of the court involved and the date and disposition; (11) The name and address of any licensing or regulatory agency with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted; (12) A photograph; (13) Any other information a tribe deems relevant; and (14) Fingerprints consistent with procedures adopted by a tribe according to 25 CFR 522.2(h).

RECORD SOURCE CATEGORIES:

Tribes or tribal entities; Federal Bureau of Investigation; Federal, state, foreign, tribal, and local law enforcement and regulatory agencies; Commission Chair and staff.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. To disclose relevant information to Federal, State, tribal, or local law enforcement of regulatory agencies to verify information supplied by applicant key employees and primary management officials in connection with determining eligibility for tribal licenses in an Indian gaming enterprise.

2. To disclose relevant information to tribes that licenses or may wish to license individuals in Indian gaming enterprise.

3. In the event that records in this system indicate a violation or potential violation of law, criminal, civil, or regulatory in nature, the relevant records may be referred to the agency charged with responsibility for investigating or prosecuting such violation.

4. To disclose relevant information to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

5. To disclose relevant information to a Federal, State, local, or tribal agency (or their agents) that is involved in a civil regulatory or enforcement action to protect the integrity of Indian gaming.

6. To appropriate agencies, entities, and persons when:

(a) NIGC suspects or has confirmed that there has been a breach of the system of records;

(b) NIGC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NIGC (including its information systems, programs, and operations), the Federal Government, or national security; and

(c) The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NIGC's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. To another Federal agency or Federal entity, when NIGC determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(a) Responding to 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 national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in electronic format in an electronic information system that is a hybrid system consisting of an on-site server a related cloud tenant environment. Some information is stored as structured data within a database system and some information is stored as unstructured electronic files.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Employee name, gaming operation where employed, social security number, and date of birth.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All records in the system are temporary records and retained and disposed of in compliance with records retention and disposition schedules that have been approved by the National Archives and Records Administration, including: NIGC Schedule DAA–600–2017–011 Item 2, requiring that

applicant background information has a 5 year retention period; NIGC Schedule DAA–600–2017–011 Item 3, requiring that applicant criminal history record information has a 1 year retention period; NIGC Schedule DAA–600–2017–003 Item 5, requiring that tribal ''notices of results'' has a 3 year retention period; and, NIGC Schedule DAA–600–2017–003 Item 6, requiring that Tribal ''notices of the issuance of a gaming licenses'' has a 3 years retention period.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The system is only accessible to authorized users using strong password protection. It utilizes firewalls, intrusion detection prevention system (IDPS), a virtual protocol network (VPN) and encrypted communications to protect its perimeter. Access to the system is limited to NIGC personnel who have a need to know for the performance of their duties and limited information about applicant past employment history is also made available to selected authorized tribal gaming regulators. Information within the system is compartmentalized and granular access is dependent on a permission structure that is role-based. All persons authorized to access the system are required to complete training that includes information about the legal requirements for proper handling of privacy information, including criminal history records information (CHRI).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information in this system of records about themselves are required to meet the requirements of NIGC regulations that implement the Privacy Act of 1974, at 25 CFR part 515.

CONTESTING RECORD PROCEDURES:

Requests for correction or amendment must identify the record to be changed and the corrective action sought in accordance with NIGC's Privacy Act regulations at 25 CFR part 515.

NOTIFICATION PROCEDURES:

Any individual who wants to know whether this system of records contains a record about themselves, can make a request, in accordance with NIGC's Privacy Act regulations, 25 CFR part 515 to: Attn: Privacy & Records Information Management Office, National Indian Gaming Commission, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Under 5 U.S.C. 552a(k)(2) the Commission is claiming exemptions from certain provisions of the Act for portions of its records. The exemptions and the reasons for them are described in the Commission regulations 25 CFR 515.13.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on March 15, 2004 (69 FR 12182).

E. Sequoyah Simermeyer,

Chairman, National Indian Gaming Commission.

[FR Doc. 2023–04673 Filed 3–8–23; 8:45 am]

BILLING CODE 7565–01–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–015]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: March 22, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436. Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 731–TA–685–867 (Fourth Review) (Stainless Steel Butt-Weld Pipe Fittings from Italy, Malaysia, and the Philippines). The Commission currently is scheduled to complete and file its determinations and views of the Commission on March 31, 2023.
5. Outstanding action jackets: none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, 202–205–2595.

The Commission is holding this meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: March 6, 2023.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2023–04879 Filed 3–7–23; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1314]

Certain Computer Network Security Equipment and Systems, Related Software, Components Thereof, and Products Containing Same; Notice of Commission Determination Not To Review an Initial Determination Granting a Motion for Leave To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined not to review an initial determination (''ID'') (Order No. 32) granting complainants' motion for leave to amend the complaint and notice of investigation to reflect a corporate name change.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On May 24, 2022, the Commission instituted this investigation based on a complaint, as amended and supplemented, filed on behalf of Centripetal Networks, Inc. of Reston, Virginia. 87 FR 31581–82 (May 24, 2022). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain computer network security equipment and systems, related software, components thereof, and products containing the same that infringe certain claims of U.S. Patent Nos. 9,264,370; 10,193,917; and 10,284,526. *Id.* at 31581. The complaint also alleged that a domestic industry

exists. *Id.* The Commission's notice of investigation names as a respondent Keysight Technologies, Inc. of Santa Rosa, California. *Id.* The Office of Unfair Import Investigations (''OUII'') is participating in this investigation. *Id.*

On January 31, 2023, Centripetal Networks, Inc. filed an unopposed motion to amend the complaint and notice of investigation to reflect the complainant changing its corporate name from Centripetal Networks, Inc. to Centripetal Networks, LLC. No party filed a response to the motion.

On February 3, 2023, the ALJ issued an ID pursuant to Commission Rule 210.14(b)(1) (19 CFR 210.14(b)(1)), granting Complainants' motion for leave to amend the complaint and notice of investigation. No petitions for review of the ID were filed.

The Commission has determined not to review the subject ID.

The Commission vote for this determination took place on March 6, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: March 6, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–04842 Filed 3–8–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1138 (CAFC Remand Proceeding)]

Certain LTE- and 3G-Compliant Cellular Communications Devices; Notice of a Commission Determination To Dismiss as Moot a Portion of the Complaint; Termination of Remand Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that, on October 24, 2022, the U.S. Court of Appeals for the Federal Circuit (''Federal Circuit'') issued a mandate with instructions to dismiss as moot the portion of the complaint filed in the above-captioned investigation relating to U.S. Patent No. 6,760,590 (''the '590 patent''), which expired during the pendency of an appeal before the Court. The Commission hereby dismisses that portion of the complaint. The remand proceeding is hereby terminated.

FOR FURTHER INFORMATION CONTACT: Richard P. Hadorn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3179. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 19, 2018, based on a complaint filed by INVT SPE LLC (''INVT'') of San Francisco, California. 83 FR 53105 (Oct. 19, 2018). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) (''section 337''), in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain LTE- and 3G-compliant cellular communications devices by reason of infringement of certain claims of five U.S. patents, including U.S. Patent Nos. 6,760,590; 7,206,587 (''the '587 patent''); and 7,848,439 (''the '439 patent''). *Id.* The complaint further alleges that a domestic industry exists. *Id.* The notice of investigation named as respondents Apple Inc. of Cupertino, California; HTC Corporation of Taoyuan City, Taiwan; HTC America, Inc. of Seattle, Washington; ZTE Corporation of Guangdong, China; and ZTE (USA) Inc. of Richardson, Texas. *Id.* at 53106. The Office of Unfair Import Investigations was also named as a party. *Id.*

On June 1, 2020, the Commission terminated the investigation with a finding of no violation of section 337 as to certain claims of the '590, '587, and '439 patents. 85 FR 34649–50 (June 5, 2020). INVT filed an appeal with the Federal Circuit with respect to certain issues in the Commission's final determination with respect to the '590 patent, including claim construction, infringement, and the technical prong of the domestic industry requirement.

The '590 patent expired on March 5, 2022, during the pendency of the appeal before the Federal Circuit. On August 31, 2022, in a precedential opinion, the Federal Circuit held that INVT's appeal as to the '590 patent had become moot. *INVT SPE LLC* v. *ITC,* 46 F.4th 1361, 1370 (Fed. Cir. 2022) (''The expiration of the '590 patent, therefore, has rendered this appeal moot with respect to that patent.''). The Court vacated the Commission's determination as to the '590 patent, and ''remand[ed] with instructions to dismiss as moot the relevant portion of the complaint.'' *Id.; see also id.* at 1365, 1381. On October 24, 2022, the Federal Circuit issued its mandate returning jurisdiction of the matter to the Commission.

In accordance with the Court's remand instructions, the Commission has determined to dismiss as moot the portion of INVT's complaint relating to the '590 patent. In addition, we observe that the Federal Circuit's vacatur of the Commission's final determination and the dismissal of the complaint pursuant to the Court's remand order as to the '590 patent sets aside all ALJ findings and Commission findings related to that patent.

The remand proceeding is hereby terminated.

The Commission vote for this determination took place on March 3, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: March 6, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–04817 Filed 3–8–23; 8:45 am]

BILLING CODE 7020–02–P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings

TIME AND DATE: The Operations and Regulations Committee (Committee) of the Legal Services Corporation (LSC) Board of Directors will meet virtually on Monday, March 13, 2023. The meeting will commence at 1:30 p.m. EDT and will continue until the conclusion of the Committee's agenda.

PLACE: Public notice of virtual meetings.

LSC will conduct the March 13, 2023 meeting via Zoom. To join the meeting, please use this link: *https://lsc-gov.zoom.us/j/82286565349?pwd=V1JJenBZbjlBbkxKSzdDY1ExbHhNZz09&from=addon.*

Meeting ID: 822 8656 5349

Passcode: 960150

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of agenda
2. Approval of minutes of the Committee's Open Session meeting on January 13, 2023
3. Briefing on proposed rulemaking timeline
4. Public comment
5. Consider and act on other business
6. Consider and act on adjournment of meeting.

CONTACT PERSON FOR MORE INFORMATION: Cheryl DuHart, Administrative Coordinator, Office of Legal Affairs, at (202) 295–1621. Questions may also be sent by electronic mail to *duhartc@lsc.gov.*

Authority: 42 U.S.C. 2996g(e).

Dated: March 7, 2023.

Stefanie Davis,

Senior Associate General Counsel for Regulations.

[FR Doc. 2023–04916 Filed 3–7–23; 11:15 am]

BILLING CODE 7050–01–P

OFFICE OF MANAGEMENT AND BUDGET

Agency Information Collection Activities; Notice and Request for Comments

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice and request for comments.

SUMMARY: The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) is proposing to revise the information collection 0348–0065 that it uses for members of the public who request a meeting with OIRA on rules under review pursuant to Executive Order 12866. The information collected would be subject to the Paperwork Reduction Act (PRA) and this notice announces and requests comment on OIRA's proposal for such a collection.

DATES: May 8, 2023.

ADDRESSES: Submit comments by the following method:

- *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. Please submit comments only and cite ''Information Collection 0348–0065'' in all correspondence related to this collection. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two to three business days after submission to verify.

FOR FURTHER INFORMATION CONTACT: *Oira_submission@omb.eop.gov,* Lisa Jones, 202–395–5897.

SUPPLEMENTARY INFORMATION:

Title: Information on Meetings with Outside Parties Pursuant to Executive Order 12866.

Abstract: Executive Order 12866, ''Regulatory Planning and Review,'' issued by President Clinton on September 30, 1993, establishes and governs the process under which OIRA reviews agency draft proposed and final regulatory actions. The Executive Order also establishes a disclosure process regarding the OIRA Administrator's (or his/her designee's) meetings with outside parties during formal review of a regulatory action if such meetings occur.

Summary of Current Meeting Process. OIRA currently discloses the subject, date, and participants of the meeting on the *Reginfo.gov* website, as well as any materials provided to OIRA at such meetings.

These meetings occur at the initiative and request of outside parties who request a meeting about a regulatory action under OIRA review to present views. OIRA invites representatives from the agency or agencies that would issue the regulatory action. If such meetings occur, OIRA does not take minutes during the meeting but would post on *RegInfo.gov* any written materials provided by outside parties during these meetings, including the initial meeting request.

To help ensure transparency associated with meetings pursuant to Executive Order 12866, OIRA collects and discloses the following information from outside parties that request a meeting with OIRA to present their views on a regulatory action currently under review:

1. The name of the regulatory action under review on which the party would like to present its views.

2. Names of all attendees who will be present at the meeting from the outside party or parties, including each attendee's organization or affiliation.

3. Electronic copies of all briefing materials that will be used during the presentation.

4. An acknowledgment by the requesting party that all information submitted to OIRA pursuant to this collection and meeting request will be made publicly available at *Reginfo.gov.*

Proposed Revisions. OMB is considering revisions to this information collection with the goal of collecting additional information from meeting requestors to facilitate further transparency, as well as improve the efficiency and effectiveness of the meeting request process. Such information may include further details about the requestor's affiliation, stated purpose for the meeting, and whether the requestor has already presented views to other Federal Government entities on the regulatory action under review.

OIRA welcomes any and all public comments on the proposed revisions to the collection of information such as the accuracy of OIRA's burden estimate, the practical utility of collecting this information, and whether there are additional pieces of information that could be collected from meeting requestors to further the disclosure provisions of Executive Order 12866.

Current actions: Proposal for revising an existing information collection requirement.

Type of review: Revision.

Affected public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Governments.

Expected average annual number of respondents: 300.

Average annual number of responses per respondent: 2.

Total number of responses annually: 600.

Burden per response: 15 minutes.

Total average annual burden: 150 hours.

Request for comments: OMB anticipates that comments submitted in response to this notice will be summarized or included in the request for OMB approval. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop,

acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to respond to a collection of information, search data sources, and complete and review the collection of information; to transmit or otherwise disclose the information; and to train personnel to be able to carry out the foregoing tasks.

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.

Richard L. Revesz,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 2023–04853 Filed 3–8–23; 8:45 am]

BILLING CODE 3110–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–016]

NASA Astrophysics Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Astrophysics Advisory Committee. This Committee reports to the Director, Astrophysics Division, Science Mission Directorate, NASA Headquarters. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Wednesday, March 29, 2023, 10 a.m.–5 p.m.; and Thursday, March 30, 2023, 9 a.m.–4 p.m., Eastern Time.

ADDRESSES: Due to current COVID–19 issues affecting NASA Headquarters occupancy, public attendance will be virtual only. See dial-in and Webex information below under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Ms. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: As noted above, this meeting is virtual and will take place telephonically and via Webex. Any interested person must use a touch-tone phone to participate in this meeting. The Webex connectivity information for each day is provided below. For audio, when joining the Webex event, you may use your computer or provide your phone number to receive a call back, otherwise, call the U.S. toll conference number listed for each day. For Wednesday, March 29, 2023, the WebEx information for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m0c0cc9b8f3d2df57341bdccc72049cbc.* The meeting number is: 2762 813 0665 and the meeting password is: APACspr23#. To join by telephone the numbers are: 1–929–251–9612 or 1–415–527–5035 (Access Code: 2762 813 0665).

For Thursday, March 30, 2023, the WebEx information for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=mdded616baf26577815d4758944d41d31.* The meeting number is: 2764 503 8149 and the meeting password is: APACspr23$. To join by telephone the numbers are 1–929–251–9612 or 1–415–527–5035 (Access Code: 2764 503 8149).

The agenda for the meeting includes the following topics:

—Astrophysics Division Update
—Updates on Specific Astrophysics Missions
—Discussion of Reports from the Program Analysis Groups

The Agenda and Program Analysis Group presentations will be posted on the Astrophysics Advisory Committee web page: *https://science.nasa.gov/researchers/nac/science-advisory-committees/apac.*

The public may submit and upvote comments/questions ahead of the meeting through the website, *https://nasa.cnf.io/sessions/k5s2/#!/dashboard,* that will be opened for input on March 15, 2023.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–04782 Filed 3–8–23; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

704th Meeting of the Advisory Committee on Reactor Safeguards (ACRS)

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 April 5–7, 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 247527668#. 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*.

Wednesday, April 5, 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.–1:00 p.m.: International Outreach Activities/ACRS Retreat Follow-up Items: Design Reviews, Topical Report Reviews, Committee Work Methods (Open)—The Committee will have discussions and deliberate regarding the subject topic.

1:00 p.m.–5:00 p.m.: Roadmap of Digital Instrumentation and Controls Regulatory Requirements, Industry and Staff Guidance/Commission Meeting Preparation (Open)—The Committee will have presentation and discussion with representatives from the NRC staff regarding the subject topic. The Committee will deliberate, continue its discussion of proposed ACRS reports and preparation of upcoming Commission meeting.

Thursday, April 6, 2023

8:30 a.m.–1:00 p.m.: Kairos Topics Discussion/Planning and Procedures Session/International Outreach Activities/Future ACRS Activities/Reconciliation of ACRS Comments and Recommendations/Preparation of Reports/Commission Meeting Preparation (Open/Closed)—The Committee will have discussion with representatives from the NRC staff regarding the subject topic. 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 and preparation of upcoming

Commission meeting. [*Note:* Pursuant to 5 U.S.C. 552b(c)(2), a portion of this session may be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS.] [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed to discuss and protect information designated as proprietary.]

1:00 p.m.–6:00 p.m.: Terrapower Natrium Reactor Design Overview and Digital Twin Walkthrough (Open/Closed)—The Committee will have presentation and discussion with representatives from Terrapower and NRC staff regarding the subject topic. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed to discuss and protect information designated as proprietary.]

Friday, April 7, 2023

8:30 a.m.–1:00 p.m.: Kairos Topics Discussion/Planning and Procedures Session Continued/International Outreach Activities/Future ACRS Activities/Reconciliation of ACRS Comments and Recommendations/ Preparation of Reports/Commission Meeting Preparation (Open/Closed)—The Committee will have discussion with representatives from the NRC staff regarding the subject topic. 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 and preparation of upcoming Commission meeting. [*Note:* Pursuant to 5 U.S.C. 552b(c)(2), a portion of this session may be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS.] [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed to discuss and protect information designated as proprietary.]

1:00 p.m.–6:00 p.m.: Preparation of Reports/Commission Meeting Preparation (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports and preparation of upcoming Commission meeting. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed 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: March 6, 2023.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2023–04847 Filed 3–8–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail, First-Class Package Service & Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* March 9, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 27, 2023, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail, First-Class Package Service & Parcel Select Contract 7 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–116, CP2023–119.

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–04826 Filed 3–8–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97039; File No. SR–FINRA–2022–031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Adopt FINRA Rules 6151 (Disclosure of Order Routing Information for NMS Securities) and 6470 (Disclosure of Order Routing Information for OTC Equity Securities)

March 3, 2023.

On November 16, 2022, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to require members to (i) publish order routing reports for orders in OTC Equity Securities, and (ii) submit their order routing reports for both OTC Equity Securities and NMS Securities to FINRA for publication on the FINRA website. The proposed rule change was published for comment in the **Federal Register** on December 6, 2022.[3] On January 18, 2023, the Commission extended the time period within which to approve, disapprove the proposed rule change, or institute proceedings to determine whether to approve or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 96415 (November 30, 2022), 87 FR 74672 (''Notice'').

disapprove the proposed rule change to March 6, 2023.[4] The Commission received four comment letters on the proposed rule change, one of which was received after the Extension.[5] Under Section 19(b)(3)(C) of the Exchange Act,[6] the Commission is hereby instituting proceedings to determine whether to approve or disapprove File Number SR–FINRA–2022–031.

I. Summary of the Proposed Rule Change and Comments Received

In 2018, the Commission amended SEC Rule 606(a) of Regulation NMS,[7] to enhance required disclosures from broker-dealers about their order routing practices for NMS Securities,[8] including enhanced disclosures for non-directed orders in NMS stocks that are submitted on a ''held'' basis in order to better allow ''customers—and retail investors in particular—that submit orders to their broker-dealers [to] be better able to assess the quality of order handling services provided by their broker-dealers'' and to allow customers to determine ''whether their broker-dealers are effectively managing potential conflicts of interest.'' [9]

As described in more detail in the Notice, FINRA proposes to adopt FINRA Rule 6470 (Disclosure of Order Routing Information for NMS Securities), which imposes disclosure requirements for unlisted stocks that are generally aligned with the requirements of SEC Rule 606(a) disclosures, but with modifications to account for differences between the over-the-counter (''OTC'') markets and the market for NMS Securities. In addition, to improve the accessibility of these new disclosures, as well as SEC Rule 606(a) reports, FINRA proposes to adopt FINRA Rule 6151 (Disclosure of Order Routing Information for OTC Equity Securities) to require members to submit their order routing reports for NMS Securities to FINRA for centralized publication on the FINRA website.

Proposed FINRA Rule 6470, entitled ''Disclosure of Order Routing Information for OTC Equity Securities,'' would require the publication of order routing disclosures for OTC Equity Securities.[10] Specifically, FINRA Rule 6470(a) would require every member to make publicly available for each calendar quarter a report on its routing of non-directed orders in OTC Equity Securities that are submitted on a held basis during that quarter, broken down by calendar month, and keep such report posted on an internet website that is free and readily accessible to the public for a period of three years from the initial date of posting on the internet website (''OTC Equity Security reports'').[11] These reports would be required to be separated into three sections: (i) domestic OTC Equity Securities; (ii) American Depository Receipts (''ADRs'') and foreign ordinaries that are OTC Equity Securities; and (iii) Canadian-listed securities trading in the United States as OTC Equity Securities.[12] In addition, FINRA Rule 6470(a) would specify that the new OTC Equity Security reports must be made available using the most recent versions of the XML schema and associated PDF renderer as published on the FINRA website,[13] and FINRA Rule 6470(d) would require the reports to be made publicly available within one month after the end of the quarter addressed in the report.[14]

Pursuant to FINRA Rule 6470(a), the new OTC Equity Security reports would be required to include the information specified in paragraphs (a)(1) through (4) of proposed FINRA Rule 6470, specifically:

- the percentage of total orders [15] for the section that were not held orders and held orders, and the percentage of held orders for the section that were non-directed orders; [16]

[4] *See* Securities Exchange Act Release No. 96699, 88 FR 4260 (January 24, 2023) (''Extension'').

[5] All comments received by the Commission on the proposed rule change are available at: *https://www.sec.gov/comments/sr-finra-2022-031/srfinra2022031.htm*.

[6] 15 U.S.C. 78s(b)(3)(C).

[7] 17 CFR 242.606(a).

[8] ''NMS Securities'' include any security or class of securities for which transaction reports are collected, processed, and made available to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. *See* 17 CFR 242.600(b).

[9] *See* Securities Exchange Act Release No. 84528, 58423 (November 2, 2018), 83 FR 58338 (November 19, 2018). A broker-dealer must attempt to execute a ''held'' order immediately, while a ''not held'' order instead provides a broker-dealer with price and time discretion. *Id.* at 58344. *See also* Notice, *supra* note 3, at 74672 n.5.

[10] *See* Notice, *supra* note 3, at 74672 n.8. FINRA Rule 6420(f) defines an ''OTC Equity Security'' as any equity security that is not an NMS stock, other than a Restricted Equity Security. FINRA Rule 6420(k) defines a ''Restricted Equity Security'' as any equity security that meets the definition of ''restricted security'' as contained in Securities Act Rule 144(a)(3).

[11] Proposed FINRA Rule 6470 would apply to ''every member,'' but FINRA notes that the focus of the proposed disclosures is held orders from customers in OTC Equity Securities, and some members may not engage in any activities involving held orders from customers in OTC Equity Securities. *See* Notice, *supra* note 3, at 74673 n.9. If a member does not accept any orders in OTC Equity Securities from customers during a given calendar quarter (whether held or not held), such member would not be required to publish a report under Rule 6470 for that quarter. *Id.* Similarly, a member that accepted only not held orders in OTC Equity Securities from customers—but no held orders in OTC Equity Securities from customers—during a given calendar quarter would not be required to publish a report for that quarter. *Id.* Further, FINRA states that if a member accepted orders in OTC Equity Securities (whether held, not held, or both) only from other broker-dealers, but not from customers, during a given calendar quarter, such member would not be required to publish a report for that quarter. *Id.*

[12] FINRA states that to provide for consistency across member reports, FINRA will publish a list of the OTC Equity Security symbols that fall under each category, and members would be required to publish reports in a manner consistent with such list. *See* Notice, *supra* note 3, at 74673. FINRA states that it will provide information in the *Regulatory Notice* announcing the effective date regarding where members may access the list of OTC Equity Security symbols that FINRA will maintain on its website. *Id.* at 74674 n.11. FINRA also notes that these categories differ from the NMS Securities required to be reported for SEC Rule 606(a) reports, which it believes is not relevant to the OTC market. *Id.*

[13] FINRA states that it will publish the technical specifications for the XML schema and associated PDF renderer on its website for member use in generating the new reports. *See* Notice, *supra* note 3, at 74673 n.12. FINRA expects that, subject to the differences between the SEC Rule 606(a) reports and the OTC Equity Security reports, the XML schema and associated PDF renderer published by FINRA would be substantially similar to those published by the SEC for the SEC Rule 606(a) reports. *Id.* FINRA believes this requirement would ensure that reports are generated and published in standardized machine-readable and human-readable forms, which would benefit investors by permitting the public to more easily analyze and compare the OTC Equity Security reports across members, as well as to more easily perform combined analysis of both SEC Rule 606(a) and OTC Equity Security reports. *Id.* at 74763.

[14] FINRA states that it understands that some introducing firms route all of their orders in OTC Equity Securities to one or more clearing firms for further routing to other venues for execution. *See* Notice, *supra* note 3 at 74673 n.10. FINRA states that the Commission has provided guidance that, where an introducing firm routes all of its covered orders to one or more clearing firms for further routing and execution and the clearing firm in fact makes the routing decision, the introducing firm generally may comply with the order routing disclosure requirements by: (i) disclosing its relationship with the clearing firm(s) on its website that includes any payment for order flow received by the introducing firm, and (ii) adopting the clearing firm's disclosures by reference, provided that the introducing firm has examined the report and does not have reason to believe it materially misrepresents the order routing practices. *Id.* FINRA states that it intends to provide parallel guidance with respect to proposed FINRA Rule 6470. *Id.*

[15] FINRA states that ''total orders'' would include all orders from customers for the section, including both directed and non-directed orders from customers. *See* Notice, *supra* note 3, at 74673 n.14.

[16] FINRA states that for purposes of the proposed disclosures, a ''non-directed order'' would mean any order from a customer other than a directed order. *See* Notice, *supra* note 3, at 74673–74 n.15. FINRA further states that consistent with the definition of ''directed order'' under Regulation NMS, a ''directed order'' would mean an order from a customer that the customer specifically instructed the member to route to a particular venue for execution. *See id.;* 17 CFR 242.600(b). FINRA notes that, similar to the definition of ''customer'' under SEC Rule 600(b)(23) of Regulation NMS, a ''customer'' is defined under FINRA rules to exclude a broker or dealer. *See* FINRA Rule 0160(b)(4). Orders from other broker-dealers would

• the identity of the ten venues to which the largest number of total non-directed held orders for the section were routed for execution [17] and of any venue to which five percent or more of non-directed held orders for the section were routed for execution, and the percentage of total non-directed held orders for the section routed to the venue; [18]

• for each identified venue, the net aggregate amount of any payment for order flow received, payment from any profit-sharing relationship received, transaction fees paid, and transaction rebates received, both as a total dollar amount and per order, for all non-directed held orders for the section; and

• a discussion of the material aspects of the member's relationship with each identified venue, including, without limitation, a description of any arrangement for payment for order flow and any profit-sharing relationship and a description of any terms of such arrangements, written or oral, that may influence a member's order routing decision including, among other things: (i) incentives for equaling or exceeding an agreed upon order flow volume threshold, such as additional payments or a higher rate of payment; disincentives for failing to meet an agreed upon minimum order flow threshold, such as lower payments or the requirement to pay a fee; (ii) volume-based tiered payment schedules; and (iii) agreements regarding the minimum amount of order flow that the member would send to a venue.[19]

To make both the existing SEC Rule 606(a) reports and the new OTC Equity Security reports more accessible for regulators, investors and others seeking to analyze and compare the data, FINRA is proposing to require that members provide the reports to FINRA for central publication on the FINRA website. Proposed FINRA Rule 6151 would require every member that is required to publish a report pursuant to SEC Rule 606(a) of Regulation NMS to provide the report to FINRA, in a manner prescribed by FINRA, within the same time and in the same formats that such report is required to be made publicly available pursuant to SEC Rule 606(a). In combination with proposed FINRA Rule 6470(d), which would require members to provide the report required by paragraph (a) of FINRA Rule 6470 within one month after the end of the quarter addressed in the report in such a manner as may be prescribed by FINRA, FINRA would be able to publish both SEC Rule 606(a) and OTC Equity Security reports on its public website, free of charge and without usage restrictions.[20]

FINRA states that it undertook an ''economic impact assessment'' to analyze the potential economic impacts of the proposed rule change, including potential costs, benefits, and distributional and competitive effects, relative to the current baseline.[21] In this analysis, FINRA analyzed the number of firms quoting, executing trades and routing orders in OTC Equity Securities over specific time periods, as well as the number of symbols traded per firm and average dollar volume of trading per symbol and per firm. In addition, FINRA published the proposed rule change in *Regulatory Notice* 21–35 (October 2021) and received five comments in response.[22] FINRA provided these comments, as well as a summary of these comments and its responses in its filing with the Commission.[23]

FINRA argues in support of its proposal that the proposed requirement for members to publish order routing disclosures for OTC Equity Securities, similar to what is available under SEC rules for NMS Securities, would provide valuable information for investors and other market participants, academics, regulators and others regarding order routing practices in the OTC market, thereby enhancing the protection of investors and the public interest.[24] In particular, FINRA believes that these new disclosures will enable investors to better assess the quality of their broker-dealers' order handling services for these securities, provide more information on the financial incentives that may affect their broker-dealers' routing decisions, and allow clearing firm(s)'s reports by reference.[25] FINRA states that this information will enable FINRA to provide investors with relevant information for all firms which would allow investors to better evaluate whether their broker-dealers are effectively managing potential conflicts of interest.[26] FINRA also argues that the proposed requirements for members to send their disclosure reports for both NMS Securities and OTC Equity Securities to FINRA for centralized publication on the FINRA website will make this important information more accessible for regulators, investors, academics and others seeking to analyze and compare the data, particularly across firms, and would facilitate the

therefore be excluded from the proposed disclosures. *See* Notice, *supra* note 3, at 74673–74 n.15.

[17] FINRA states that, consistent with the SEC's approach to SEC Rule 606(a), a ''venue'' would be defined broadly to cover any market center or any other person or entity to which a member routes orders for execution. *See* Notice, *supra* note 3, at 74674 n.16. Accordingly, for purposes of proposed FINRA Rule 6470, where an alternative trading system (''ATS'') offers both automatic order execution and order delivery functionality, the ATS should be identified as the venue only when the ATS provides order execution. Conversely, for purposes of proposed FINRA Rule 6470, in cases where the ATS instead provides order delivery, the separate market center to which the orders are delivered—*e.g.,* a market maker or other ATS—should be identified as the venue where the order was routed for execution. *Id.*

[18] Proposed FINRA Rule 6470(b) would provide that a member is not required to identify execution venues that received less than 5% of non-directed held orders for a section of the member's OTC Equity Securities report, provided that the member has identified the top execution venues that in the aggregate received at least 90% of the member's total non-directed held orders for the section. FINRA states that this provision is consistent with exemptive relief that the Commission has provided with respect to SEC Rule 606(a) reports. *See* Notice, *supra* note 3, at 74674 n.17.

[19] FINRA states that the types of arrangements referenced above are not an exhaustive list of terms of payment for order flow arrangements or profit-sharing relationships that may influence a broker-dealer's order routing decision that would be required to be disclosed. *See* Notice, *supra* note 3, at 74674 n.18. For example, if a broker-dealer receives a discount on executions in other securities or some other advantage in directing order flow in a specific security to a venue, or if a broker-dealer receives equity rights in a venue in exchange for directing order flow there, then all terms of those arrangements would also be required to be disclosed. *Id.* Similarly, if a broker-dealer receives variable payments or discounts based on order types and the number of orders sent to a venue, such arrangements would be required to be disclosed. *Id.* However, FINRA notes that these are only examples, and a member would be required to disclose any other material aspects of its relationship with each identified venue regardless of whether a particular example is listed in the proposed rule text or otherwise discussed in this proposed rule change. *Id.*

[20] *See* Notice, *supra* note 3, at 74674–75. FINRA states that the SEC has provided guidance that introducing firms may comply with SEC Rule 606(a) by incorporating their clearing firm(s) reports in specified circumstances, and FINRA intends to provide similar guidance with respect to the OTC Equity Security reports required under proposed FINRA Rule 6470. *Id.* at 74675 n.25. To facilitate centralized access to the reports, such introducing firms must provide FINRA with a list of their clearing firm(s) and the hyperlink to the web page where they disclose their clearing firm relationship(s) and adopt the clearing firm(s)'s reports by reference. *Id.* Each introducing firm relying on this guidance would be required to provide this information to FINRA upon implementation of the proposed rule change and to update FINRA if the information previously provided changes. *Id.* This information will enable FINRA to provide investors with relevant information for all firms, including introducing firms incorporating clearing firm reports by reference, on FINRA's website. *Id.*

[21] *See* Notice, *supra* note 3, at 74675–78.

[22] Comments received by FINRA are available on FINRA's website at *https://www.finra.org/rules-guidance/notices/21-35#comments.*

[23] *See* Notice, *supra* note 3, at 74678–80.

[24] *See* Notice, *supra* n. 3 at 74675.

[25] *See id.*

[26] *See id.*

ability of FINRA and the SEC to review the data for regulatory purposes.[27]

The Commission received two comment letters that were broadly supportive of the proposed rule change and greater transparency on routing of orders in generally.[28] One commenter submitted two letters and was supportive of some aspects of the rule proposal,[29] but expressed concerns about and opposed other aspects of the proposal.[30]

That commenter states that the proposed FINRA rule, like SEC Rule 606(a), applies when a reporting firm receives and routes a customer order to a second firm, and the second firm (''routing firm'') can route the order to various execution venues but itself cannot execute the order (''routing firm scenario''). The commenter also states that this requires the reporting firm to report the net fees paid or received between the routing firm and the venue in the SEC Rule 606(a) tables or FINRA's OTC Equity Security Routing Public Report as applicable, and material aspects disclosures.[31] The commenter notes that the proposed FINRA rule, like SEC Rule 606(a), does not require the reporting of the net fees paid or received between the reporting broker-dealer and the routing broker in the OTC Equity Security Routing Public Report tables.[32] The commenter argues that this approach obscures relevant information from retail customers, because, to understand the financial inducements faced by a reporting firm, the relevant information is the payments between the reporting firm and the routing firm.[33] The commenter also argues that this results in reported data that is not comparable across broker-dealers.[34] The commenter also states that this approach requires firms to report on financial arrangements to which they might not be a party, that the rules do not impose any obligation on the routing firm to provide this data to the reporting firm, and a reporting firm cannot effectively validate the data relating to routing firm scenarios.[35] The commenter further states that the rule filing does not explicitly discuss the costs for such reporting.[36] The commenter further suggests that if FINRA adopts this reporting, FINRA Rule 6470 should be revised to address the routing scenario.[37] The commenter also states this reporting scenario should not apply for routes to foreign routing firms.

The commenter argues that there are a significant number of OTC stocks that have a limited number of available execution venues or only have one or two market makers, and that there is a potential risk that investors viewing the report for these stocks would see a high percentage of order flow being routed to one or two venues without appropriate context of the limited choices available to the reporting firm, and that some firms with lower trading volume in OTC equities could have routing relationships with a limited number of market makers.[38] The commenter suggests that FINRA should identify this as a factor for investors to consider when reviewing a broker-dealer's OTC Equity Security report.[39] The commenter also states that FINRA should consider whether certain categories of data that firms are required to report in the OTC Equity Security reports could be obtained by FINRA from the consolidated audit trail (''CAT'').[40] The commenter further states that the rule filing does not provide clear guidance on reporting scenarios relating to trading on OTC Link ATS and raises several hypothetical situations where it believes OTC Link ATS should be reported as the execution venue, as opposed to where the execution actually took place.[41]

The commenter also raises concerns about implementation of the proposal and argues that a longer implementation period is appropriate to ensure that industry members will have sufficient time to properly implement the planned reporting changes.[42] The commenter states that it supports centralized publication of SEC Rule 606(a) reports and the OTC routing reports, but argues that if FINRA will publish these reports that firms should no longer be required to separately publish these reports on their own websites, and instead firms should be required to provide a link from its public website to the applicable section of the FINRA website.[43]

II. Proceedings To Determine Whether To Approve or Disapprove SR–FINRA–2022–031 and Grounds for Disapproval Under Consideration

The Commission hereby institutes proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[44] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[45] the Commission is

[27] *See id.*

[28] *See* letters to Vanessa Countryman, Secretary, Commission, from G.P., dated November 30, 2022 (''GP Letter''); Daniel Lambden, dated December 5, 2022 (''Lambden Letter'').

[29] FIF is supportive of some aspects of the rule proposal, including: FINRA's proposal to maintain the same quarterly reporting timeframe for OTC Equity Security reports as applies for SEC Rule 606(a) reporting; FINRA's chosen OTC equity security reporting categories; FINRA's assertion that it will publish and maintain a file of which symbols are included in each OTC equity category and make this file accessible to all industry members without charge (FIF further recommends that the symbol file be made available to industry members prior to the first day of each quarter, because requiring industry members to process daily updates to a reportable symbol list would significantly increase the reporting burden for firms); FINRA's approach of not requiring the OTC Equity Security reports to be broken out by order type; FINRA's proposal to require reporting of payments per executed order rather than per share; FINRA's decision to limit the OTC Equity Security reports to non-directed held orders; and proposed FINRA Rule 6470(b) which would provide a limited exception to venue reporting requirements in proposed FINRA Rule 6470(a)(2). *See* FIF Letter at 7–9.

[30] *See* FIF Letter and letter to Vanessa Countryman, Secretary, Commission, from Howard Meyerson, Managing Director, Financial Information Forum, dated December 20, 2022 (''FIF Letter'') and dated February 3, 2023 (''FIF Letter II'').

[31] *See* FIF Letter at 2.

[32] *See id.*

[33] *See id.*

[34] *See id.* at 3–4.

[35] *See id.* at 5.

[36] *See id.* at 5.

[37] *See id.* at 6.

[38] *See id.*

[39] *See id.*

[40] FIF Letter at 6. The CAT is operated pursuant a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. *See* Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016).

[41] FIF Letter at 6 and FIF Letter II at 2–4.

[42] FIF also states that the Commission has not provided market participants an adequate period of time to comment on the rule proposal. FIF Letter at 9–10. FIF requests that any implementation timetable should run from the date that FINRA publishes technical specifications, schemas, interpretive FAQs and other applicable documentation. *Id.* at 9.

[43] FIF Letter at 7. FIF also recommends that FINRA consider creating a database with structured firm routing report data that industry members and other market participants could access through automated queries. *Id.*

[44] 15 U.S.C. 78s(b)(2)(B).

[45] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Exchange Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so

providing notice of the grounds for possible disapproval under consideration. As described above, FINRA has proposed to require members to publish order routing reports for orders in OTC Equity Securities, and submit their order routing reports for both OTC Equity Securities and NMS Securities to FINRA for publication on the FINRA website. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with the Section 15A(b)(6) of the Exchange Act,[46] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 15A(b)(6) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[47]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by March 30, 2023. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 13, 2023.

The Commission asks that commenters address the sufficiency of FINRA's statements in support of the proposal and any other issues raised by the proposed rule change under the Exchange Act. In this regard, the Commission seeks commenters' views regarding the application of the proposed rule in the routing firm scenario.

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–FINRA–2022–031 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–FINRA–2022–031. 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 FINRA. 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–FINRA–2022–031 should be submitted on or before March 30, 2023. Rebuttal comments should be submitted by April 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[48]

Sherry R. Haywood,

Assistant Secretary.

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finding, or if the self-regulatory organization consents to the longer period. *See id.*

[46] 15 U.S.C. 78o–3(b)(6).

[47] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[48] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97042; File No. SR–CboeEDGX–2023–016]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

March 3, 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 March 1, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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 EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its Fee Schedule. 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://markets.cboe.com/us/options/regulation/rule_filings/edgx/*) [sic], 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

[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 its Fee Schedule applicable to its equities trading platform (''EDGX Equities'') as follows: (1) by modifying and eliminating certain Growth Tiers; (2) by modifying and eliminating certain Non-Displayed Add Volume Tiers; (3) by modifying the criteria of Retail Growth Tier 3; and (4) by introducing new fee code DX and modifying the description of existing fee code DQ. The Exchange proposes to implement these changes effective March 1, 2023.

The Exchange first notes that it 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 only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 15% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a ''Maker-Taker'' model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above $1.00, the Exchange provides a standard rebate of $0.00160 per share for orders that add liquidity and assesses a fee of $0.0030 per share for orders that remove liquidity. For orders in securities priced below $1.00, the Exchange provides a standard rebate of $0.00009 per share for orders that add liquidity and assesses a fee of 0.30% of the total dollar value for orders that remove liquidity. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Growth Tiers

Under footnote 1 of the Fee Schedule, the Exchange currently offers various Add/Remove Volume Tiers. In particular, the Exchange offers five Growth Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes B,[4] V,[5] Y,[6] 3,[7] and 4,[8] where a Member reaches certain add volume-based criteria, including ''growing'' its volume over a certain baseline month. First, the Exchange is proposing to discontinue Growth Tiers 1–3, as no Members have satisfied the criteria within the past six months and the Exchange no longer wishes to, nor is required to, maintain such tiers. More specifically, the proposed change removes these tiers as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

Second, the Exchange proposes to modify the criteria of Growth Tier 4 and Growth Tier 5, in addition to renumbering the tiers following the discontinuation of Growth Tiers 1–3. Currently, Growth Tier 4 (proposed Growth Tier 1) is as follows:

• Growth Tier 4 provides a rebate of $0.0034 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where (1) MPID adds a Step-Up ADAV[9] from October 2021 ≥ 0.12% of the TCV[10] or MPID adds a Step-Up ADAV from October 2021 ≥ 16,000,000; and (2) MPID adds an ADV ≥ 0.30% of TCV or MPID adds an ADV ≥ 35,000,000.

Now, the Exchange proposes to add a third prong of criteria. The proposed criteria for current Growth Tier 4 (proposed Growth Tier 1) is as follows:

• Proposed Growth Tier 1 provides a rebate of $0.0034 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where (1) MPID adds a Step-Up ADAV from October 2021 ≥ 0.12% of the TCV or MPID adds a Step-Up ADAV from October 2021 ≥ 16,000,000; and (2) MPID adds an ADV ≥ 0.30% of TCV or MPID adds an ADV ≥ 35,000,000; and (3) MPID adds an ADAV ≥ 0.30% of TCV with displayed orders that yield fee codes B, V, or Y.

The proposed modification to proposed Growth Tier 1 is designed to encourage MPIDs to grow their volume in displayed liquidity with orders yielding fee codes B, V, or Y.

In addition, the Exchange also proposes to modify the criteria of current Growth Tier 5 (proposed Growth Tier 2). Currently, Growth Tier 5 is as follows:

• Growth Tier 5 provides a rebate of $0.0034 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where (1) Member adds a Step-Up ADAV from October 2022 ≥ 0.15% of the TCV or Member adds a Step-Up ADAV from October 2022 ≥ 15,000,000; and (2) Member has a total remove ADV ≥ 0.45% of TCV or Member has a total remove ADV ≥ 45,000,000.

Now, the Exchange proposes to add a third prong of criteria. The proposed criteria for current Growth Tier 5 (proposed Growth Tier 2) is as follows:

• Proposed Growth Tier 2 provides a rebate of $0.0034 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where (1) Member adds a Step-Up ADAV from October 2022 ≥ 0.15% of the TCV or Member adds a Step-Up ADAV from October 2022 ≥ 15,000,000; (2) Member has a total remove ADV ≥ 0.45% of TCV or Member has a total remove ADV ≥ 45,000,000; and (3) Member adds a Retail Step-Up ADV (*i.e.,* yielding fee codes ZA[11] or ZO[12]) from August 2022 ≥ 0.10% of TCV.

The proposed modification to proposed Growth Tier 2 is intended to incentivize Members to grow retail volume on the Exchange.

[3] See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (February 22, 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[4] Fee code B is appended to orders adding liquidity to EDGX in Tape B securities.

[5] Fee code V is appended to orders adding liquidity to EDGX in Tape A securities.

[6] Fee code Y is appended to orders adding liquidity to EDGX in Tape C securities.

[7] Fee code 3 is appended to orders adding liquidity to EDGX in the pre and post market in Tapes A or C securities.

[8] Fee code 4 is appended to orders adding liquidity to EDGX in the pre and post market in Tape B securities.

[9] ADAV means average daily added volume calculated as the number of shares added per day ADAV is calculated on a monthly basis. Step-Up ADAV means ADAV in the relevant baseline month subtracted from current ADAV.

[10] TCV means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[11] Fee code ZA is appended to Retail Orders that add liquidity.

[12] Fee code ZO is appended to Retail orders that adds liquidity during the pre- and post-market.

Non-Displayed Add Volume Tiers

In addition to the Growth Tiers offered under footnote 1, the Exchange also offers Non-Displayed Add Volume Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes DM,[13] HA,[14] MM,[15] and RP,[16] where a Member reaches certain volume-based criteria offered in each tier. The Exchange now proposes to discontinue the use of Non-Displayed Step-Up Volume Tiers 1 and 2, as no Members have satisfied the criteria within the past six months and the Exchange no longer wishes to, nor is required to, maintain such tiers. More specifically, the proposed change removes these tiers as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

The Exchange also proposes to amend the criteria of current Non-Displayed Step-Up Volume Tier 3, in addition to renumbering this tier following the discontinuation of Non-Displayed Step-Up Volume Tiers 1 and 2. Currently, the criteria for Non-Displayed Step-Up Volume Tier 3 (proposed Non-Displayed Step-Up Volume Tier 1) is as follows:

• Non-Displayed Step-Up Volume Tier 3 provides a rebate of $0.0026 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Members adds a Step-Up ADAV from October 2022 ≥ 0.15% of the TCV or Member adds a Step-Up ADAV from October 2022 ≥ 15,000,000; and (2) Member has a total remove ADV ≥ 0.45% of TCV or Member has a total remove ADV ≥ 45,000,000.

Now, the Exchange proposes to add a third prong of criteria. The proposed criteria for proposed Non-Displayed Step-Up Volume Tier 1 is as follows:

• Non-Displayed Step-Up Volume Tier 1 provides a rebate of $0.0026 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Members adds a Step-Up ADAV from October 2022 ≥ 0.15% of the TCV or Member adds a Step-Up ADAV from October 2022 ≥ 15,000,000; (2) Member has a total remove ADV ≥ 0.45% of TCV or Member has a total remove ADV ≥ 45,000,000; and (3) Member adds a Retail Step-Up ADV (*i.e.,* yielding fee codes ZA or ZO) from August 2022 ≥ 0.10% of TCV.

The proposed modification to proposed Non-Displayed Step-Up Volume Tier 1 is intended to incentivize Members to add non-displayed retail volume on the Exchange.

Retail Volume Tiers

Pursuant to footnote 2 of the Fee Schedule, the Exchange offers Retail Volume Tiers which provide Retail Member Organizations (''RMOs'') [17] an opportunity to receive an enhanced rebate from the standard rebate for Retail Orders [18] that add liquidity (*i.e.,* yielding fee code ZA or ZO). Currently, the Retail Volume Tiers offer three Retail Growth Tiers, where a Member is eligible for an enhanced rebate for qualifying orders (*i.e.,* yielding fee code ZA or ZO) meeting certain add volume-based criteria, including ''growing'' its volume over a certain baseline month. The Exchange now proposes to amend the criteria of Retail Growth Tier 3. Currently, the criteria for Retail Growth Tier 3 is as follows:

• Retail Growth Tier 3 provides a rebate of $0.0037 per share to qualifying orders (*i.e.,* orders yielding fee code ZA or ZO) where (1) Member adds a Step-Up ADAV from October 2022 ≥ 0.15% of the TCV or Member adds a Step-Up ADAV from October 2022 ≥ 15,000,000; and (2) Member has a total remove ADV ≥ 0.45% of TCV or Member has a total remove ADV ≥ 45,000,000.

Now, the Exchange proposes to add a third prong of criteria. Proposed Retail Growth Tier 3 is as follows:

• Retail Growth Tier 3 provides a rebate of $0.0037 per share to qualifying orders (*i.e.,* orders yielding fee code ZA or ZO) where (1) Member adds a Step-Up ADAV from October 2022 ≥ 0.15% of the TCV or Member adds a Step-Up ADAV from October 2022 ≥ 15,000,000; (2) Member has a total remove ADV ≥ 0.45% of TCV or Member has a total remove ADV ≥ 45,000,000; and (3) Members adds a Retail Step-Up ADV (*i.e.,* yielding fee code ZA or ZO) from August 2022 ≥ 0.10% of TCV.

The proposed modification to Retail Growth Tier 3 is intended to incentivize RMOs to add retail volume on the Exchange.

Further, the Growth Tiers, Non-Displayed Add Volume Tiers, and Retail Volume Tiers are intended to provide Members an opportunity to receive an enhanced rebate by increasing their order flow to the Exchange, which further contributes to a deeper, more liquid market and provides even more execution opportunities for active market participants. Incentivizing an increase in liquidity adding or removing volume, through enhanced rebate opportunities, encourages liquidity adding Members on the Exchange to contribute to a deeper, more liquid market, and liquidity executing Members on the Exchange to increase transactions and take execution opportunities provided by such increased liquidity, together providing for overall enhanced price discovery and price improvement opportunities on the Exchange. As such, increased overall order flow benefits all Members by contributing towards a robust and well-balanced market ecosystem.

Fee Codes DQ and DX

The Exchange currently offers fee code DQ, which is appended to Midpoint Discretionary Orders (''MDOs'') [19] using the Quote Depletion Protection (''QDP'') [20] order instruction. QDP is designed to provide enhanced protections to MDOs by tracking significant executions that constitute the best bid or offer on the EDGX Book [21] and enabling Users to avoid potentially unfavorable executions by preventing MDOs entered with the optional QDP instruction from exercising discretion to trade at more aggressive prices when QDP has been triggered.[22] Currently, MDOs entered with the QDP instruction are appended fee code DQ and assessed a flat fee of $0.00040 per share in securities at or above $1.00 and 0.30% of dollar value for securities priced below $1.00. The Exchange now proposes to amend fee code DQ to be appended to MDOs entered with a QDP instruction that add liquidity to the Exchange. There would be no change to the fee associated with fee code DQ. The Exchange now proposes to introduce fee code DX, which would be appended to MDOs with a QDP instruction that remove liquidity from the Exchange. Orders appended with fee code DX

[13] Fee code DM is appended to orders that add liquidity using MidPoint Discretionary Order within discretionary range.

[14] Fee code HA is appended to non-displayed orders that add liquidity.

[15] Fee code MM is appended to non-displayed orders that add liquidity using Mid-Point Peg.

[16] Fee code RP is appended to non-displayed orders that add liquidity using Supplemental Peg.

[17] *See* EDGX Rule 11.21(a)(1). A ''Retail Member Organization'' or ''RMO'' is a Member (or a division thereof) that has been approved by the Exchange under this Rule to submit Retail Orders.

[18] *See* EDGX Rule 11.21(a)(2). A ''Retail Order'' is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

[19] *See* Exchange Rule 11.8(g).

[20] *See* Exchange Rule 11.8(g)(10).

[21] *See* Exchange Rule 1.5(d).

[22] *See* Securities Exchange Act Release No. 89007 (June 4, 2020), 85 FR 35454 (June 10, 2020) (SR–CboeEDGX–2020–010) (''Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend the Rule Relating to MidPoint Discretionary Orders to Allow Optional Offset or Quote Depletion Protection Instructions'').

would be assessed a fee of $0.00060 per share in securities at or above $1.00 and 0.30% of dollar value for securities priced below $1.00.

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.[23] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[24] 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)[25] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4)[26] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, 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. The Exchange believes that its proposal to modify proposed Growth Tiers 1 and 2, proposed Non-Displayed Step-Up Volume Tier 1, and Retail Growth Tier 3 reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. Additionally, the Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges,[27] including the Exchange,[28] and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Competing equity exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.

In particular, the Exchange believes the proposed modifications to the criteria of proposed Growth Tiers 1 and 2, proposed Non-Displayed Step-Up Volume Tier 1, and Retail Growth Tier 3 are reasonable because they will be available to all Members and provide all Members with an additional opportunity to receive an enhanced rebate. The Exchange further believes the proposed modifications to proposed Growth Tiers 1 and 2, proposed Non-Displayed Step-Up Volume Tier 1, and Retail Growth Tier 3 will provide a reasonable means to encourage liquidity adding displayed orders, liquidity adding non-displayed orders, and retail orders, respectively, in Members' order flow to the Exchange and to incentivize Members to continue to provide liquidity adding volume to the Exchange by offering them an additional opportunity to receive an enhanced rebate on qualifying orders. An overall increase in activity would deepen the Exchange's liquidity pool, offers additional cost savings, support the quality of price discovery, promote market transparency and improve market quality, for all investors.

The Exchange believes that the proposed changes to proposed Growth Tiers 1 and 2, proposed Non-Displayed Step-Up Volume Tier 1, and Retail Growth Tier 3 are reasonable as they do not represent a significant departure from the criteria currently offered in the Fee Schedule. The Exchange also believes that the proposal represents an equitable allocation of fees and rebates and is not unfairly discriminatory because all Members will be eligible for the proposed new tiers and have the opportunity to meet the tiers' criteria and receive the corresponding enhanced rebate if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying the new proposed tiers. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on the prior months volume, the Exchange anticipates that at least one Member will be able to satisfy the criteria proposed under proposed Growth Tiers 1 and 2, proposed Non-Displayed Step-Up Volume Tier 1, and Retail Growth Tier 3. The Exchange also notes that proposed changes will not adversely impact any Member's ability to qualify for enhanced rebates offered under other tiers. Should a Member not meet the proposed new criteria, the Member will merely not receive that corresponding enhanced rebate.

The Exchange believes the proposed addition of fee code DX and the revised applicability of fee code DQ are reasonable as the Exchange offers many other fee codes that are specifically designed for orders that add liquidity to the Exchange or remove liquidity from the Exchange.[29] While the fee assessed for orders appended with fee code DX will be slightly higher than the fee assessed for orders appended with fee code DQ, the Exchange believes that promoting liquidity-adding MDOs containing a QDP instruction represents an equitable allocation of fees and rebates and is not unfairly discriminatory because the fees will apply to all Members who add or remove liquidity utilizing an MDO with a QDP instruction, equally. Furthermore, the Exchange believes that assessing a lower fee under fee code DQ will promote a reasonable means to encourage liquidity adding volume to the Exchange for MDOs utilizing a QDP instruction. While Members are assessed a small fee to utilize MDOs with a QDP instruction, the Exchange believes that promoting liquidity adding activity would help deepen the Exchange's liquidity pool, support the quality of price discovery, and improve market quality, for all investors.

Finally, the Exchange believes that the proposed rule change to eliminate Growth Tiers 1–3 and Non-Displayed Step-Up Volume Tiers 1 and 2 is reasonable because the Exchange is not required to maintain these tiers or provide Members an opportunity to receive enhanced rebates. The Exchange believes the proposal to eliminate these tiers is also equitable and not unfairly discriminatory because it applies to all Members (*i.e.,* the tiers will not be available for any Member). The Exchange notes that no Members have satisfied the criteria of Growth Tiers 1–3 and Non-Displayed Step-Up Volume Tiers 1–2 in any of the past six months.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] *Id.*

[26] 15 U.S.C. 78f(b)(4).

[27] *See e.g.,* BZX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[28] *See e.g.,* EDGX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[29] *See e.g.,* EDGX Equities Fee Schedule, Fee Codes 3 and 6.

The Exchange also notes that the proposed rule change to remove these tiers merely results in Members not receiving an enhanced rebate, which, as noted above, the Exchange is not required to offer or maintain. Furthermore, the proposed rule change to eliminate Growth Tiers 1–3 and Non-Displayed Step-Up Volume Tiers 1–2 enables the Exchange to redirect resources and funding into other programs and tiers intended to incentivize increased order flow.

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. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further 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.''

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to proposed Growth Tiers 1 and 2, proposed Non-Displayed Step-Up Volume Tier 1, and Retail Growth Tier 3 will apply to all Members equally in that all Members are eligible for each of the Tiers, have a reasonable opportunity to meet the Tiers' criteria and will receive the enhanced rebate on their qualifying orders if such criteria is met. The Exchange does not believe the proposed changes burdens competition, but rather, enhances competition as it is intended to increase the competitiveness of EDGX by amending an existing pricing incentive and adopting pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem. Finally, the Exchange does not believe the proposed rule change to eliminate Growth Tiers 1–3 and Non-Displayed Step-Up Volume Tiers 1–2 will impose any burden on intramarket competition because it applies to all Members uniformly, as in, the tiers will not longer be available to any Member.

The Exchange does not believe the proposal to introduce the DX fee code does not impose a burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fees associated with fee code DX would apply to all Members equally in that all Members would be subject to the same flat fee for the execution of an MDO with a QDP instruction that removes liquidity from the Exchange. Although MDOs entered with the QDP instruction would be subject to the pricing described in this proposed rule change, the Exchange does not believe that pricing would impose any significant burden on intramarket competition as this fee would be applied in the same manner to the execution of any MDO entered with a QDP instruction that removes liquidity from the Exchange. Both MDO and the associated QDP instruction are available to all Members on an equal and non-discriminatory basis. As a result, any Member can decide to use (or not use) the QDP instruction based on the benefits provided by that instruction in potentially avoiding unfavorable executions, and the associated charge that the Exchange proposes to introduce. As discussed, any firm that chooses to use the QDP instruction with an MDO that removes liquidity would be charged the same flat fee for the execution of orders that are entered with this instruction. The proposal to modify fee code DQ to apply only to MDO orders using the QDP instruction that add liquidity to the Exchange similarly does not impose a burden on intramarket competition in that the applicability of the fee code will apply equally to all Members in that all Members would be subject to the same flat fee for the execution of an MDO with a QDP instruction that adds liquidity to the Exchange and the Exchange does not propose a change to the existing fee.

Next, the Exchange believes the proposed rule changes does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 15% of the market share.[30] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues 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.'' [31] 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 stated 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'. . . .''.[32] 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.

[30] *Supra* note 8 [sic].

[31] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[32] *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

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) of the Act [33] and paragraph (f) of Rule 19b–4 [34] 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 will 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–CboeEDGX–2023–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2023–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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–CboeEDGX–2023–016, and should be submitted on or before March 30, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04787 Filed 3–8–23; 8:45 am]

BILLING CODE 8011–01–P

[33] 15 U.S.C. 78s(b)(3)(A).

[34] 17 CFR 240.19b–4(f).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–382, OMB Control No. 3235–0435]

Submission for OMB Review; Comment Request; Extension: Customer Account Statements (17 CFR 242.607)

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 607 (17 CFR 242.607) under the Securities Exchange Act of 1934 (17 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 607 requires disclosure on each new account and on a yearly basis thereafter, on the annual statement, the firm's policies regarding receipt of payment for order flow from any market makers, exchanges or exchange members to which it routes customers' order in national market system securities for execution; and information regarding the aggregate amount of monetary payments, discounts, rebates or reduction in fees received by the firm over the past year.

The information collected pursuant to Rule 607 is necessary to facilitate the establishment of a national market system for securities. The purpose of the rule is to ensure that customers are adequately apprised of the broker-dealer's order routing practices with respect to the customer's order, in furtherance of the Commission's statutory mandate to protect investors.

The Commission estimates that approximately 3,643 respondents will make the third-party disclosures required in the collection of information requirements to 183,511,801 customer accounts each year. The Commission estimates that the average number of hours necessary for each respondent to comply with Rule 607 per year is 39.714 hours, which results in an average aggregated annual burden of 144,678.102 hours.

The collection of information in Rule 607 is mandatory for all respondents, but does not require the collection of confidential information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by April 10, 2023 to (i) *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: March 6, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04825 Filed 3–8–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97043; File No. 10–239]

24X National Exchange LLC; Notice of Withdrawal of Application for Registration as a National Securities Exchange Under Section 6 of the Securities Exchange Act of 1934

March 3, 2023.

On March 25, 2022, 24X National Exchange LLC (''24X'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a Form 1 application under the Securities Exchange Act of 1934 (''Act''), seeking registration as a national securities exchange under Section 6 of the Act [1] (''Form 1 Application''). Notice of the Form 1 Application was published for comment in the **Federal Register** on June 6, 2022.[2] The Commission received three comments on the Form 1 Application and a letter in response to the comments from 24X.[3] On September 1, 2022, the Commission instituted proceedings pursuant to Section 19(a)(1)(B) of the Act [4] (the ''OIP'') to determine whether to grant or deny 24X's Form 1 Application.[5] The Commission received one comment letter in response to the OIP and a letter in response to the OIP from 24X.[6] On October 21, 2022, 24X filed an amendment to its Form 1 Application (''Amendment No.1'').[7] Notice of Amendment No. 1 was published for comment in the **Federal Register** on November 9, 2022.[8] On November 10, 2022, 24X filed a second amendment to its Form 1 Application (''Amendment No. 2'').[9] Notice of Amendment No. 2 was published for comment in the **Federal Register** on November 22, 2022.[10] On November 18, 2022, the Commission extended the time to determine whether to grant or deny the application.[11] The Commission received a comment letter after the publication of extension of time.[12]

On February 16, 2023, the Exchange withdrew the Form 1 Application (File No. 10–239).[13]

By the Commission.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04797 Filed 3–8–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34845; File No. 812–15325]

PGIM Private Real Estate Fund, Inc., et al.

March 3, 2023.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of application for an order (''Order'') under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: PGIM Private Real Estate Fund, Inc., PGIM, Inc., PGIM Investments LLC, PGIM Private Credit Fund, PGIM Real Estate U.S. Core Debt Fund, L.P., PGIM Real Estate U.S. Debt Fund LP, PGIM Real Estate U.S. Impact Value Partners LP, PGIM Retirement Real Estate Fund II LP, PRISA LP, PRISA II LP, PRISA III Fund LP, Senior Housing Partnership Fund VI LP, PGIM Senior Loan Opportunities (Levered) I, L.P., PGIM Senior Loan Opportunities I, L.P., PGIM Senior Loan Opportunities (Parallel Fund) I, L.P., PSLO I US Investors Levered Debt SPV LLC, PGIM US Investors/Non-US Senior Debt Levered I Fund, PGIM US Investors/Non-US Senior Debt Levered I Supplemental Fund, PGIM Senior Loan Opportunities Management Fund I, L.P., PGIM US Investors/Non-US Senior Debt I Fund, PGIM Senior Debt I Management Fund, PGIM Senior Loan Opportunities I Co-Investment II, L.P., PGIM Non-US Investors/Non-US Senior Debt I Fund A, PGIM Non-US Investors/US Senior Debt I Fund A, PGIM Senior Loan Opportunities I Co-Investment I, L.P., PGIM Senior Loan Opportunities (Parallel Fund) II, L.P., PGIM Non-US Investors/US Senior Debt I Fund, PGIM Non-US Investors/Non-US Senior Debt I Fund, PGIM Private Capital Fund (Ireland) ICAV, Private Placement Trust Investors, LLC, PGIM Global Investors/Global Senior Debt II Fund, PRIVEST, PRIVEST PLUS, PGIM Infrastructure Debt Fund, Gibraltar Universal Life Reinsurance Company, PRUCO Life Insurance Company, PRUCO Life Insurance Company of New Jersey, Prudential Annuities Life Assurance Corporation, Prudential Arizona Reinsurance Captive Company, Prudential Arizona Reinsurance Term Company, Prudential Arizona Reinsurance Universal Company, Prudential Legacy Insurance Company of New Jersey, Prudential Term Reinsurance Company, Prudential Universal Reinsurance Company, Universal Prudential Arizona Reinsurance Company, PAR U Hartford Life& Annuity Comfort Trust, PAR U Hartford Life Insurance Comfort Trust, PICA Hartford Life& Accident Comfort Trust, PICA Hartford Life& Annuity Comfort Trust, PICA Hartford Life Insurance Comfort Trust, PRUCO Reinsurance Ltd., The Gibraltar Life Insurance Co.,Ltd., The Prudential Life Insurance Company,Ltd., Gibraltar Reinsurance Company Ltd., PGIM Warehouse,Inc., Dryden Arizona Reinsurance Term Company, Lotus Reinsurance Company Ltd., The Prudential Insurance Company of America.

FILING DATES: The application was filed on April 22, 2022, and amended on November 1, 2022 and February 3, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below.

Hearing requests should be received by the Commission by 5:30 p.m. on March 28, 2023, and should be accompanied by proof of service on

[1] 15 U.S.C. 78f.

[2] *See* Securities Exchange Act Release No. 95007 (May 31, 2022), 87 FR 34333 (June 6, 2022).

[3] Comment and response letters relating to the Form 1 Application are available on the Commission's website at *https://www.sec.gov/comments/10-239/10-239.htm.*

[4] 15 U.S.C. 78s(a)(1)(B).

[5] *See* Securities Exchange Act Release No. 95651 (Sept. 1, 2022), 87 FR 54736 (Sept. 7, 2022).

[6] *See supra* note 3.

[7] Amendment No. 1 is available on the Commission's website at *https://www.sec.gov/rules/other/2022/24x/24x-form-1.htm.*

[8] *See* Securities Exchange Act Release No. 96218 (Nov. 3, 2022), 87 FR 67725 (Nov. 9, 2022).

[9] Amendment No. 2 is available on the Commission's website at *https://www.sec.gov/rules/other/2022/24x/24x-form-1.htm.*

[10] *See* Securities Exchange Act Release No. 96337 (Nov. 17, 2022), 87 FR 71388 (Nov. 22, 2022).

[11] *See* Securities Exchange Act Release No. 96364 (Nov. 18, 2022), 87 FR 72553 (Nov. 25, 2022).

[12] *See supra* note 3.

[13] *See* letter from Paul Adcock, Head of Equities and Senior Director, 24X, to Vanessa Countryman, Secretary, Commission, dated Feb. 16, 2023.

applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Claudia DiGiacomo, *claudia.digiacomo@prudential.com;* Benjamin C. Wells, *bwells@stblaw.com;* Ryan P. Brizek, *ryan.brizek@stblaw.com.*

FOR FURTHER INFORMATION CONTACT: Stephan N. Packs, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated February 3, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04785 Filed 3–8–23; 8:45 am]

BILLING CODE 8011–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36486 (Sub No. 4)]

Grainbelt Corporation—Trackage Rights Exemption—BNSF Railway Company

Grainbelt Corporation (GNBC), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(7) [1] to extend the term of the previously amended, local trackage rights on trackage owned by BNSF Railway Company (BNSF) between approximately milepost 668.73 in Long, Okla., and approximately milepost 723.30 in Quanah, Tex. (the Line), allowing GNBC to (1) use the Line to access the Plains Cotton Cooperative Association (PCCA) facility near BNSF Chickasha Subdivision milepost 688.6 at Altus, Okla., and (2) operate additional trains on the Line to accommodate the movement of trains transporting BNSF customers' railcars (loaded or empty) located along the Line, to unit train facilities on the Line (collectively, the PCCA Trackage Rights).[2] GNBC and BNSF have entered into an amendment to extend the PCCA Trackage Rights until March 31, 2024.[3]

The transaction may be consummated on or after March 23, 2023, the effective date of the exemption (30 days after the verified notice was filed).

As a condition to this exemption, any employees affected by the acquisition of the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than March 16, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36486 (Sub No. 4), must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on GNBC's representative, Eric M. Hocky, Clark Hill PLC, Two Commerce Square, 2001 Market Street, Suite 2620, Philadelphia, PA 19103.

According to GNBC, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: March 6, 2023.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Raina White,

Clearance Clerk.

[FR Doc. 2023–04844 Filed 3–8–23; 8:45 am]

BILLING CODE 4915–01–P

[1] The pleadings in this docket were originally filed in Docket No. FD 36580, but given that the trackage rights at issue are the same as those in Docket No. FD 36486, this proceeding has been changed to a subdocket of that original proceeding.

[2] GNBC states that it originally acquired overhead trackage rights from BNSF's predecessor between Snyder Yard at milepost 664.00 and Quanah at milepost 723.30 allowing GNBC to interchange at Quanah with BNSF and Union Pacific Railroad Company. According to GNBC, these original trackage rights were amended over the years to allow various local services to be provided. In 2021, BNSF and GNBC amended the trackage rights to include the PCCA Trackage Rights, *see Grainbelt Corp.—Trackage Rts. Exemption—BNSF Ry.,* FD 36486 (STB served Mar. 12, 2021), and those trackage rights were extended in 2022, *see Grainbelt Corp.—Trackage Rts. Exemption—BNSF Ry.,* FD 36486 (Sub No. 2) (STB served Mar. 8, 2022).

[3] GNBC states that its verified notice is related to a petition for partial revocation, in which GNBC seeks authority to allow the trackage rights at issue here to expire automatically on March 31, 2024, the termination date set forth in the amended trackage rights agreement. GNBC's petition for partial revocation will be addressed in a separate decision in Docket No. FD 36486 (Sub No. 5).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2022–1565]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Mitsubishi MU–2B Series Airplane Training Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection of information is necessary to document participation in, completion of, and compliance with the pilot training program for the MU–2B series airplane under subpart N of 14 CFR part 91.

DATES: Written comments should be submitted by April 10, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Paul Penner by email at: *paul.penner@faa.gov;* phone: 818–267–3343.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this

information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0725.

Title: Mitsubishi MU–2B Series Airplane Special Training Requirements.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on November 21, 2022 (87 FR 70888). In response to the increasing number of accidents and incidents involving the Mitsubishi MU–2B series airplane, the Federal Aviation Administration (FAA) began a safety evaluation of the MU–2B in July of 2005. As a result of this safety evaluation, on February 6, 2008 the FAA issued Special Federal Aviation Regulation No. 108—Mitsubishi MU–2B Series Special Training, Experience, and Operating Requirements. This Special Federal Aviation Regulation (SFAR) established a standardized pilot training program. The collection of information is necessary to document participation in, completion of, and compliance with the pilot training program for the MU–2B under subpart N of part 91, issued on September 7, 2016, which superseded SFAR No. 108.

Respondents: Approximately 15 part 91 training providers, and approximately 250 active MU–2 pilots.

Frequency: Every year (pilots); every two years (training providers).

Estimated Average Burden per Response: Pilots: Logbook endorsement and training course final phase check = 10 minutes. Training providers: Submission of training program = 4 hours.

Estimated Total Annual Burden: Pilots: 42 hours. Training providers: 32 hours. Total: 74 hours.

Issued in Washington, DC, on March 6, 2023.

D.C. Morris,

Project Manager, Flight Standards Service, General Aviation and Commercial Division.

[FR Doc. 2023–04846 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0071]

Parts and Accessories Necessary for Safe Operation; Exemption Application From Waymo LLC, and Aurora Operations, Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; clarification of scope, and extension of comment period.

SUMMARY: FMCSA clarifies its March 3, 2023, notice announcing an application from Waymo LLC (Waymo) and Aurora Operations, Inc. (Aurora) for a 5-year exemption from the required placement of warning devices around stopped commercial motor vehicles (CMVs); the requirement that lamps for warning devices be steady-burning; and to allow use of a warning device for stopped vehicles not currently allowed by Agency rules. FMCSA clarifies that the application was filed by Waymo and Aurora on behalf of a class of motor carriers operating autonomous driving systems (ADS) equipped CMVs and is not limited to Waymo or Aurora. The Agency also extends the public comment period on the request for an exemption.

DATES: Comments must be received on or before April 10, 2023.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA–2023–0071 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the Public Participation and Request for Comments section below for further information.
- *Mail:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Each submission must include the Agency name and the docket number (FMCSA–2023–0071) for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

Privacy Act: In accordance with 49 U.S.C. 31315(b), DOT solicits comments from the public to better inform its exemption process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14–FDMS, which can be reviewed at *https://www.transportation.gov/privacy,* the comments are searchable by the name of the submitter.

FOR FURTHER INFORMATION CONTACT: Mr. Luke Loy, Vehicle and Roadside Operations Division; Office of Carrier, Driver and Vehicle Safety Standards, FMCSA, at (202) 366–0676 or *mcpsv@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0071), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number ''FMCSA–2023–0071'' in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you

are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The Agency must publish its decision in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption and the regulatory provision from which the exemption is granted. The notice must specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Applicant's Request

Waymo and Aurora seek an exemption from the regulations that require specific placement of warning devices around a stopped CMV. Waymo and Aurora believe it is possible to achieve the safety purpose of the warning device in an alternative way by using forward- and rearward-facing amber flashing lights mounted on the cab at a height above the upper edge of the sideview mirrors. Waymo and Aurora each separately tested variants of such devices and have concluded that the use of the cab-mounted warning devices was equally or more effective in enabling road users to recognize and react to the potential hazard presented by the stopped CMV.

Waymo and Aurora therefore request an exemption from the warning device placement requirements of 49 CFR 392.22(b), the utilization of a warning device that does not meet the steady-burning lamp requirement of 49 CFR 393.25(e), and the utilization of a warning device for stopped vehicles that is not currently identified in 49 CFR 393.95(f).

The exemption sought would allow all motor carriers operating ADS-equipped CMVs without a human on board (or with a human on board), when stopped upon the traveled portion or the shoulder of a highway for any cause other than necessary traffic stops, to use a warning system consisting of forward- and rearward-facing cab mounted flashing amber lamps mounted at a height above the upper edge of the sideview mirrors instead of the currently required warning devices placed around the CMV, as described in 49 CFR 392.22(b).

A copy of Waymo/Aurora's application for exemption and supporting documentation is available for review in the docket for this notice.

IV. Request for Comments

In accordance with 49 U.S.C. 31315(b), FMCSA requests public comment from all interested persons on the application. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the Addresses section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–04841 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2022–0098]

Brightline Trains Florida, LLC's Positive Train Control Safety Plan and Request for Positive Train Control System Certification

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on February 28, 2023, Brightline Trains Florida, LLC (BLF) submitted its Positive Train Control Safety Plan (PTCSP), Version 1.0, dated January 30, 2023, to FRA's Secure Information Repository. BLF asks FRA to approve its PTCSP and certify BLF's Interoperable Electronic Train Management System (I–ETMS) as a mixed PTC system.

DATES: FRA will consider comments received by May 8, 2023 before taking final action on the PTCSP. FRA may consider comments received after that date to the extent practicable and without delaying implementation of a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to *https://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this railroad is Docket No. FRA–2022–0098. All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

SUPPLEMENTARY INFORMATION: In its PTCSP, BLF asserts that the I–ETMS PTC system is a mixed PTC system as defined in title 49 Code of Federal Regulations (CFR) 236.1015(e)(4). The PTCSP describes BLF's I–ETMS and the associated I–ETMS safety processes, safety analyses, and test, validation, and verification processes used during the development of I–ETMS. The PTCSP also contains I–ETMS's operational and support requirements and procedures.

BLF's PTCSP is available for review online at *https://www.regulations.gov/*

docket/FRA-2022-0098. Interested parties are invited to comment on the PTCSP by submitting written comments or data. During its review of the PTCSP, FRA will consider any comments or data submitted. *See* 49 CFR 236.1011(e). However, FRA may elect not to respond to any particular comment, and under 49 CFR 236.1009(d)(3), FRA maintains the authority to approve or disapprove the PTCSP at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy*. See *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov*. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2023–04832 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Office of the Assistant Secretary for Research and Technology

[Docket No. DOT–OST–2023–0011]

Notice of Request for Clearance of a New Information Collection: Electric Vehicle Inventory and Use Survey (eVIUS)

AGENCY: Bureau of Transportation Statistics (BTS) Office of the Assistant Secretary for Research and Technology (OST–R), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice announces the intention of the BTS to request the Office of Management and Budget's (OMB's) approval for a new information collection related to the nation's Battery Electric Vehicles (BEVs). The information collected will be used to produce national statistics on the characteristics and uses of BEVs. A summary report of survey findings will also be published by BTS on the BTS web page: *www.bts.gov.*

DATES: Comments must be submitted on or before Friday, May 5, 2023.

ADDRESSES: You may submit comments identified by DOT Docket ID Number DOT–OST–2023–0011 to the U.S. Department of Transportation (DOT), Dockets Management System (DMS). You may submit your comments by mail or in person to the Docket Clerk, Docket No., U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Room W12–140, Washington, DC 20590. Comments should identify the docket number as indicated above. Paper comments should be submitted in duplicate. The DMS is open for examination and copying, at the above address, from 9 a.m. to 5 p.m., Monday through Friday, except federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on Docket DOT–OST–2023–0011.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (the internet, fax, or professional delivery service) to submit comments to the docket and ensure their timely receipt at U.S. DOT. You may fax your comments to the DMS at (202) 493–2251. Comments can also be viewed and/or submitted via the Federal Rulemaking Portal: *http://www.regulations.gov.*

Please note that anyone is able to electronically search all comments received into our docket management system by the name of the individual submitting the comment (or signing the comment if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; pages 19475–19570) or you may review the Privacy Act Statement at *http://www.gpoaccess.gov/fr/.*

FOR FURTHER INFORMATION CONTACT: Ryan Grube, (202) 734–1569, eVIUS Program Manager, BTS, OST–R, Department of Transportation, 1200 New Jersey Ave. SE, Room E32–317, Washington, DC 20590. Office hours are from 8:00 a.m. to 5:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Electric Vehicle Inventory and Use Survey (eVIUS).

Background: The BTS, with its partners, the Federal Highway Administration (FHWA) and the U.S. Department of Energy (DOE), is planning to conduct the first Electric Vehicle Inventory and Use Survey (eVIUS).

Every 5 years from 1962 to 2002, as a part of the Economic Census, the U.S. Census Bureau conducted the Truck Inventory and Use Survey (TIUS), which was renamed the Vehicle Inventory and Use Survey (VIUS) in 1997. The survey was conducted to better understand the characterizes and use of trucks on our nation's roads. Since its inception, the survey has been used to guide investments in the nation's infrastructure, conduct size and weight studies, track changes in vehicle technologies, and more. In 2022, the BTS, in partnership with the US Census Bureau, FHWA, and DOE, conducted the 2021 VIUS, the first VIUS in almost two decades. The survey scope was inclusive of all Class 1–8 trucks.

As the pace of electric vehicles increases on the nation's roadways, to aid public planning for future transportation systems and infrastructure investments, BTS is planning to conduct an electric vehicle specific VIUS to better understand the characteristics and uses of battery electric vehicles, with an expanded scope of vehicle types to include passenger cars and buses. The data collection will be administered to a national sample of battery electric vehicle owners. The sample will be stratified on the vehicle registration state and the class size of the vehicle. The survey will request the respondents to provide information such as: Vehicle Miles Traveled (VMT) over the past 12 months, the average VMT in a typical trip, the type of vehicle owner (personal, commercial, lessee), the number of other vehicles owned in the household, charging behaviors, and type of use. The survey will be limited to 10 questions and the data collection period will be limited to 12-weeks to ensure timely results.

Respondents: The target population for the survey will be all registered battery electric vehicle owners in the U.S. The respondents will be sampled proportionally by registration state and Gross Vehicle Weight Rating (GVWR) class size.

Estimated Average Burden per Response: The burden per respondent is estimated to be an average of 10 minutes. This average is based on an

estimate of 1 minute to answer each question.

Estimated Total Annual Burden: The total annual burden (in the year that the survey is conducted) is estimated to be between 1,666 and 3,333 hours depending on the final sample size (that is 10 minutes per respondent for 10,000–20,000 respondents, which equals 100,000–200,000 minutes).

Frequency: One time.

Public Comments Invited: Interested parties are invited to send comments regarding any aspect of this information collection, including, but not limited to: (1) the necessity and utility of the information collection for the proper performance of the functions of the DOT; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, clarity and content of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on the 6th of March 2023.

Cha-Chi Fan,

Director, Office of Data Development and Standards, Bureau of Transportation Statistics, Office of the Assistant Secretary for Research and Technology.

[FR Doc. 2023–04812 Filed 3–8–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0568]

Agency Information Collection Activity Under OMB Review: Submission of School Catalog to the State Approving Agency

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link *www.reginfo.gov/public/do/PRAMain,* select ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or OMB Control No. 2900–0568.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0568'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Title 38 U.S.C. 3675; 3676; 38 CFR 21.4253 and 21.4254.

Title: Submission of School Catalog to the State Approving Agency.

OMB Control Number: 2900–0568.

Type of Review: Revision of a currently approved collection.

Abstract: State Approving Agencies and VA use the catalogs to determine what courses can be approved for VA training. VA receives catalogs when institutions change their education programs, tuition and fees and calendars, etc. In general, the catalogs are collected twice a year. Without the catalogs, VA and SAAs cannot determine what courses could be approved. There was a decrease in burden during this renewal period because, unlike for the previous submission, we now take the annual average number of catalogs received during periods 2019, 2020 and 2021, rather than the actual grand total of the number of catalogs received for those periods.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 87 FR 247 on December 27, 2022, page 79449.

Affected Public: Individuals and Households.

Estimated Annual Burden: 891 hours.

Estimated Average Burden Time per Respondent: 15 minutes.

Frequency of Response: Twice Annually.

Estimated Number of Respondents: 3,567.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–04818 Filed 3–8–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0252]

Agency Information Collection Activity: Application for Authority To Close Loans on an Automatic Basis Nonsupervised Lenders; Request for Agent Recognition

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 8, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0252'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0252'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct

or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Application for Authority to Close Loans on an Automatic Basis Nonsupervised Lenders (VA Form 26–8736) & Request for Agent Recognition (VA Form 26–8736c).

OMB Control Number: 2900–0252.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–8736 is used by non-supervised lenders requesting approval to close loans on an automatic basis. The form contains information and data considered crucial for making acceptability determinations as to lenders who shall be approved for this privilege. VA-Form 26–8736c is used for yearly recertifications and Agent applications.

Affected Public: Individuals or households.

Estimated Annual Burden: 440.1 hours.

Estimated Average Burden per Respondent: 25 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 4,820.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–04808 Filed 3–8–23; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

Vol. 88 Thursday,
No. 46 March 9, 2023

Part II

Securities and Exchange Commission

17 CFR Parts 275 and 279
Safeguarding Advisory Client Assets; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA–6240; File No. S7–04–23]

RIN 3235–AM32

Safeguarding Advisory Client Assets

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing a new rule under the Investment Advisers Act of 1940 (''Advisers Act'' or ''Act'') to address how investment advisers safeguard client assets. To effect our redesignation of the current custody rule for the proposed new safeguarding rule, we are proposing to renumber the current rule. In addition we are proposing to amend certain provisions of the current custody rule for enhanced investor protections. We also are proposing corresponding amendments to the recordkeeping rule under the Advisers Act and to Form ADV for investment adviser registration under the Advisers Act.

DATES: Comments should be received on or before May 8, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.html*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–04–23 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–04–23. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also 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 the Commission does not redact or 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 materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Shane Cox, Laura Harper Powell, Michael Schrader, and Samuel Thomas, Senior Counsels; Holly H. Miller, Senior Financial Analyst; Alex Bradford and Michael Republicano, Assistant Chief Accountants; Christopher Staley, Branch Chief; and Melissa Roverts Harke, Assistant Director at (202) 551-6787 or *IArules@sec.gov*, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment to amend and renumber 17 CFR 275.206(4)–2 (rule 206(4)–2) under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 *et seq.*] to redesignate it as rule 17 CFR 275.223–1 (rule 223–1) under the Advisers Act, and make corresponding amendments to 17 CFR 275.204–2 (rule 204–2) and 17 CFR 279.1 (Form ADV) under the Advisers Act.[1]

Table of Contents

I. Introduction
A. Background
B. Overview of the Proposal
II. Discussion
A. Scope of Rule
1. Scope of Assets
2. Scope of Activity Subject to the Proposed Rule
B. Qualified Custodian Protections
1. Definition of Qualified Custodian
2. Possession or Control
3. Minimum Custodial Protections
C. Certain Assets That Are Unable To Be Maintained With a Qualified Custodian
1. Definition of Privately Offered Security and Physical Assets
2. Adviser's Reasonable Determination
3. Adviser Reasonably Safeguards Assets
4. Notification and Prompt Independent Public Accountant Verification
5. Surprise Examination or Audit
D. Segregation of Client Assets
E. Investment Adviser Delivery of Notice to Clients
F. Amendments to the Surprise Examination Requirement
G. Exceptions from the Surprise Examination
1. Entities Subject to Audit (''Audit Provision'')
2. Discretionary Authority
3. Standing Letters of Authorization
H. Amendments to the Investment Adviser Recordkeeping Rule
1. Client Communications
2. Client Accounts
3. Account Activity
4. Independent Public Accountant Engagements
5. Standing Letters of Authorization
I. Changes to Form ADV
J. Existing Staff No-Action Letters and Other Staff Statements
K. Transition Period and Compliance Date
III. Economic Analysis
A. Introduction
B. Broad Economic Considerations
C. Baseline
1. Current Regulation
2. Affected Parties and Industry Statistics
3. Market Practice
D. Benefits and Costs of Proposed Rule and Form Amendments
1. Scope
2. Qualified Custodian Protections
3. Certain Assets That Are Unable To Be Maintained With a Qualified Custodian
4. Segregation of Investments
5. Investment Adviser Delivery of Notice to Clients
6. Exceptions From the Surprise Examination
7. Amendments to the Investment Adviser Recordkeeping Rule
8. Changes to Form ADV
E. Efficiency, Competition, and Capital Formation
F. Reasonable Alternatives
1. Scope of Assets
2. Elimination of Privately Offered Securities Exception
3. Distribution of Requirements Across Reasonable Assurances and Written Agreement
3. Additional Accounting and Client Notification Requirements for Privately Offered Securities and Physical Assets That Are Not Maintained With a Qualified Custodian
4. Additional Safeguards When Clients Assets Are Not Maintained With a Qualified Custodian
5. Designating Clearing Agencies and Transfer Agents as Qualified Custodians
G. Request for Comment
IV. Paperwork Reduction Act Analysis
A. Introduction
B. Rule 223–1
1. Qualified Custodian Provision
2. Notice to Clients
3. Annual Surprise Examination
C. Exceptions

[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any section of the Advisers Act, we are referring to 15 U.S.C. 80b, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any section of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

1. Certain Assets That Are Unable To Be Maintained With a Qualified Custodian
2. Audit Provision
D. Total Hour Burden Associated With Proposed Rule 223–1
E. Rule 204–2
F. Form ADV
G. Request for Comments
V. Initial Regulatory Flexibility Analysis
A. Reason for and Objectives of the Proposed Action
1. Proposed Rule 223–1
2. Proposed Rule 204–2
3. Proposed Amendments to Form ADV
B. Legal Basis
C. Small Entities Subject to the Rule and Rule Amendments
1. Small Entities Subject to Amendments to the Custody Rule
D. Projected Reporting, Recordkeeping and Other Compliance Requirements
1. Proposed Rule 223–1
2. Proposed Amendments to Rule 204–2
3. Proposed Amendments to Form ADV
E. Duplicative, Overlapping, or Conflicting Federal Rules
F. Significant Alternatives
1. Proposed New Rule 223–1 and Amendments to Rule 204–2 and Form ADV
G. Solicitation of Comments
VI. Consideration of Impact on the Economy
VII. Statutory Authority

I. Introduction

A. Background

Rule 206(4)–2 under the Act (the ''custody rule'' or ''current rule'') regulates the custodial practices of advisers. Although the Commission has amended the rule over time as custodial and advisory practices have changed, since its adoption it has been designed to safeguard client funds and securities from the financial reverses, including insolvency, of an investment adviser and to prevent client assets from being lost, misused, stolen, or misappropriated.[2]

As originally adopted in 1962, the rule required all investment advisers with ''custody'' (*i.e.,* physical possession) of client funds and securities to deposit client funds in a bank account that was maintained in the adviser's name and contained only client funds.[3] Advisers, in addition, were required to segregate client securities and hold them in a ''reasonably safe'' place. In each case, the rule required investment advisers to provide their clients notice of these protocols and to engage an independent public accountant to conduct an annual surprise examination[4] to verify client funds and securities independently. These requirements were designed to protect client assets at a time when the system for owning and transacting in securities was paper-based.

The Commission amended the rule in 2003 to expand the definition of custody beyond physical possession to include situations in which an adviser had any ability to obtain possession of client funds or securities. The 2003 amendments made clear that the rule applied to any investment adviser ''holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them.''[5] It included three illustrative examples in the rule's definition of ''custody'': (1) possession of client funds or securities, even briefly; (2) authority to withdraw funds or securities from a client's account; and (3) any capacity that gives the adviser legal ownership of, or access to, client funds or securities.[6] In the adopting release, the Commission stated this expansion of the concept of adviser custody would not include authorized trading, however, stating that clients' custodians are generally under instructions to transfer funds or securities out of a client's account only upon a corresponding transfer of securities or funds into the account.[7]

In recognition of then-modern custodial practices, the Commission in 2003 required advisers to keep securities (not just funds as under the 1962 rule) with a custodian, and it expanded the types of custodians that would qualify under the rule.[8] The Commission expressed concern that some advisers were still keeping certificates in office files or safety deposit boxes, which put those securities at risk.[9] The Commission identified as ''qualified custodians'' the types of regulated financial institutions that customarily provided custodial services subject to regulatory examination.[10] The Commission also relied more on the protections of qualified custodians, eliminating the adviser's need to undergo the rule's annual surprise examination by an independent public accountant if the adviser had a ''reasonable belief'' that the qualified custodian would provide account statements directly to the adviser's clients. The Commission provided an exception, however, from the requirement to maintain client securities with a qualified custodian after commenters had pointed out that, *on occasion,* a client may purchase privately offered securities where the only evidence of the client's ownership was recorded on the issuer's books and

[2] *See* Custody or Possession of Funds or Securities of Clients, Investment Advisers Act Release No. 123 (Feb. 27, 1962) [44 FR 2149 (Mar. 6, 1962)] (''1962 Adopting Release''). *See also* Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2176 (Sept. 25, 2003) [68 FR 56692 (Oct. 1, 2003)] (''2003 Adopting Release''); Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2044 (Jul. 18, 2002) [67 FR 48579 (Jul. 25, 2002)], at nn. 3, 15 (''2002 Proposing Release'').

[3] As with the current rule, the proposed amendments would apply to investment advisers registered, or required to be registered, with the Commission. However, the original rule was broader in scope, applying to ''all investment advisers,'' until it was amended in 1997. Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)], at section II.I.5. Unless otherwise indicated, references throughout this release to ''adviser'' or ''investment adviser'' refer to investment advisers registered, or required to be registered, with the Commission. Further, we have previously stated, and would continue to take the position (if these amendments were adopted), that most of the substantive provisions of the Advisers Act do not apply with respect to the non-U.S. clients (including funds) of a registered offshore adviser. This approach was designed to provide appropriate flexibility where an adviser has its principal office and place of business outside of the United States. We believe it would be appropriate to continue to apply this approach, including in the proposed safeguarding rule context (if adopted). For an adviser whose principal office and place of business is in the United States (onshore adviser), the Advisers Act and rules thereunder, including the proposed safeguarding rule, would apply with respect to the adviser's U.S. and non-U.S. clients. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Release No. IA–3222 (June 22, 2011) [76 FR 39645 (July 6, 2011)] (Most of the substantive provisions of the Advisers Act do not apply to the non-U.S. clients of a non-U.S. adviser registered with the Commission.); Registration Under the Advisers Act of Certain Hedge Fund Advisers, Release No. IA–2333 (Dec. 2, 2004) [69 FR 72054, 72072 (Dec. 10, 2004)] (''Hedge Fund Adviser Release'') (stating (1) that the following rules under the Advisers Act would not apply to a registered offshore adviser, assuming it has no U.S. clients: compliance rule, custody rule, and proxy voting rule; (2) stating that the Commission would not subject an offshore adviser to the rules governing adviser advertising [17 CFR 275.206(4)–1] or cash solicitations [17 CFR 275.206(4)–3] with respect to offshore clients; and (3) noting that U.S. investors in an offshore fund generally would not expect the full protection of the U.S. securities laws and that U.S. investors may be precluded from an opportunity to invest in an offshore fund if their participation would result in full application of the Advisers Act and rules thereunder, but that a registered offshore adviser would be required to comply with the Advisers Act and rules thereunder with respect to any U.S. clients it may have).

[4] The terms ''surprise examination'' and ''independent verification'' are used throughout the release and are generally interchangeable.

[5] *See* rule 206(4)–2(a). *See also* rule 206(4)–2(d)(v)(2) (defining ''custody''). The original rule did not define ''custody,'' which was conceptualized at that time as limited to physically holding securities.

[6] *See id.*

[7] *See* 2003 Adopting Release, *supra* footnote 2, at note 10 and accompanying text.

[8] *See* 2003 Adopting Release *supra* footnote 2, at section I.

[9] *See* 2002 Proposing Release, *supra* footnote 2, at section II.B.

[10] The financial institutions identified by the Commission were broker-dealers, banks and savings associations, futures commission merchants, and certain foreign financial institutions. *See* 2003 Adopting Release at II.B.

the transfer of ownership requires the consent of the issuer or the holders of the issuer's outstanding securities. As a result, commenters argued that it was difficult to maintain certain of these assets in accounts with qualified custodians. The Commission noted that these impediments to transferability along with the conditions it imposed in the privately offered securities exception (''privately offered securities exception''), including in some cases obtaining and distributing audited financial statements (''the audit provision''), provided external safeguards against the kinds of abuse the rule seeks to prevent.

The Commission most recently amended the rule in 2009 after several enforcement actions against investment advisers, including actions stemming from the frauds perpetrated by Bernard Madoff and Allen Stanford (which also resulted in criminal convictions), alleging fraudulent conduct that included, among other things, misappropriation or other misuse of client assets involving certain affiliates of the adviser.[11] These cases underlined additional risks both when an adviser has access to client funds or securities not explicitly covered within the scope of the rule, as well as when the qualified custodian is a related person of the adviser. In direct response to certain of these cases, the 2009 amendments explicitly extended the scope of the rule to reach an adviser's ability to access client funds or securities through its related persons, expanded the circumstances in which a surprise examination is necessary, and required advisers to obtain an independent accountant's report evaluating internal controls related to custody where the adviser or its related person serves as qualified custodian.[12]

Following the Madoff and Stanford frauds, and on the heels of the Commission's recently adopted 2009 amendments to the custody rule, Congress expressly vested the Commission with authority to promulgate rules requiring registered advisers to take steps to safeguard client assets over which advisers have custody by adding section 223 to the Advisers Act in the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[13] Leading up to the enactment of the Dodd-Frank Act, Congress heard testimony that certain client investments were not covered by the custody rule because they were neither funds nor securities, putting them at greater risk of loss, theft, misappropriation, or being subject to the financial reverses of an adviser.[14] Congress also heard testimony about the important role requiring advisers to maintain client funds and securities with qualified custodians has in preventing fraud—a requirement that applies only if an adviser is subject to the custody rule and the assets are not subject to an exception from the qualified custodian requirement.[15] Subsequently, Congress authorized the Commission to prescribe rules requiring advisers to take steps to safeguard all client assets, not just funds and securities, over which an adviser has custody.[16]

In addition to this legislative context, industry developments prompt us again to reconsider the important prophylactic protections of the custody rule and to address certain gaps in protections—some of which Congress identified and gave us the tools to address 13 years ago.[17] We have seen changes in

[11] *See* Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2968 (Dec. 30, 2009) [75 FR 1455 (Jan. 11, 2010)], at n.1 (''2009 Adopting Release'') (referring to the cases cited in Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2876 (May 20, 2009) [74 FR 25353 (May 27, 2009)] (''2009 Proposing Release'')). *See also* Judgment, ECF Doc No. 100, 4, *United States* v. *Madoff, No. 09 Cr. 213 (S.D.N.Y. June 29, 2009)* (Bernard L. Madoff pled guilty to eleven felony charges including securities fraud, investment adviser fraud, mail fraud, wire fraud, three counts of money laundering, false statements, perjury, and making false filings with the SEC); Order Granting Motion for Summary Judgment, *SEC* v. *Stanford International Bank, Ltd., et al.,* Civil Action No. 3:09–CV0298 (N.D. Tex. Apr. 25, 2013) (the SEC obtained a $5.9 billion judgment against R. Allen Stanford who was convicted in a parallel criminal case of conspiracy to commit mail and wire fraud, four counts of wire fraud, five counts of mail fraud, one count of conspiracy to obstruct an SEC investigation, one count of obstruction of an SEC proceeding, and one count of conspiracy to commit money laundering and sentenced to a total of 110 years in prison); *SEC* v. *WG Trading Investors, L.P.,* 09–CV–1750 (S.D.N.Y. July 29, 2010) (involving a broker-dealer and affiliated registered adviser that orchestrated a fraudulent investment scheme misappropriating as much as $554 million and sending clients misleading account information); *Isaac I. Ovid,* SEC Admin. Proceeding No. 3–14313 (Mar. 30 2011) (registered investment adviser and manager of purported hedge funds, pled guilty in parallel criminal proceeding in connection with which he was required to pay restitution in excess of $12 million); *Young and Acorn Capital Management, LLC,* SEC Admin. Proceeding No. 3–14654 (Feb. 28 2012) (registered investment adviser and its principal convicted of misappropriating $95 million in a Ponzi scheme in a parallel criminal case whereupon the SEC issued an order revoking the adviser's registration and barred the principal from association with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent); *SEC* v. *The Nutmeg Group, LLC, et al.,* Litigation Release No. 24677 (Nov. 26, 2019) (commingled investor funds with his personal assets, implemented flawed internal systems and methods for valuing and reporting assets under management, and transferred millions of dollars out of the investment pools to himself and companies controlled by family members).

[12] *See generally* rule 206(4)–2; *see also* 2009 Adopting Release, *supra* footnote 11, at sections II.A and B.

[13] *See* section 411 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (adding section 223 to the Advisers Act which provides ''[a]n investment adviser registered under this subchapter shall take such steps to safeguard client assets over which such adviser has custody, including, without limitation, verification of such assets by an independent public accountant, as the Commission may, by rule, prescribe.'' 15 U.S.C. 80b–18b). Congress also required the U.S. Government Accountability Office to study the rule's compliance costs. *See id.* at section 412.

[14] *See* Regulating Hedge Funds and other Private Investment Pools, Hearing Before the House Subcommittee on Securities, Insurance, and Investment, 111 Cong. 50–51 (2009) (Statement of James S. Chanos, Chairman, Coalition of Private Investment Companies) (stating that the current rule's scope—which was ''funds and securities'' and with an exception from certain protections for privately offered securities—excluded assets such as privately issued uncertificated securities, bank deposits, real estate assets, swaps, and interests in other private investment funds leaving a ''gaping hole'' in the rule) (''Dodd Frank Regulating Hedge Funds and other Private Investment Pools Testimony by James S. Chanos''). Congress also heard testimony about the benefits qualified custodians provide in preventing fraud. *See id.* (''Requiring independence between the function of managing a private investment fund and controlling its assets, by requiring that all assets be titled in the name of a custodian bank or broker-dealer for the benefit of the private fund and requiring all cash flows to move through the independent custodian, would be an important control. Similarly, requiring an independent check on the records of ownership of the interests in the private investment fund, as well as imposing standards for the qualification of private investment fund auditors—neither of which currently is required by the Advisers Act—would also greatly reduce opportunities for mischief.'').

[15] *See* S. Rep. No. 111–176, at 77 (2010) (''the custodian requirement largely removes the ability of an investment adviser to pay the proceeds invested by new investors to old investors. The custodian will take the instructions to buy or sell securities, but not to remit the proceeds of sales to the adviser or to others (except in return for share redemptions by investors). At a stroke, this requirement eliminates the ability of the manager to 'recycle' funds from new to old investors.'' *quoting* Testimony of Professor John C. Coffee, Jr.; The Madoff Investment Securities Fraud: Regulatory and Oversight Concerns and the Need for Reform: Testimony before the U.S. Senate Committee on Banking, Housing and Urban Affairs, 111th Congress, 1st session, pp. 8, 10 (2009)).

[16] Earlier versions of this bill show that Congress considered retaining the current rule's funds and securities formulation. *See* Investor Protection Act of 2009, H.R. 3817, 111th Cong section 419 (2009).

[17] The current rule has also been the subject of numerous inquiries and requests for staff views. *See, e.g.,* Staff Responses to Questions about the Custody Rule (''Custody Rule FAQs''), *available at https://www.sec.gov/divisions/investment/custody_faq_030510.htm;* Privately Offered Securities under the Investment Advisers Act Custody Rule, Division of Investment Management Guidance Update No. 2013–04 (Aug. 2013) (''2013 IM Guidance''); Private Funds and Application of the Custody Rule to Special Purpose Vehicles and Escrows, Division of Investment Management Guidance Update No. 2014–07 (June 2014) (''2014 IM Guidance''). Staff reports, statistics, and other staff documents (including those cited herein) represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. Furthermore, the

technology, advisory services, and custodial practices create new and different ways for client assets to be placed at risk of loss, theft, misuse, or misappropriation that may not be fully addressed under the current rule.

For example, advisory services have expanded and developed in recent years, leading to questions about the scope of activities that trigger application of the current rule. More specifically, nearly 20 years ago when the Commission interpreted authorized trading not to be within the definition of custody, it had stated that clients' custodians are generally under instructions to transfer funds or securities out of a client's account only upon corresponding transfer of securities or funds into the account. At the time, the Commission's view was that such an arrangement would minimize the risk that an adviser could withdraw or misappropriate the funds or securities in its client's custodial account.

Discretionary trading practices today, however, do not necessarily involve a one-for-one exchange of assets under a custodian's oversight. For instance, an adviser may instruct an issuer or a transfer agent that recorded ownership of a client's privately offered security to redeem the client's interest and direct the proceeds to a particular account. Because there is no qualified custodian involved in such a transaction, a client's ability to monitor its investments for suspicious activity is limited (*e.g.,* a qualified custodian would not attest to this transaction on the account statements it provides), and a surprise examination or an audit may not discover any misappropriation until the assets are gone. Moreover, if the security is not included in the sample over which an accountant performs its procedures during a surprise examination or if the client's holdings of the security do not meet the materiality threshold for a financial statement audit, misappropriation may go undetected for an indeterminate amount of time.

Other times, advisers find themselves subject to the rule because of authority they do not wish to have. For instance, we understand that some advisory clients' custodial agreements empower investment advisers with a broad array of authority that they neither want nor use.[18] Advisers have little to no ability to eliminate this authority because they are usually not parties to the custodial agreements between clients and qualified custodians, but nonetheless these arrangements result in an adviser having custody under the rule.

While these developments suggest a need to protect clients better and modify the application of the current rule, other developments suggest a need to improve the rule's efficacy, including particularly the protections provided by the qualified custodian, who has long been the key gatekeeper under this rule. A growing number of assets are not receiving custodial protections as a result of certain of the current rule's exceptions from the requirement to maintain assets with a qualified custodian, particularly the exception for privately offered securities.[19] That exception and the exception for mutual fund shares were adopted at a time when dematerialized ownership of securities was still developing, and the exceptions were envisioned as being necessary ''at times'' or ''on occasion.'' This rarity is no longer the case. We understand that, today, the overwhelming majority of securities are uncertificated, the volume of privately offered securities has vastly expanded with the expansion of private capital, and custodians have developed safeguarding and reporting practices, particularly with respect to publicly traded securities.[20] We acknowledge that the custodial market for privately issued securities is less developed,[21] but we believe that some custodians presently custody these assets and we understand that new custodial services are being developed.[22] What has also developed, however, is a practice by custodians in which the custodian lists assets for which it does not accept custodial liability on a client's account statement on an accommodation basis only; the custodian does not attest to the holdings of or transactions in those investments or take steps to ensure that the investments are safeguarded appropriately (''accommodation reporting''). The custodian merely reports the holdings or transactions as reported to it by the adviser. This practice undermines the account statement's integrity and utility in helping to verify that the client owns the assets and they have not been stolen or misappropriated. We view the integrity of custodial account statements to be critical to the safeguarding of client assets. Clients should be able to review their account statements to evaluate the legitimacy of any movement within their account, whether it is a trade, a payment, or a fee withdrawal. In contrast, the current exception for mutual fund shares requires a transfer agent of the mutual fund to fulfill all of the obligations assigned to a qualified custodian under the rule, including sending statements directly to the client. In our longstanding experience with the current rule, this exception has not raised similar types of investor protection concerns.

At the same time, the evolution of financial products and services discussed above has led to new entrants and new services in the custodial marketplace, including newly launched state-chartered trust companies, as well as established bank and broker-dealer custodians seeking to develop new practices to safeguard assets.[23] Our staff has also observed a general reduction in the level of protections offered by custodians, often resulting in advisory clients with the least amount of bargaining power (*i.e.,* retail investors) receiving the most limited protections. We understand, for instance, that it is decreasingly common for banks acting as custodians to do so in a fiduciary capacity.[24] These changes in the

Commission has neither approved nor disapproved these documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person. The Commission has expressed no view regarding the analysis, findings, or conclusions contained therein. As discussed in section II.J, staff in the Division of Investment Management is reviewing staff no-action letters and other staff letters to determine whether any such letters should be withdrawn in connection with any adoption of this proposal. If the rule is adopted, some of the letters and statements may be moot, superseded, or otherwise inconsistent with the rule and, therefore, would be withdrawn.

[18] We use the term ''custodial agreement'' throughout the release to refer to a contract between an advisory client and the qualified custodian. The adviser usually is not a party.

[19] Preqin Global Private Debt Report (2018), *available at https://docs.preqin.com/samples/2018-Preqin-Global-Private-Debt-Report-Sample-Pages.pdf* (showing the growth in private capital assets under management from 2007 to 2017 by the following asset classes: private equity, private debt, real estate, infrastructure, natural resources).

[20] *See* discussion in section II.C *infra* and at text accompanying footnote 229.

[21] We understand that many qualified custodians will not currently accept custodial liability for certain instruments including certain crypto assets, commodities, and privately issued securities. *See* Letter to Karen Barr re Engaging on Non-DVP Custodial Practices and Digital Assets: Investment Advisers Act of 1940: Rule 206(4)–2 (Mar. 12, 2019) (''2019 RFI'').

[22] *See, e.g.,* DTCC, Project Whitney Case Study (May 2020), *available at https://www.dtcc.com/~/media/Files/Downloads/settlement-asset-services/user-documentation/Project-Whitney-Paper.pdf.*

[23] *See, e.g.,* Tomito Geron, Companies Compete to Be Cryptocurrency Custodians, The Wall Street Journal (Sept. 17, 2019).

[24] *See* OCC Bulletin 2019–21, April 29, 2019, ''Fiduciary Regulations; Non-Fiduciary Activities; Advance Notice of Proposed Rulemaking.'' According to this Bulletin, Bank non-fiduciary custody activities have increased in asset size since 1996. This Bulletin reports, as of December 2018, bank non-fiduciary custody assets were about $42 trillion, whereas bank fiduciary custody assets were about $9 trillion. *See also* Edward H. Klees, How

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industry have caused us to reconsider the role of a ''qualified custodian'' under our rule and what minimum protections clients should receive.

Finally, since the Commission last amended the current rule, there have been significant developments with respect to crypto assets,[25] which generally use distributed ledger or blockchain technology (broadly referred to as ''DLT'') [26] as a method to record ownership and transfer assets. While potentially creating certain efficiencies in transactions, this technology also presents technological, legal, and regulatory risks to advisers and their clients.[27] Unlike mechanisms used to transact in more traditional assets, this technology generally requires the use of public and private cryptographic key pairings, resulting in the inability to restore or recover many crypto assets in the event the keys are lost, forgotten, misappropriated, or destroyed.[28] By design, DLT finality often makes it difficult or impossible to reverse erroneous or fraudulent crypto asset transactions, whereas processes and protocols exist to reverse erroneous or fraudulent transactions with respect to more traditional assets. These specific characteristics could leave advisory clients without meaningful recourse to reverse erroneous or fraudulent transactions, recover or replace lost crypto assets, or correct errors that result from their adviser having custody of these assets.

Additionally, we understand that many advisers may be reluctant to provide a full range of advisory services to their clients with respect to crypto assets because of concerns that a market for custodial services to safeguard these assets has not yet fully developed. We understand that other advisers provide advisory services that would generally result in an adviser having ''custody'' within the meaning of the rule (*e.g.,* serving as the general partner for a private fund that holds crypto asset securities), and therefore are required to comply with the rule. Some of these advisers, however, may not maintain their client's crypto assets with a qualified custodian, instead attempting to safeguard their client's crypto assets themselves—a practice that is not compliant with the custody rule if those crypto assets are funds or securities and do not meet an exception from the qualified custodian requirement. Other advisers offering similar advisory services might take the position that crypto assets are not covered by the custody rule at all. This, however, is incorrect because most crypto assets are likely to be funds or crypto asset securities covered by the current rule.[29]

B. Overview of the Proposal

In the light of these developments and additional authority that Congress has given us under the Dodd-Frank Act to prescribe investment adviser custody rules, we are redesignating the custody rule as new rule 223–1 under the Advisers Act (the ''safeguarding rule'' or the ''proposed rule'') and proposing a number of amendments to strengthen its protections.[30] The proposal is designed to recognize the evolution in products and services investment advisers offer to their clients and to strengthen and clarify existing custody protections, while also proposing complementary refinements to how advisers report custody information on Form ADV and the books and records they are required to keep that are designed to improve our oversight and risk-assessment abilities.[31] Importantly, the proposal maintains the core purpose of protecting client assets from loss, misuse, theft, or misappropriation by, and the insolvency or financial reverses of, the adviser and maintains the Commission's ability to pursue advisers for failing to properly safeguard client assets under the Act's antifraud provisions.[32]

First, the proposed amendments are designed to modernize the scope of assets and activities that would trigger application of the rule. In today's increasingly complex and global financial markets, this update also would simplify the rule's application and better align the rule with the Commission's statutory authority.[33] Because investment advisers provide

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Safe are Institutional Assets in a Custodial Bank's Insolvency, 68 Bus. LAW. 103, 110, footnote 46 (2012) (''Klees Article''). In addition to certain institutions identified under the Home Owners' Loan Act and members of the Federal Reserve System, the Advisers Act generally identifies ''banks'' as banking institutions or savings associations a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks. Advisers Act sec. 202(a)(2).

[25] There are also digital assets. The term ''digital asset'' refers to an asset that is issued and/or transferred using distributed ledger or blockchain technology, including, but not limited to, so-called ''virtual currencies,'' ''coins,'' and ''tokens.'' *See Custody of Digital Asset Securities by Special Purpose Broker-Dealers,* Securities Exchange Act Release No. 90788 (Dec. 23, 2020), 86 FR 11627, 11627 n.1 (Feb. 26, 2021) (''Commission Statement''). A digital asset may or may not meet the definition of a ''security'' under the Federal securities laws. *See, e.g., Report of Investigation Pursuant to section 21(a) of the Securities Exchange Act of 1934: The DAO,* Securities Exchange Act Release No. 81207 (July 25, 2017) (''DAO 21(a) Report''), *available at https://www.sec.gov/litigation/investreport/34-81207.pdf; SEC* v. *W.J. Howey Co.,* 328 U.S. 293 (1946). To the extent digital assets rely on cryptographic protocols, these types of assets also are commonly referred to as ''crypto assets.'' For purposes of this release, the Commission does not distinguish between the terms ''digital asset'' and ''crypto asset.''

[26] The terms DLT and blockchain, a type of DLT, generally refer to databases that maintain information across a network of computers in a decentralized or distributed manner. Blockchain networks commonly use cryptographic protocols to ensure data integrity. *See, e.g.,* World Bank Group, ''Distributed Ledger Technology (DLT) and Blockchain,'' FinTech Note No. 1 (2017), *available at: https://openknowledge.worldbank.org/bitstream/handle/10986/29053/WP-PUBLIC-Distributed-Ledger-Technology-and-Blockchain-Fintech-Notes.pdf?sequence=1&isAllowed=y.*

[27] We note that our staff has expressed a similar view. *See, e.g.,* SEC Staff Accounting Bulletin No. 121, [87 FR 21016 (Apr. 11, 2022)] (generally describing risks related to the safeguarding of crypto assets); Custody of Digital Asset Securities by Special Purpose Broker-Dealers, *supra* footnote 25 (generally discussing risks related to broker-dealer custody of crypto asset securities). *See also* Joint Statement on Crypto-Asset Risks to Banking Organizations (Jan 3, 2023), *available at https://occ.treas.gov/news-issuances/news-releases/2023/nr-ia-2023-1a.pdf* (generally discussing risks related to bank custody of crypto assets).

[28] *See, e.g.,* Not Your Keys, Not Your Coins: Unpriced Credit Risk in Cryptocurrency, at section I, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107019.*

[29] The application of the current rule turns on whether a particular client investment is a fund or a security. To the extent there is a question as to whether a *particular* crypto asset is an investment contract that is a security, the analysis is governed by the test first articulated by the Supreme Court in *SEC* v. *W.J. Howey Co.,* 328 U.S. 293, 301 (1946). *See, e.g., SEC* v. *Kik Interactive Inc.,* 492 F. Supp. 3d 169, 177–180 (S.D.N.Y. 2020) (applying *Howey* in granting the Commission's motion for summary judgment finding Kik's sale of Kin tokens to the public was a sale of a security and required a registration statement); *SEC* v. *LBRY,* No. 21–CV–260–PB, 2022 WL 16744741 (D.N.H. Nov. 7, 2022) (applying *Howey* in granting the Commission's motion of summary judgement finding ''no reasonable trier of fact could reject the SEC's contention that LBRY offered LBC [a crypto asset] as a security.'' *Id.* at 21); Report of Investigation Pursuant to section 21(a) of the Securities Exchange Act of 1934: The DAO, Rel. No. 81207 (July 25, 2017) (describing how DAO tokens were securities under *Howey*); *see also* Spotlight on Crypto Assets and Cyber Enforcement Actions, *available at https://www.sec.gov/spotlight/cybersecurity-enforcement-actions.* Importantly, even if a particular crypto asset is not a security, the current rule also covers funds.

[30] We are also renumbering portions of the custody rule that we are not amending.

[31] In a technical, conforming change from the current rule, the proposed rule would replace, in certain places, references to ''you'' with ''investment adviser.''

[32] While we are renumbering the current rule as rule 223–1, section 206(4) is still available to the Commission and is also a basis of statutory authority for this proposed rulemaking. To establish a violation of section 206(4) for an adviser's failure to safeguard client assets, the Commission does not need to demonstrate that an investment adviser acted with scienter. *See SEC* v. *Steadman,* 967 F.2d 636, 646–7 (D.C. Cir. 1992). As we noted when we adopted rule 206(4)–8, the court in *Steadman* analogized section 206(4) of the Advisers Act to section 17(a)(3) of the Securities Act, which the Supreme Court had held did not require a finding of scienter (citing *Aaron* v. *SEC,* 446 U.S. 680 (1980)). *See* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Investment Advisers Act Rel. 2628, (Aug. 3, 2007), 72 FR 44763 (Aug. 9, 2007). *See also* Steadman at 643, n.5.

[33] *See supra* note 16 and accompanying text.

services related to an array of financial products beyond just funds or securities, the proposed rule would require certain minimum protections, particularly the safeguards of a qualified custodian, for substantially all types of client assets held in an advisory account. Specifically, the safeguarding rule would specify the types of assets subject to the safeguarding requirements of the rule by defining ''assets'' as ''funds, securities, or other positions held in a client's account,'' as opposed to the custody rule's use of ''funds and securities.'' [34] This change would expressly include certain assets that may not have previously been categorized as ''funds'' or ''securities'' and would accommodate developments in the market for various investment types that develop in the future, irrespective of their status as funds or securities. By expanding the scope of the rule to include client assets instead of only client funds and securities, we believe we are properly balancing the desire of investment advisers to provide advisory services regarding novel or innovative asset types with the need to ensure that such assets are properly safeguarded.

The proposed rule also would explicitly include discretionary authority to trade within the definition of custody.[35] When an adviser has discretion to trade client assets, it has an arrangement in which it may instruct the adviser's custodian to dispose the client's assets. An adviser with discretion may also have broad authority to direct purchases or sales of client assets that may not currently involve a qualified custodian, such as loan participation interests. An adviser's ability or authority to effect a change in beneficial ownership of a client's assets, including for purposes of trading, could place client assets at risk of loss that the rule is designed to address.[36] This change would rectify any unintended consequences of our prior interpretive position.[37]

Like the custody rule, the safeguarding rule would entrust safekeeping of client assets to a qualified custodian because we continue to believe it provides critical safeguards for those assets. Unlike the custody rule, however, the safeguarding rule would specify that a qualified custodian does not ''maintain'' a client asset for purposes of the rule if it does not have ''possession or control'' of that asset. The proposed rule would further define ''possession or control'' to mean holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets.[38] This change is designed to improve account statement integrity and reliability by eliminating an adviser's ability to request accommodation reporting.[39] Further, in a change from the current rule, the proposed rule would require an adviser to enter into a written agreement with and receive certain assurances from the qualified custodian to make sure the qualified custodian provides certain standard custodial protections when maintaining client assets.[40]

Under the proposal, the written agreement would require two provisions that are not explicitly addressed by the current rule. One provision would require the qualified custodian to provide promptly, upon request, records relating to clients' assets held in the account at the qualified custodian to the Commission or to an independent public accountant engaged for purposes of complying with the safeguarding rule. The other would specify the adviser's agreed-upon level of authority to effect transactions in the account. The proposed rule's written agreement requirement would also incorporate, and expand, two components of the current rule: account statements and internal control reports. Under the first, the written agreement must contain a provision requiring the qualified custodian to deliver account statements to clients and to the adviser, as currently advisers must have only a reasonable basis for believing this is done. The other provision would require the qualified custodian to obtain a written internal control report that includes an opinion of an independent public accountant regarding the adequacy of the qualified custodian's controls. This provision expands the internal control requirement to all qualified custodians from the current rule's application to an adviser or its related person [41] that acts as a qualified custodian.

In addition to the written agreement requirement, advisers would have to obtain reasonable assurances that the qualified custodian satisfies five additional enumerated items.[42] These include assurances that the custodian will: (1) exercise due care in accordance with reasonable commercial standards in discharging its duty as custodian and implement appropriate measures to safeguard client assets from theft, misuse, misappropriation, or other similar type of loss; (2) indemnify the client against losses caused by the qualified custodian's negligence, recklessness, or willful misconduct; (3) not be excused from its obligations to the client as a result of any sub-custodial or other similar arrangements; (4) clearly identify and segregate client assets from the custodian's assets and liabilities; and (5) not subject client assets to any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors, except to the extent agreed to or authorized in writing by the client.

We are proposing to modify the current rule's privately offered securities exception from the obligation to maintain client assets with a qualified custodian by expanding the exception to include certain physical assets.[43] We are also proposing refinements to the definition of privately offered securities that are designed to ensure appropriate application and interpretation of this exception.[44] In addition, we are proposing to modify the conditions for relying on this exception to improve investor protections in the absence of one of the rule's key gatekeepers. Specifically, an adviser could rely on the exception only if it reasonably

[34] *See* 15 U.S.C. 80b–23 (''section 223'') ''An investment adviser registered under this subchapter shall take such steps to safeguard client *assets* over which such adviser has custody, including, without limitation, verification of such assets by an independent public accountant, as the Commission may, by rule, prescribe.'' *See* proposed rule 223–1(a).

[35] Proposed rule 223–1(d)(3).

[36] *See* section II.A.2. Recognizing that there are times when an investment adviser neither wants nor uses the ability or authority that would trigger the proposed rule and that there are times when an adviser inadvertently receives client investments, the proposed rule would provide limited and tailored exclusions in these circumstances. *See infra,* discussion of discretionary trading authority in section II.G.2.

[37] When adopting amendments to the custody rule in 2003, we stated in a footnote: ''An adviser's authority to issue instructions to a broker-dealer or [other] custodian to effect or settle trades does not constitute 'custody.' Clients' custodians are generally under instructions to transfer funds (or securities) out of a client's account only upon corresponding transfer of securities (or funds) into the account. This 'delivery versus payment' arrangement minimizes the risk that an adviser could withdraw or misappropriate the funds or securities in its client's custodial account.'' 2003 Adopting Release, *supra* footnote 2, at n.10. Absent this narrowly drawn exception for ''delivery versus payment'' transactions, authorized trading comes within the definition of custody.

[38] Proposed rule 223–1(d)(8). For further discussion of possession or control, please see discussion *infra* section II.B.2.

[39] *See infra* discussion section II.B.3.b.ii.

[40] Proposed rule 223–1(a)(1).

[41] The term ''related person'' would have the same meaning as in the current rule.

[42] *See* proposed rule 223–1(a)(1)(ii).

[43] See proposed rule 223–1(b)(2).

[44] *See* proposed rule 223–1(d)(9).

determines that ownership cannot be recorded and maintained by a qualified custodian, the adviser reasonably safeguards the assets, the adviser notifies the independent public accountant performing the verification of such an asset transfer within one business day, an independent public accountant verifies asset transfers and notifies the Commission upon the findings of any material discrepancies, and the existence and ownership of the assets are verified during an annual independent verification or as part of a financial statement audit by an independent public accountant.[45] The modifications are also designed to limit availability of the exception to circumstances that truly warrant it because we believe the bulk of advisory client assets are able to be maintained by qualified custodians and should be safeguarded in the manner contemplated under the safeguarding rule.

Under the proposed rule, advisers with custody of client assets would be required to segregate those assets by (1) titling or registering the assets in the client's name or otherwise holding the assets for the client's benefit, (2) not commingling the assets with the adviser's or any of its related persons' assets, and (3) not subjecting the assets to any right, charge, security interest, lien, or claim of any kind in favor of the investment adviser or its related persons or creditors, except to the extent agreed to or authorized in writing by the client.[46] This provision, which would apply regardless of whether the client's assets are maintained by a qualified custodian, is designed to prevent the adviser, or its related person, from using client assets for its own purposes or in a manner not authorized by the client or in a manner inconsistent with its fiduciary duty. We believe this will also help to protect client assets and enable them to be returned in the event that an adviser experiences financial hardship.

The proposed rule would continue to depend on the protections provided by independent public accountants. We have long relied on these third-party gatekeepers to provide ''another set of eyes'' on client assets, and we believe they serve an important role in safeguarding client assets. In light of the proposed changes to the rule's scope, however, the proposal seeks to balance better the costs associated with obtaining a surprise examination with the investor protections it offers by providing exceptions to the surprise examination requirement when the adviser's sole reason for having custody is because it has discretionary authority or because the adviser is acting according to a standing letter of authorization, each subject to certain conditions.[47] We believe that the risk to client assets is lower in these contexts and the protections offered by the surprise examination may not justify the cost of obtaining one. Finally, the proposed safeguarding rule amendments would expand the scope of who can satisfy the rule's surprise examination requirement through financial statement audits by specifying that an entity is not required to be a limited partnership, limited liability company, or another type of pooled investment vehicle to rely on this provision.[48]

The proposal also seeks to update and enhance recordkeeping requirements for advisers that would work in concert with the proposed rule. We believe that these updates would enhance the Commission's oversight of the safeguarding practices of advisers and their compliance with the rule, which will, in turn, promote investor protections.

Finally, we are proposing amendments to Form ADV to align reporting obligations with the proposal and improve the accuracy of custody-related data available to the Commission, its staff, and the public. In addition, we are improving the structure of Form ADV Item 9.[49] More accurate and comprehensive information that aligns with the proposed rule would inform the Commission's examination initiatives and would allow the Commission and its staff to better assess risks specific advisers pose to investors.[50]

II. Discussion

A. Scope of Rule

Like the current rule, the proposed rule would apply to any investment adviser registered or required to be registered with the Commission under section 203 of the Act that has ''custody'' of a client's assets.[51] Also consistent with the current rule, the proposed rule would also apply to any adviser whose ''related persons'' have custody in connection with advisory services the adviser provides to the client.[52]

The proposed rule would change the current rule's scope, however, in two important ways. First, it would expand the types of investments covered by the rule. Currently, the rule applies to client ''funds and securities'' of which an adviser has custody. The proposed rule would extend the rule's coverage beyond client ''funds and securities'' to client ''assets'' so as to include additional investments held in a client's account. Second, the proposed rule would make explicit that the current rule's defined term ''custody'' includes discretionary authority.

1. Scope of Assets

The proposed rule would define ''assets'' as ''funds, securities, or other positions held in a client's account.'' [53] The proposal, like the current rule, therefore would apply to a client's funds as well as a client's securities. However, the proposed rule also would apply to other positions held in a client's account that are not funds or securities. This proposed change uses the more expansive and explicit language employed by Congress in empowering the Commission to develop rules to protect client *assets* when advisers have custody.[54] Congress made this change following several high profile enforcement actions relating to misappropriation of client assets.[55] The proposed amendments also recognize the continued evolution of the types of investments held in advisory accounts since the custody rule was amended in 2009 and since the enactment of section 223. Looking forward, the proposed definition of assets is designed to remain evergreen, encompassing new investment types as they continue to evolve and multiply to recognize that the protections of the rule should not

[45] *See* proposed rule 223–1(b)(2).

[46] *See* proposed rule 223–1(a)(3).

[47] See proposed rule 223–1(b)(7) and (8).

[48] *See* proposed rule 223–1(b)(4).

[49] *See infra* discussion at section II.I.

[50] *See infra* discussion at section II.J. Because Form ADV Part 1A is submitted in a structured, XML-based data language specific to that form, the information in the proposed amendments to Part 1A would continue to be structured (*i.e.,* machine-readable).

[51] Proposed rule 223–1. As with the current rule, an adviser would be required to comply with the proposed rule in circumstances where the adviser provides advisory services to a person's assets, even if uncompensated. ''Although a person is not an 'investment adviser' for purposes of the Advisers Act unless it receives compensation for providing advice to others, once a person meets that definition (by receiving compensation from *any* client to which it provides advice), the person is an adviser, and the Act applies to the relationship between the adviser and any of its clients (whether or not the adviser receives compensation from them).'' *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011) [76 FR 42,950 (July 19, 2011)], at text accompanying n.74.

[52] Consistent with the current rule, under the proposed rule, the term ''related person'' would mean ''any person, directly or indirectly, controlling or controlled by [the investment adviser], and any person that is under common control with [the investment adviser].'' Proposed rule 223–1(d)(11).

[53] Proposed rule 223–1(d)(1).

[54] *See* section 223, *supra* footnote 34.

[55] *See supra* footnote 11.

depend on which type of assets the client entrusts to the adviser.

The proposed rule's use of the term ''other positions'' in the definition of assets encompasses holdings that may not necessarily be recorded on a balance sheet as an asset for accounting purposes, including, for example, short positions and written options.[56] We believe, in the advisory account context, that the entirety of a client account's positions, holdings, or investments should receive the protections of the proposed rule regardless of how they may be treated for accounting purposes. Moreover, the fiduciary duty extends to the entire relationship between the adviser and client regardless of whether a specific holding in a client account meets the definition of funds or a security.[57] Consequently, the proposed rule's definition of assets would include investments such as all crypto assets, even in the instances where such assets are neither funds nor securities.[58] Assets under the rule also would include financial contracts held for investment purposes, collateral posted in connection with a swap contract on behalf of the client, and other assets that may not be clearly funds or securities covered by the current rule.[59] Additionally, physical assets, including artwork, real estate, precious metals, or physical commodities (*e.g.,* wheat or lumber), would be within the scope of the proposed rule. ''Assets'' also would encompass investments that would be accounted for in the liabilities column of a balance sheet or represented as a financial obligation of the client including negative cash, which we believe would be consistent with the purposes of the Act and the longstanding policy goal of the rule to prevent potential fraud, misuse, or misappropriation.[60]

We also request comment on all aspects of the proposed definition of ''assets,'' including the following items:

1. Should the rule apply to client ''assets'' beyond the scope of the current rule's formulation of ''funds or securities,'' as proposed? Should the proposed rule include the term ''other positions'' as a catch-all for a client's positions subject to the adviser-client relationship? Should another term, such as client investments, be used instead?

2. Should we define client ''assets'' by referencing other terms, such as ''securities and similar investments'' or ''any investment,'' which are used but not defined in the Investment Company Act custody rules?[61] Should we instead incorporate the term ''investment'' from the definition of ''qualified purchaser'' under the Investment Company Act?[62]

3. Are there particular types of assets held in a client's advisory account that should or should not be subject to the proposed rule? If so, what are they and why should they be included or excluded? Are there other safeguards outside of the proposed rule that apply to these positions that would satisfy the policy goals of the rule? Does the answer depend on the type of asset?

4. To the extent that the adviser has custody of certain physical assets, should we narrow the proposed definition to exclude such physical assets? For example, should the proposed definition exclude artwork, real estate, precious metals, or physical commodities (*e.g.,* wheat or lumber), for example?

5. It is our understanding that some advisers treat client assets that may not be ''funds or securities'' consistent with rule 206(4)–2. If so, what types of assets do they maintain with a qualified custodian under the current rule? If not, how do the advisers safeguard these client assets?

6. Should we provide guidance about how the proposed rule would apply to certain asset types? If so, for what types of assets? Should we provide guidance for certain assets that would be subject to exceptions from the proposed rule, such as privately offered securities or physical assets?

7. Should the proposed rule apply to assets that are treated as liabilities from an accounting perspective? Is it sufficiently clear that the proposed rule would apply to portfolio holdings that are liabilities on a balance sheet? Should we provide additional clarification as to what types of investments may appear as liabilities within the scope of the advisory relationship? What types of holdings typically appear as liabilities? Are there any exemptions or provisions required for such investments if they are included within the scope of the rule?

2. Scope of Activity Subject to the Proposed Rule

The proposal generally would preserve the current rule's definition of ''custody,'' and apply when an adviser ''holds, directly or indirectly, client assets, or has any authority to obtain possession of them.''[63] The general principle of this definition is to apply the rule when an adviser has the ability or authority to effect a change in beneficial ownership of a client's assets.[64] An adviser with this ability or authority can subject a client's assets to the risks of loss, misuse, misappropriation, theft, or financial reverses of the adviser. Moreover, the rule would continue to apply when an adviser's related person has the ability to obtain client assets in connection with advisory services. Like the current rule, the proposed rule would institute prophylactic safeguards where there is this *potential* for loss or harm to a client given the adviser's ability or authority to deprive the client of ownership and to obtain possession of the client's assets.

In addition to this overarching principle, the current definition of custody includes three categories that serve as examples of custody: physical possession, certain arrangements when the adviser is authorized or permitted to instruct the client's custodian, and circumstances when the adviser acts in certain capacities.[65] The proposed rule

[56] Similarly, rule 6(c)–11 under the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] (the ''Investment Company Act'') defines an exchange-traded fund's portfolio holdings as the securities, assets, or other positions held by the exchange-traded fund. *See* 17 CFR 270.6c–11. *See* Exchange Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) [84 FR 57162 (Oct. 24, 2019)], at n.249 (including within the term ''other positions'' short positions in equity, overdrawn or negative cash balances, written call or put options (where the other side has the option and can put or call the underlying instrument to the party who wrote the contract)).

[57] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA–5248 (Jun. 5, 2019) at footnote 17 (discussing the broad scope of the fiduciary duty in a variety of contexts, including situations where securities are not specifically involved).

[58] Crypto assets that are funds or securities are subject to the current custody rule, which applies to all ''funds and securities'' over which an adviser has custody. *See* discussion of whether crypto assets or digital assets meet the definition of security at *supra* footnote 29.

[59] *Id.* Our staff has taken a similar position regarding collateral for transactions, such as swaps. *See* Custody Rule FAQs, *supra* footnote 17, at Question II.10.

[60] *See* rule 6c–11, *supra* footnote 56. The release discussed that liabilities were contemplated to be part of ''other positions.''

[61] *See* rules 17f–1, 17f–2, 17f–5, and 17f–6 under the Investment Company Act.

[62] *See* rule 2a51–1(b) under the Investment Company Act.

[63] *See* proposed rule 223–1(d)(3).

[64] For example, an adviser that physically holds a check drawn by the advisory client and made payable to a third party is not subject to the rule solely as a result of holding the check, since the adviser cannot use the check to change ownership of the client's underlying cash holdings. *See* rule 206(4)–2(d)(2)(i). Similarly, if a stock certificate is non-transferable (*i.e.,* it cannot be used to effect a change in beneficial ownership of the client's investment), an adviser would not be subject to the rule as a result of holding it. Our staff previously took a similar view. *See* 2013 IM Guidance, *supra* footnote 17.

[65] Under the current rule, custody includes three prongs: (i) Possession of client funds or securities (but not of checks drawn by clients and made payable to third parties) unless the adviser receives them inadvertently and returns them to the sender promptly but in any case within three business days of receiving them; (ii) Any arrangement (including

Continued

would retain these categories because, going forward, we believe this approach will continue to provide flexibility as the asset management industry continues to evolve, introduces novel investment products, and provides new services to its advisory clients.

We believe we need to provide specificity, however, regarding the arrangement category of the custody definition to state explicitly that discretionary trading authority is an arrangement that triggers the rule.[66] Specifically, the amended custody definition would include any arrangement (including, but not limited to, a general power of attorney or discretionary authority) under which the adviser is authorized or permitted to withdraw or transfer beneficial ownership of client assets upon the adviser's instruction.[67] In addition, the proposed discretionary authority definition is consistent with the definition in Form ADV and is the authority to decide which assets to purchase and sell for the client.[68]

The Commission previously stated that an adviser's authority to issue instructions to a broker-dealer or a custodian to effect or to settle trades, or authorized trading, does not constitute custody.[69] We had explained then that the risk of an adviser withdrawing or misappropriating funds and securities are minimized when a client's custodian is under instructions to transfer funds (or securities) out of a client's account only upon corresponding transfer of securities (or funds) into the account.[70] However, while we continue to believe that there is a more limited risk of loss to a client from authorized trading when a qualified custodian participates in a one-for-one exchange of assets like this, we also believe that discretionary authority presents the types of risks the rule is designed to address. The adviser, for instance, could use its discretionary authority over a client's assets to instruct an issuer's transfer agent or administrator (*e.g.,* the administrator for a loan syndicate) to sell its client's interest and to direct the cash proceeds of the sale to an account that the adviser owns and controls, thereby depriving the client of ownership, unbeknownst to the client or its qualified custodian. Unless a client or its custodian is required to participate in these transactions, such as when the client must sign the subscription agreement to purchase the security (*i.e.,* the adviser does not have a power of attorney and cannot sign for the client in any other capacity), the client will be unable to monitor the assets in its account for potential misuse or misappropriation effectively.[71]

We believe it is important to extend the protections of the rule by explicitly including ''discretionary authority'' within the definition of custody. However, because we continue to believe more limited risk of loss exists when a qualified custodian participates in transactions, we are also proposing a limited exception to the surprise examination requirement of the rule. The exception would generally apply to client assets that are maintained with a qualified custodian when the sole basis for the application of the rule is an adviser's discretionary authority that is limited to instructing the client's qualified custodian to transact in assets that settle only on a delivery versus payment (''DVP'') basis.[72] In DVP transactions, clients' custodians are under instructions to transfer assets out of a client's account only upon corresponding transfer of assets into the account. This ''delivery versus payment'' arrangement minimizes the risk that an investment adviser could withdraw or misappropriate the assets in its client's custodial account. In our view, DVP transactions reduce the risk that the seller of an asset could deliver the asset but not receive payment or that the buyer of an asset could make payment but not receive delivery of the asset.[73]

We request comment on all aspects of the proposed application of the rule to advisers with discretionary authority, along with the continuing application of the rule more generally, including the following items.

8. Should the proposal generally retain the current rule's definition of custody? The proposed rule would generally retain the three categories that serve as examples of custody in the current rule: physical possession, certain arrangements when the adviser is authorized or permitted to withdraw or transfer beneficial ownership of client assets upon the adviser's instructions, and circumstances when the adviser acts in certain capacities. Should the proposed rule change the current definition of custody from these three categories? What should the proposal provide alternatively?

9. Should the rule apply to when an adviser has discretionary authority over client assets, as proposed? Are there provisions of the proposed rule that should or should not apply to advisers who have custody because they have discretionary authority?

10. Do advisers with discretionary authority over a client's assets (regardless of settlement method) currently have safeguards in place that effectively limit the risks to clients of loss, misuse, theft, or—in particular—misappropriation? If so, what are they? Do these safeguards differ depending on whether the arrangement involves a qualified custodian?

11. When a trade settles in a manner that is not DVP, are there controls that are or could be established in the event one leg of the trade does not complete? If so, how commonly are such controls utilized? Are there circumstances when such controls could not be established or implemented? Should we require controls or policies and procedures for advisers and/or the respective custodians in these circumstances?

12. Should the definition of custody contain an exception (or should we interpret the definition of custody not to include) when the adviser has authority to instruct the client's custodian to remit assets from the custodial account to the client at his or her mailing address of record? If so, should such an exception or interpretation be subject to any conditions? For example, should the client be required to grant the adviser this authority in writing to the qualified custodian? Should an exception or interpretation also be conditioned on the adviser lacking authority to open an account on behalf

a general power of attorney) under which the adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the adviser's instruction to the custodian; and (iii) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives the adviser or its supervised person legal ownership of or access to client funds or securities.

[66] Proposed rule 223–1(d)(3) (proposed custody definition) and proposed rule 223–1(d)(4)(discretionary authority definition). The second prong of the current custody definition states: ''Any arrangement (including a general power of attorney) under which you are authorized or permitted to withdraw client funds or securities maintained with a custodian upon your instruction to the custodian.'' *See* current rule 206(4)–2(d)(3).

[67] The proposed amended definition also removes the reference ''to the custodian'' from the arrangement category. This formulation ensures that custody is triggered if, for example, an adviser can instruct a transfer agent or administrator to withdraw or transfer beneficial ownership of client assets. *See* proposed rule 223–1(d)(3).

[68] Proposed rule 223–1(d)(4).

[69] 2003 Adopting Release, *supra* footnote 2, at n.10.

[70] *Id.*

[71] Our staff stated a similar view under the current rule. *See* Custody Rule FAQs, *supra* footnote 17, at Question VII.3.

[72] Proposed rule 223–1(b)(8). *See infra* at section II.G.2.

[73] For discussion of delivery versus payment settlement operations, *see* Bank for International Settlements, ''Delivery versus Payment in Securities Settlement Systems,'' Sept. 1992, p. 1 at *https://www.bis.org/cpmi/publ/d06.pdf.*

of the client? Should the adviser also lack authority to designate or change the client's mailing address of record with the qualified custodian, or if the adviser has this authority, would it be sufficient protection for the adviser to have a reasonable belief that the custodian would send a notice of any change of mailing address to the client at the client's old address of record upon receiving the request from the adviser to change the mailing address? [74] For example, broker-dealers must send a customer who is a natural person a notification of a change of mailing address to the customer's old mailing address.[75] Similarly, banks that follow guidance issued by banking regulators send confirmation of a customer request for a change of mailing address to both the old and new address on record.[76] Is there adequate protection when the custodian is subject to these regulatory requirements because the adviser would be unable to remit its client's assets to the client at a mailing address other than the client's address of record at the custodian? Alternatively, should such an exception or interpretation hinge on whether advisers design policies and procedures under rule 206(4)–7 (the ''Compliance Rule'') that address the risk to clients of remitting client investments to non-clients?

13. Should we make clear that an adviser is subject to the custody rule and would also be subject to the proposed rule with respect to its client's assets that are held, or accessible, by a related carrying broker or executed through a related introducing broker? [77] Conversely, should we make clear that an adviser would not be subject to the rule solely due to its related person acting as the trustee of a participant-directed defined contribution plan established for the benefit of the adviser's employees, provided the adviser does not provide investment advisory services to the plan or any investment option available under the plan? [78] Similarly, should we clarify the meaning of ''in connection with advisory services'' in the context of related person custody? [79] For example, should we make clear that where an adviser's client has a bank account with a bank that is the adviser's related person, but does not use the bank account in connection with the adviser's advisory activity, we would not view the bank's authority to be ''in connection with advisory services'' that the adviser provides to its client and that the rule, therefore, would not apply?

14. Advisers that act as trustee of a trust would have custody of that trust's assets under the proposed rule. Should we adopt an exception from the definition of custody for (or should we interpret the definition of custody not to include) cases where an adviser acts as co-trustee of a trust and no single co-trustee is able to effect any change in control of the beneficial ownership of the trust's investments without the prior written consent of a co-trustee(s) that is not a related person? [80] In what circumstances is a co-trustee required either by law or the trust instrument to protect the trust beneficiaries from the actions of a single trustee acting alone? Similarly, should we adopt an exception in (or should we interpret the definition of custody not to include) circumstances where an adviser has the ability or authority to effect a change in beneficial ownership of a trust's investments, where an adviser is co-trustee along with the grantor of a revocable grantor trust, and the adviser is prohibited by the trust instrument or by law from withdrawing any investments from the trust without the prior written consent of all of its co-trustees? [81]

15. An adviser would have custody under the proposed rule when it comes into possession of client assets. The rule contains an exception from the definition of custody for possession of client assets when the adviser receives them inadvertently and returns them to the sender within three business days. Should we amend the exception to accommodate (or interpret the definition of custody not to include) other situations in which the adviser inadvertently receives client assets? [82] For example, should such an exception or interpretation be conditioned such that the adviser return the client's assets to the sender or forward them to the client or the client's custodian within five days of receipt? Should such an exception or interpretation be available only when client assets are received from senders, such as those identified in staff statements? Rather than specify senders in such an exception, should the exception or interpretation be available when an adviser determines it would be unfeasible to return the assets, or when there is a risk that the client's assets could be lost if the adviser attempted to return them to the sender? Should such an exception or interpretation be available only if the investment adviser's receipt of its client's assets is inadvertent? Should we condition such an exception or interpretation on recordkeeping requirements under proposed rule 204–2 or on whether advisers design policies and procedures under rule 206(4)–7? We understand that for certain private fund advisers and trustees it is difficult to avoid temporarily possessing client checks and physical assets because there may not be an independent representative to arrange the movement of such assets into a qualified custodian. Are there any particularities to these contexts that would benefit from an exception or interpretation? In addition, are there other circumstances that involve checks written to third parties, checks written to clients, and checks written to advisers where the adviser has no authority to deposit client assets into any account other than directed by the client that would benefit from exceptions or interpretations? Are there certain policies and procedures maintained by advisers that mitigate the custody risks associated with receiving checks that may be beneficial to include in this rulemaking? For example, if the adviser has policies and procedures reasonably designed to maintain such

[74] We note that the staff has issued an FAQ on this topic. *See* Custody Rule FAQs, *supra* footnote 17, at FAQ II.5.A. and B.

[75] Exchange Act Rule 17a–3(a)(17)(i)(B)(2).

[76] *See, e.g.,* Federal Reserve System Supervisory Letter SR 0–11 (Apr. 26, 2001), Office of Comptroller of the Currency (''OCC'') Advisory Letter 2001–4 (Apr. 30, 2001), Federal Deposit Insurance Corporation Financial Institution Letter 39–2001 (May 9, 2001), Office of Thrift Supervision CEO Letter No. 139 (May 4, 2001), and National Credit Union Administration Letter No. 01–CU–09 (Sept. 2001).

[77] We note that the staff has issued an FAQ on this topic. *See* Custody Rule FAQs, *supra* footnote 17, at Question XIV.2–3. *See* also section II.J, *infra*.

[78] We note that the staff has issued an FAQ on this topic. Our staff has stated that it would not consider an adviser to have custody where the investment adviser and the related person trustee are, to the extent applicable, in compliance with the Employee Retirement Income Security Act of 1974 (ERISA) and rules and regulations issued thereunder with respect to the plan. *See* Custody Rule FAQs, *supra* footnote 17, Question XII.1.

[79] *See* proposed rule section 223–1(d)(3).

[80] We note that the staff has issued an FAQ on this topic. *See* Custody Rule FAQs, supra footnote 17, at Question XII.2.

[81] We note that the staff has issued an FAQ on this topic. *See* Custody Rule FAQs, supra footnote 17, Question XII.3. *See also,* 2003 Adopting Release, *supra* footnote 2 at note 15 (stating that the Commission would not view the adviser to have custody of the funds or securities of the estate, conservatorship, or trust solely because the supervised person has been appointed in these capacities as a result of family or personal relationship with the decedent, beneficiary or grantor (and not a result of employment with the adviser)).

[82] We note that the staff has issued a no-action letter on this topic. The Commission's staff has stated that when advisers infrequently receive specific types of client funds or securities from a list of enumerated third parties that the staff identified, the staff would not recommend enforcement for violation of the current custody rule if the adviser meets specified conditions. *See* Investment Adviser Association, SEC Staff No-Action Letter (Sep. 20, 2007) (''2007 IAA No-Action Letter''). *See also* Custody Rule FAQs, *supra* footnote 17, at Question II.1.

assets with a qualified custodian, should we provide an exception if an adviser to a private fund or serving as a trustee would not be subject to the rule for the brief handling of client checks or physical assets?

16. Should we include an exception from the rule for assets for which the adviser provides advice in certain sub-adviser relationships, such as was described in our staff's statements? [83] In what circumstances should such an exception apply? Would an exception designed to capture circumstances where the proposed rule would apply to the sub-adviser only because its related person triggers the rule with respect to the same advisory clients be beneficial? Such an exception could be conditioned on the related person being fully subject to (and in compliance with) the applicable requirements of the custody rule. Would such a condition to the exception work in practice? Should such exception be conditioned on the adviser's related person fully complying with the requirements of the proposed rule? If not, why not? If so, how would advisers determine whether their related person is fully complying with the rule? Are there alternative safeguards that commenters would suggest? Alternatively, should such sub-advisers be subject to all or certain requirements of the rule? If only certain requirements, which ones and why? Should we condition such an exception on recordkeeping requirements under proposed rule 204–2 or on whether advisers design policies and procedures under rule 206(4)–7?

17. Are there are any other arrangements or circumstances where an adviser would have custody under the proposed rules but an exception would be beneficial and not inconsistent with the policy goals of the rule? For example, are there specific circumstances involving custody at electronic platforms, investment adviser aggregators, benefit plans, introducing broker-dealers, plan sponsors, record-keepers, or third party administrators that would benefit from an exception or interpretation that these arrangements constitute or do not constitute custody?

B. Qualified Custodian Protections

Qualified custodians would continue to serve as key gatekeepers under the proposed rule. These institutions' custodial activities are subject to regulation and oversight.[84] Accordingly, as under the current rule, investment advisers with custody of client assets would be required to maintain those assets with a qualified custodian.[85] We are proposing several ways to strengthen the requirement, however, in light of the evolution of the market for custodial services, financial products, and advisory services over the last decade. These proposed changes aim to provide investors with certain standard custodial protections that will improve the safeguarding of their assets in the current market as well as in the future as the market for financial products and advisory services continues to evolve.

The proposed rule would continue to allow banks or savings associations, registered broker-dealers, registered futures commission merchants, and certain foreign financial institutions to act as qualified custodians, but, in a change from the current rule, only if they have ''possession or control'' of client assets pursuant to a written agreement between the qualified custodian and the investment adviser.[86] Also in a change from the current rule, the proposed rule would modify the definition of foreign financial institution and requirements for banks and savings associations in the definition of qualified custodian.[87] In the case of a qualified custodian that is the adviser, the proposed rule would require that the written agreement be between the adviser and the client.

The proposed rule would require that the written agreement contain contractual provisions that we believe are critical to providing important protections for advisory client assets. As discussed in further detail below, the contractual terms would address recordkeeping, client account statements, internal control reports, and the adviser's agreed-upon level of authority to effect transactions in the account. In addition, the proposed rule would require that an adviser obtain reasonable assurances from a qualified custodian relating to certain protections the qualified custodian will provide to the advisory client, including with respect to the qualified custodian's standard of care, indemnification, limitation of liability for sub-custodial services, segregation of client assets, and attachment of liens to client assets. Also as discussed below, we believe that many of these important protections are already provided—through contract or practice—by certain custodians to certain custodial customers in the current market. However, the proposed rule is designed to expand and formalize the minimum standard of protections to advisory clients' assets held by qualified custodians in a manner that would provide consistent investor protections across all qualified custodians under our proposed rule. We believe that the proposed rule leverages the expertise and regulatory regimes of qualified custodians with respect to a wide range of assets, while, at the same time, tailoring and bolstering the protections afforded to advisory clients to improve the safeguarding of client assets over which advisers have custody.

1. Definition of Qualified Custodian

Qualified custodians under the proposed rule would include the types of financial institutions that clients and advisers customarily turn to for custodial services and that have in place practices that are designed to protect custodial assets. We continue to believe that the use of a qualified custodian would enhance the protections afforded to client assets.[88]

The proposed rule, like the current rule, would define the term ''qualified custodian'' to mean a bank or savings association, registered broker-dealer, registered futures commission merchant (''FCM''), or certain type of foreign financial institution (''FFI'') that meets the specified conditions and requirements.[89] We continue to believe that these financial institutions should be permitted to act as qualified custodians because, as discussed in more detail below, they operate under regular government oversight, are subjected to periodic inspection and examination, have familiarity with providing custodial services, and are in a position to attest to custodial customer holdings and transactions [90]—all critical

[83] We note that the staff has issued a no-action letter on this topic. *See Investment Adviser Association,* SEC Staff No-Action Letter (Apr. 25, 2016), *available at: https://www.sec.gov/divisions/investment/noaction/2016/investment-adviser-association-042516-206(4).htm.*

[84] 2002 Proposing Release, *supra* footnote 2, at n. 30; 2009 Proposing Release, *supra* footnote 11, at n. 4.

[85] Proposed rule 223–1(a)(1)(i). The proposed rule would provide an exception, and another means of compliance with the rule, for certain assets that are unable to be maintained with a qualified custodian. *See* proposed rule 223–1(b)(2).

[86] *See* proposed rule 223–1(a)(1).

[87] *See* proposed rule 223–1(d)(10)(i) and (iv); section II.B.1.b, *infra.*

[88] *See* 2003 Adopting Release, *supra* footnote 2; 2009 Adopting Release, *supra* footnote 11.

[89] Proposed rule 223–1(d)(10). Not all registered broker-dealers and registered FCMs meet the definition of qualified custodian under the custody rule or the proposed safeguarding rule. Notably, only those broker-dealers or FCMs holding client assets in customer accounts meet this definition. This would include the broker-dealers subject to the customer protection rule (Exchange Act Rule 15c3–3) and FCMs holding futures customers funds subject to 17 CFR 1.20.

[90] *See, e.g.,* 2009 Adopting Release, *supra* footnote 11, at section I (describing qualified custodians under the rule as the types of financial

components of safeguarding client assets under the proposed rule. As a result, with the exception of proposed amendments to the definition of qualified custodian relating to banks, savings associations, and FFIs, we are not changing the types of institutions that may serve as qualified custodians under the rule.[91]

a. Bank and Savings Association Qualified Custodian Proposed Amendments

The current rule includes in the definition of qualified custodian a bank as defined in section 202(a)(2) of the Advisers Act (15 U.S.C. 80b–2(a)(2)) or a savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811). The proposed rule would largely retain this definition of qualified custodian relating to banks and savings associations. However, in connection with the proposed rule's focus on setting certain minimum protections for client assets, the rule would require that a qualifying bank or savings association hold client assets in an account that is designed to protect such assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association (*i.e.,* an account in which client assets are easily identifiable and clearly segregated from the bank's assets) in order to qualify as a qualified custodian. We believe that requiring banks and savings associations to hold client assets in such an account brings the requirements for bank and savings association qualified custodians in line with the protections required for broker-dealers, FCMs, and FFIs acting as qualified custodians under the current custody rule and under the proposed safeguarding rule.[92]

We believe that the proposed account requirement would improve the safeguarding of client assets. We understand that, generally, a bank deposit account creates a debtor-creditor relationship between the bank and depositor.[93] This debtor-creditor relationship typically does not create a special or fiduciary relationship.[94] While applicable insolvency law and procedures vary depending on any particular bank or savings association's regulatory regime,[95] we understand that assets held in accounts of the type proposed by the rule are more likely to be returned to clients upon the insolvency of the qualified custodian because they may pass outside of a bank's insolvency, may be recoverable if wrongly transferred or converted, and are not treated as general assets of the bank.[96]

We believe that the proposed rule would provide flexibility to banks and savings associations to use the appropriate accounts available to them under applicable law and offered by them to customers. Rather than consider the treatment of custodial customer assets upon a bank's failure in all 50 states, and risk the protections of our rule eroding if state banking law protections vary or evolve, we are proposing to establish a consistent and uniform standard to protect all advisory clients. The account terms should identify clearly that the account is distinguishable from a general deposit account and clarify the nature of the relationship between the account holder and the qualified custodian as a relationship account that protects the client assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association.

b. Proposed Enhancements to Definition of Foreign Financial Institution

Advisory clients often invest in assets traded on foreign exchanges and their advisers must, as a practical matter, maintain those assets with financial institutions in foreign countries where the assets are traded. In order to facilitate these types of holdings, the current rule includes FFIs that customarily hold financial assets for their customers, as qualified custodians, provided that the FFI keeps the advisory clients' assets in customer accounts segregated from the FFI's proprietary assets.[97]

We are proposing to require that an FFI satisfy seven new conditions in order to serve as a qualified custodian for client assets under the proposed rule.[98] These proposed conditions are partly drawn from our experience with the factors relevant to the safekeeping of ''Foreign Assets'' by the types of foreign financial entities that can act as an ''Eligible Foreign Custodian'' as defined in rule 17f–5 under the Investment Company Act.[99] Such conditions are also designed to address our understanding of market developments since the adoption of rule 17f–5 by providing enhanced investor protections for advisory clients and their assets that

institutions to which clients and advisers customarily turn for custodial services and as subject to regulation and oversight).

[91] We remind advisers that as additional financial institutions become available to custody assets, advisers must continue to exercise their fiduciary duties to clients in connection with selection and monitoring of the qualified custodian. *See, e.g.,* Standard of Conduct for Investment Advisers Release, *supra* note 57, at section II (''The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.'') (citations omitted).

[92] The current custody rule requires that in order to be included in the definition of qualified custodian, a broker-dealer registered under section 15(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(1)), must hold the client assets in customer accounts, a futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)) must hold the client assets in customer accounts subject to certain additional requirements, and an FFI must customarily hold financial assets for its customers and must keep the advisory clients' assets in customer accounts segregated from its proprietary assets. *See* rule 206(4)–2(d)(6)(ii), (iii), and (iv). *See also* proposed rule 223–1(d)(10).

[93] *See generally,* Graham, Heitz, Lapine, *et al.,* 6a Banking Law section 134.05 (2022) section 134.05 (collecting cases) (''Banking Law''). We understand that a deposit in a bank is either general or special and that a deposit is a general deposit unless there is an agreement or understanding that it should be special. *See* 5C Michie on Banks and Banking, Deposits section 339 (Sept. 2022) (collecting cases) (''Michie on Banks & Banking''); Banking Law, section 134.05 (''Accounts are either special accounts or general accounts.'') (collecting cases).

[94] *Id.*

[95] *See* 3 Michie on Banks & Banking, Insolvency and Dissolution. section 17. Jurisdiction and Powers of Courts and Officials in General (discussing state-by state jurisdiction and certain regulatory powers).

[96] *See* Michie on Banks & Banking, Deposits section 339 (collecting cases under a wide variety of state laws where a bank may be acting as a trustee, bailee, or agent in connection with a customer account that is treated as other than a general deposit account).

[97] *See* rule 206(4)–2(d)(6)(iv). Under the current rule, when an adviser selects an FFI to hold clients' assets, we believe the adviser's fiduciary obligations require it either to have a reasonable basis for believing that the FFI satisfies the conditions and would provide a level of safety for client assets similar to that which would be provided by a ''qualified custodian'' in the United States or to disclose fully to clients any material risks attendant to maintaining the assets with the foreign custodian. *See* 2003 Adopting Release, *supra* footnote 2, at note 22.

[98] We also propose to eliminate the requirement under the current definition that the FFI keeps the advisory clients' assets in customer accounts segregated from its proprietary assets because the proposed rule, more broadly, would require advisers to obtain reasonable assurances from qualified custodians that *all* advisory client assets are segregated from the qualified custodian's proprietary assets and liabilities. *See* proposed rule 223–1(a)(1)(ii)(D).

[99] Rule 17f–5 under the Investment Company Act defines an Eligible Foreign Custodian as an entity that is incorporated or organized under the laws of a country other than the United States and that is a Qualified Foreign Bank or a majority-owned direct or indirect subsidiary of a U.S. Bank or bank-holding company. For these purposes, a Qualified Foreign Bank is defined as a banking institution or trust company, incorporated or organized under the laws of a country other than the United States, that is regulated as such by the country's government or an agency of the country's government. *See* 17 CFR 270.17f–5(a)(1) and (a)(5). Rule 17f–5(c)(1) under the Investment Company Act lists the factors relevant to the safekeeping of Foreign Assets, as defined in rule 17f–5(a)(2). *See* 17 CFR 270.17f–5(c)(1) and (a)(2).

we believe would help promote an FFI having generally similar protections as a U.S.-based qualified custodian. Recent events in crypto assets markets also have highlighted the need for similarly enhanced custody safeguards of client assets held outside the United States.

For an FFI to be a qualified custodian under the proposed rule, it would need to be:

- Incorporated or organized under the laws of a country or jurisdiction other than the United States, provided that the adviser and the Commission are able to enforce judgments, including civil monetary penalties, against the FFI;
- Regulated by a foreign country's government, an agency of a foreign country's government, or a foreign financial regulatory authority [100] as a banking institution, trust company, or other financial institution that customarily holds financial assets for its customers;
- Required by law to comply with anti-money laundering and related provisions similar to those of the Bank Secrecy Act [31 U.S.C. 5311, *et seq.*] and regulations thereunder;
- Holding financial assets for its customers in an account designed to protect such assets from creditors of the foreign financial institution in the event of the insolvency or failure of the foreign financial institution;
- Having the requisite financial strength to provide due care for client assets;
- Required by law to implement practices, procedures, and internal controls designed to ensure the exercise of due care with respect to the safekeeping of client assets; and
- Not operated for the purpose of evading the provisions of the proposed rule.[101]

We believe each of these proposed new conditions would enhance the ability and responsibility of advisers to protect client assets maintained outside the United States for the following reasons.

Regarding the first condition, we are proposing to require the adviser to determine that the adviser and the Commission are able to enforce judgments, including civil monetary penalties, against the FFI. The FFI could satisfy this condition by such means as appointing an agent for service of process in the United States or having offices in the United States, and the adviser can request the relevant documentation for verification purposes. This condition would thus limit the types of foreign financial entities to those that are subject to or consent to U.S. jurisdiction.

Regarding the second condition, we believe requiring an FFI be regulated by a foreign country's government, an agency of a foreign country's government, or a foreign financial regulatory authority, as defined in section 202(a)(24) of the Advisers Act, would help ensure that client assets maintained with an FFI are subject to regulatory oversight that would better serve our policy goal of protecting custodial assets by the use of qualified custodians that meet our proposed requirements. In addition to banking institutions and trust companies, we would permit foreign-regulated financial institutions who customarily hold financial assets for their customers (*e.g.,* the foreign equivalent of broker-dealers or FCMs) to serve as ''qualified custodians.''

We believe the requirement in the third condition for an FFI to comply with anti-money laundering (''AML'') and related provisions similar to those of the Bank Secrecy Act (''BSA'') and regulations thereunder would help increase the likelihood that the FFI would readily identify and investigate aberrant behavior in a client account, such as activity that might suggest misappropriation or some other type of loss to a client. We generally believe an FFI would be able to satisfy this condition if it is required to comply with the laws and regulations established by a member or observer jurisdiction of the Financial Action Task Force (''FATF'') and not otherwise listed on any sanctions list administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury (''OFAC''),[102] or on any special measures list administered by the Financial Crimes Enforcement Network of the U.S. Department of the Treasury (FinCEN'').[103]

The fourth condition would replace and strengthen the segregation requirement for FFIs in the current definition of qualified custodian in the custody rule, and it is designed to complement the proposed segregation requirements of the safeguarding rule. In the current rule, an FFI that customarily holds financial assets for its customers is permitted to serve as a qualified custodian, provided that the FFI keeps the advisory clients' assets in customer accounts segregated from its proprietary assets. The proposed new condition would require the FFI to hold financial assets for its customers in accounts designed to protect such assets from creditors of the FFI in the event of the insolvency or failure of the FFI.[104] This condition would thereby impose investor protections, particularly in the event of an FFI insolvency or bankruptcy, that are more comparable to those we are proposing for assets held with U.S.-regulated bank or savings association qualified custodians. We believe advisers would be able to assess whether an FFI is holding client assets in such accounts in the course of obtaining the reasonable assurances we are proposing to require advisers obtain from all qualified custodians, which are discussed more fully below.[105]

The fifth condition is designed to limit the types of FFIs that can serve as qualified custodians to those that have the requisite financial strength to meet the proposed due care standard for client assets. We believe the determination of an FFI's financial strength could be based on objective measures and other indicators of financial health that are reasonably comparable to those that apply to U.S. banks and other regulated financial institutions.[106] Given that advisers would be required to maintain an ongoing reasonable belief that the FFI qualified custodian is meeting its due

[100] Defined in section 202(a)(24) of the Advisers Act [15 U.S.C. 80b–2(a)(24)].

[101] Proposed rule 223–1(d)(10)(iv).

[102] The FATF is an inter-governmental body whose purpose is the development and promotion of policies, both at the national and international levels, to combat money laundering and the financing of terrorism and proliferation. The FATF monitors members' progress in implementing AML measures, reviews money laundering techniques and counter-measures, and promotes the adoption and implementation of AML measures globally. *See https://www.fatf-gafi.org/en/the-fatf/what-we-do.html/.* To search sanctions lists administered by OFAC, such as the Specially Designated Nationals and Blocked Persons list, *see https://sanctionssearch.ofac.treas.gov.*

[103] *See* section 311 of the USA PATRIOT Act [Pub. L. 107–56] (granting the Secretary of the Treasury the authority to conclude, if reasonable grounds exist, that a foreign jurisdiction, foreign financial institution, or an international transaction or account is of ''primary money laundering concern,'' and to require domestic financial institutions and financial agencies to take certain ''special measures,'' such as additional due diligence and special attention to particular account transactions, among other measures, against the designated entity).

[104] *Compare* rule 204–2(d)(6)(iv) *with* proposed rule 223–1(d)(10)(iv)(D).

[105] *See infra* section II.B.3.a.iv (discussing the adviser's requirement to obtain reasonable assurances from qualified custodians regarding the required account segregation requirements).

[106] When the Commission adopted amendments to rule 17f–5 (17 CFR 270.17f–5) in 1997, its adopting release offered guidance to evaluate financial strength by ''assess[ing] the adequacy of the custodian's capital with a view of protecting the fund against the risk of loss from a custodian's insolvency.'' *See* Custody of Investment Company Assets Outside the United States, Investment Company Act Release No. 22658 (May 12, 1997) [62 FR 26923 (May 16, 1997)], at 26928. We understand that relevant governments and their banking regulators typically set regulatory capital requirements for foreign banking institutions.

care standard, advisers also could require notifications from the FFI of any changes, including changes in the financial strength of the FFI, that would have an impact on the agreed terms of the written custodial contract. Such notifications may provide timely information to help advisers, as fiduciaries, to react and respond to emerging risks of loss of client assets.

Under the sixth condition, FFI qualified custodians would be required by law to implement practices, procedures, and internal controls designed to ensure the exercise of due care with respect to the safekeeping of assets. Since FFIs are subject to a broad range of regulatory regimes, we believe this condition would help promote a minimum level of practices, procedures, and internal controls across qualified custodians for safekeeping client assets under the proposed rule, regardless of where and how they are held. Further, we believe this requirement will help to ensure that an FFI's practices, procedures, and internal controls, including, but not limited to, those with respect to the safekeeping of certificated and uncertificated assets, custodial recordkeeping, and security and data protection, should not differ in material ways from those of U.S.-regulated qualified custodians. Similar to the fourth condition, advisers should be able to assess and evaluate an FFI's internal controls while obtaining the reasonable assurances we are proposing advisers obtain from all qualified custodians.[107]

Finally, we have included an anti-evasion requirement in the seventh condition for FFI qualified custodians that is similar to the anti-evasion provision currently in the definition of ''bank'' under section 202(a)(2) of the Advisers Act and in the definition of ''U.S. Bank'' under rule 17f–5 of the Investment Company Act.[108] Given the broad scope of foreign financial entities that we would permit to serve as qualified custodians, we believe it is appropriate to apply the anti-evasion requirement to all types of FFIs, rather than limiting its application to only banking institutions or trust companies.

We request comment on all aspects of the proposed rule's qualified custodian requirement, including the following items.

18. Should we continue to require that client assets be maintained with qualified custodians? If not, what alternative protections for client assets should we require as part of the rule?

19. Should the rule continue to include banks as defined in section 202(a)(2) of the Advisers Act or savings associations as defined in section 3(b)(1) of the Federal Deposit Insurance Act as qualified custodians, as proposed? Should the rule narrow the definition to include only certain banks and savings associations as qualified custodians? If so, how? For example, should the rule permit only banks or savings associations that are subject to Federal regulation and supervision to act as qualified custodians? Alternatively, should the rule permit only state banks and savings association that are members of the Federal Reserve System to act as qualified custodians? [109] Would narrowing of the types of banks and savings associations that meet the definition of qualified custodian provide additional protections to advisory clients in the event of the custodian's insolvency? Is there another way to achieve our policy goal?

20. Should we require banks and savings associations to hold client assets in an account designed to protect such assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association as proposed? Is our understanding correct that requiring banks and savings associations to hold client assets in an account of this type would provide client assets with enhanced protection from general creditors in the event of the qualified custodian's insolvency and increase the likelihood of return of client assets to advisory clients upon a qualified custodian's insolvency? Do commenters agree with our view that this enhanced protection is especially important in light of the broad range of regulatory regimes and insolvency processes to which a growing number of state-chartered trust companies and other state-chartered, limited purpose banking entities entering the custodial market may be subject?

21. Should the rule require the account terms to identify clearly that the account is distinguishable from a general deposit account? Should the rule require the terms of the account clarify the nature of the relationship between the account holder and the qualified custodian, for example, whether the account is a special account,[110] a fiduciary account,[111] or whether the bank or savings association is acting as a trustee, a bailee, or agent of the account holder?

22. Would requiring banks and savings associations to hold client assets in an account designed to protect such assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association reduce the availability of banks or savings associations that could offer services as a qualified custodian? Would it increase costs to advisory clients?

23. Rather than requiring accounts of this type for all banks and savings associations, should the rule require accounts that protect client assets from creditors of a bank or savings association in the event of the insolvency or failure of the bank or savings association for a subset of these institutions that are not federally insured or OCC member banks? For example, should the rule require accounts of this type for state banks that are not members of the Federal Reserve System?

24. Are there alternative bank and savings association account safeguards we should require?

25. Should the rule continue to include broker-dealers registered under section 15(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') as qualified custodians, as proposed? Are there additional requirements we should require when a broker-dealer is acting as a qualified custodian under the rule? For example, should we explicitly clarify that this would include only registered broker-dealers that carry customer accounts, or is that already understood from the current rule?

26. Should the rule continue to include FCMs as qualified custodians, as proposed? Should we remove the condition in the current rule that prohibits maintaining client securities with an FCM unless the securities are ''incidental'' to client futures transactions? In 2013, the CFTC enhanced protections afforded to customers and customer assets held by FCMs including protections covering,

[107] *See infra* section II.B.3.a.i (discussing the adviser's requirement to obtain reasonable assurances from a qualified custodian regarding the qualified custodian's required exercise of due care and implementation of appropriate measures to safeguard client assets from theft, misuse, misappropriation, or other similar type of loss).

[108] 17 CFR 270.17f–5(a)(7)(iii).

[109] *See generally* Membership of State Banking Institutions in the Federal Reserve System (Regulation H) 12 CFR 208.01 *et. seq.*

[110] *See, e.g., Bank of America, N.A.* v. *Lehman Bros. Holdings, Inc.* (In re Lehman Bros. Holdings, Inc.), 439 B.R. 811, 824–825 (Bankr. S.D.N.Y. Nov. 16, 2010) (''Other factors that courts have examined to ascertain the parties' mutual intent [to create a special rather than general account] include: (1) whether the parties agreed to segregate the funds; (2) whether the bank paid interest on the funds; (3) whether the depositor lacked an unfettered right to withdraw the funds; and (4) whether a third party possessed an interest in the funds.'').

[111] *See, e.g.,* 12 CFR 9.13 and 12 CFR 150.230 (addressing custody of fiduciary assets for banks and savings associations, respectively).

among other things, risk management, recordkeeping and disclosure, and the treatment of customer-segregated funds secured in foreign futures and options accounts.[112] Are the 2013 CFTC regulatory enhancements sufficient grounds to eliminate that condition of the current rule?

27. Should the rule limit the FFIs that can act as qualified custodians under this rule, as proposed? Are the proposed conditions on an FFI sufficiently clear, and if not, how should they be made clearer? Should we eliminate any condition, add any condition, or require only certain conditions and not others when an FFI is acting as a qualified custodian under the rule? For example, as part of the rule, should we require an adviser to find that the FFI provides a level of safety for client assets equivalent to that which would be provided by a qualified custodian in the United States or to fully disclose to clients any material risks attendant to maintaining the assets with the foreign custodian? Should this requirement apply only when the adviser is involved in selecting (or assisting a client in selecting) a qualified custodian? Are there types of FFIs that currently serve as qualified custodians that would no longer be eligible to serve as qualified custodians under the proposed rule? Would the proposed changes to the definition of FFI enhance or inhibit investor protections? Would the proposed changes to the definition of FFI cause any investments that an investment adviser currently is able to select on behalf of its clients to become unavailable for selection by the adviser due to the lack of the existence of an FFI that satisfies the conditions of the proposed rule? Should we only permit institutions regulated by a specific foreign financial regulatory authority? If so, which foreign financial authority and why? Should we require the adviser to obtain documentation that identifies the FFI's specific financial regulatory authority or authorities? Should the rule permit only certain types of FFIs to qualify as qualified custodians and if so, which ones? Are there any types of regulated foreign entities that should not hold certain types of client assets outside the United States? Should the proposed rule account for the country or jurisdiction where an FFI is primarily operating, rather than the country or jurisdiction of incorporation or organization, as proposed? If so, how would the adviser determine where the FFI is primarily operating?

28. Should the proposed rule limit the types of FFIs that can be qualified custodians? If so, which institutions should be included? Only banking institutions or trust companies? Should we also specifically include foreign securities depositories and clearing agencies or broker-dealer and FCM equivalents?

29. Is the proposed definition to include regulated FFIs that customarily hold financial assets for customers too broad; would it allow unsound institutions to act as qualified custodians under the proposed rule?

30. What, if any, impacts would our proposed conditions have on the availability of FFIs that can serve as qualified custodians? What would be the positive and negative effects of requiring FFIs to provide custodial protections similar to the protections provided by U.S. qualified custodians?

31. Should the proposed rule require an FFI to be subject to or consent to U.S. jurisdiction for judgment enforceability, as proposed? Alternatively, should judgment enforceability be a factor relevant to the adviser's consideration of whether client assets will be subject to the requisite due care standard by an FFI, similar to the approach in rule 17f–5(c)(1) under the Investment Company Act?[113] Should we require the adviser to obtain the FFI's consent to service of process in the United States to verify that it meets this condition? Should such consent to service of process be effected by the FFI's submission of a specified form to the Commission, similar in effect to Form ADV–NR for the appointment of an agent for service of process by a non-resident general partner or a non-resident managing agent of any investment adviser?

32. Should an FFI be required to comply with laws and regulations similar to the BSA to act as a qualified custodian, as proposed? Do the AML requirements for FFIs help ensure that a qualified custodian would more readily identify and investigate aberrant behavior in a client's account? Alternatively, should we specify the types of AML programs that must be in place for FFIs?

33. Should we treat an FFI as being required to comply with laws and regulations similar to the BSA if the FFI is required to comply with the laws and regulations established by a member or observer jurisdiction of the FATF and not otherwise listed on any sanctions list administered by the OFAC or on any special measures list under section 311 of the USA PATRIOT Act administered by FinCEN? Alternatively (or in addition), should we automatically consider an FFI to *not* be required to comply with similar laws and regulations if it is required to comply with the laws and regulations of a country identified by the FATF as a high-risk or other monitored jurisdiction?[114]

34. Should we require that an FFI hold financial assets in accounts designed to protect such assets from creditors of the FFI in the event of the FFI's insolvency or failure, as proposed? Alternatively, should we require advisers to obtain reasonable assurances from an FFI qualified custodian that the FFI is holding client assets in such accounts? Should we require an FFI to have account protections that are generally similar to those of a U.S. bank or savings association in the event of its insolvency or failure? If so, should we provide guidance around how an adviser would make such determinations of general similarity and to maintain records of these determinations?

35. Should we provide additional guidance around how an adviser would determine that an FFI's practices, procedures, and internal controls are designed to ensure the exercise of due care with respect to safekeeping of client assets? Should we require an FFI's practices, procedures, and internal controls to be generally similar to those of a U.S.-regulated bank or savings association? If an FFI is not a bank or savings association, but rather a foreign-equivalent to a U.S. broker-dealer or U.S. FCM, should we require the adviser to determine that such FFI's practices, procedures, and internal controls are generally similar to those required by U.S. broker-dealers or FCMs? If so, should we provide guidance around how advisers would make such determinations of general similarity and

[112] The CFTC in 2013 enhanced FCM requirements surrounding the holding and investment of customer funds, including the ability of FCMs to withdraw funds from futures customer segregated accounts. Under the enhanced protections, FCMs are required to deposit proprietary funds (*i.e.* residual interest) into futures, cleared swap, and foreign futures customer accounts for purposes of creating a buffer to ensure compliance with segregation requirements. In addition, FCMs are required to file electronically their segregation calculations with the CFTC and their self-regulatory organization each business day. Further, FCMs are required to establish risk management programs designed to monitor and manage risks associated with customer funds. *See* Enhancing Protections Afforded Customers and Customer Funds Held by Future Commission Merchants and Derivatives Clearing Organizations, (''CFTC Enhanced Protections Release'') [78 FR 68506 (Nov. 14, 2013)].

[113] *See* 17 CFR 270.17f–5(c)(1)((iv).

[114] The FATF identifies jurisdictions with weak measures to combat money laundering and terrorist financing in two FATF public documents that are issued three times a year. *See https://www.fatf-gafi.org/en/topics/high-risk-and-other-monitored-jurisdictions.html.*

to maintain records of these determinations?

36. Should we provide additional guidance around how an adviser would determine the requisite financial strength of an FFI qualified custodian? Should we require advisers to maintain records of these determinations? Should we require advisers to have policies and procedures to determine and monitor the financial strength of all qualified custodians, not just FFI custodians? Should this requirement apply only when the adviser is involved in selecting (or assisting a client in selecting) a qualified custodian?

37. To what extent do advisers or qualified custodians utilize sub-custodians, such as foreign subsidiaries of a domestic qualified custodian? What types of sub-custodians are utilized? Do these sub-custodians have direct relationships with the adviser or client or do they only interact directly with the qualified custodian? How are sub-custodians overseen? Is this oversight performed by the adviser or the qualified custodian? If it is by the qualified custodian, how do advisers ensure that the client assets are safeguarded properly?

38. Should the rule permit securities depositories, administrators, or other intermediaries to be qualified custodians? Do they offer similar services to the other types of financial institutions that meet this definition, for example, by safeguarding and providing account statements to advisory clients? Would they be able to agree to the contractual terms contained in the proposed written agreement requirement? Would advisers be able to satisfy the reasonable assurances requirement under the proposed rule if one of these types of entities were holding client assets? Do these types of entities maintain ''possession or control'' of client assets, as discussed below? Do they have similar capital adequacy requirements under their respective regulatory regimes to the other types of financial institutions that are included in the definition of qualified custodian? Are there certain categories of these entities that would more easily function as qualified custodians than others?

39. The rule currently excepts advisers from complying with the requirement to maintain mutual fund shares with a qualified custodian, provided they are maintained with a transfer agent.[115] Should transfer agents be included in the definition of qualified custodian in the final rule? Do they offer similar services to the other types of financial institutions that meet this definition, for example, by providing account statements to advisory clients? Would they be able to agree to the contractual terms contained in the proposed written agreement requirement? Would advisers be able to satisfy the reasonable assurances requirement under the proposed rule if a transfer agent were holding client assets?

40. Should insurance companies be included in the definition of qualified custodian under certain circumstances, such as in the variable annuity context?[116] Do they offer services similar to the other types of financial institutions that meet this definition, for example, by safeguarding and providing account statements to advisory clients? Would they be able to agree to the contractual terms contained in the proposed written agreement requirement? Would advisers be able to satisfy the reasonable assurances requirement under the proposed rule if an insurance company were holding client assets? Do insurance companies maintain ''possession or control'' of client assets, as discussed below? Do insurance companies have similar capital adequacy requirements to the other types of financial institutions that are included in the definition of qualified custodian? Are there certain categories or types of insurance companies that would more easily function as qualified custodians than others?

2. Possession or Control

In a change from the current rule, the proposed rule would require that an investment adviser maintain client assets with a qualified custodian that has possession or control of those assets. For the purposes of proposed rule, ''possession or control'' would be defined to mean holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets, the qualified custodian's participation would effectuate the transaction involved in the change in beneficial ownership, and the qualified custodian's involvement is a condition precedent to the change in beneficial ownership.[117] We understand that a qualified custodian's participation in a change in beneficial ownership may take different forms depending on the type of asset involved.[118] Similarly, we view participation by a qualified custodian to require the qualified custodian to participate in a way that it is willing to attest to the transaction on an account statement and for which it customarily takes custodial liability. By contrast, we would not view ''accommodation reporting,'' as described above, to constitute ''participation.'' The proposed requirement and related definition are designed to achieve several objectives. First, a critical custodial function is to prevent loss or unauthorized transfers of ownership of the client's assets. It is our understanding that a custodian will only provide this safeguarding function, however, and assume custodial liability for a custodial customer's loss, if the custodian had possession or control of the asset that is lost. Second, because the qualified custodian would be required to participate in any change in beneficial ownership of a client asset, the proposed possession or control definition would provide assurance that a regulated party who is hired for safekeeping services by the client to act for the client is involved in any change in beneficial ownership of the client's asset. Finally, we believe it would help ensure the integrity of account statements provided by qualified custodians because the custodian would report only on the holdings in its possession or control (unless the client requests that the qualified custodian report on holdings that are not in its possession or control). As a result, a client could take comfort that what is reported on its account statement is an accurate attestation of holdings and transactions by that custodian.

The proposed definition of ''possession or control'' in proposed rule 223–1 is designed to be consistent with the laws, rules, or regulations administered by the qualified custodian's functional or primary financial regulator for purposes of its custodial activities. Under the existing regulatory regimes under which qualified custodians currently operate, a qualified custodian must generally

[115] Rule 206(4)–2(b)(1).

[116] Our staff indicated it would not recommend enforcement action when an insurance company served a particular role with respect to variable annuity contracts similar to the role of a transfer agent with respect to mutual fund shares. *See* American Skandia Life Assurance Corporation, May 16, 2005.

[117] *See* proposed rule 223–1(a)(1)(i) and (d)(2)(8). Exchange Act Rule 15c3–3(c) prescribes when securities shall be deemed to be under the control of a broker-dealer. See 17 CFR 240.15c3–3(c).

[118] For example, for certain privately offered securities, we understand banks will put the securities in their name as nominee. We also understand that a change in beneficial ownership may occur at different points in the transaction lifecycle based on the type of asset involved. For example, when purchasing an equity security, the change in beneficial ownership occurs on trade date (*see, e.g.,* rule 240.13d–3—Determination of beneficial owner), but we understand that when purchasing real property, the change in beneficial ownership typically occurs on the settlement date.

maintain assets in its physical possession or control. We believe our proposed definition of possession or control (*i.e.,* being required to participate in any change of beneficial ownership) is consistent with how the concept of possession or control is understood currently by most qualified custodians and does not conflict with the requirements of qualified custodians' respective regulatory regimes. The proposed rule would formalize that understanding.

For example, under the Exchange Act, broker-dealers are required promptly to obtain and maintain in their physical possession or control all of their customers' fully paid and excess margin securities.[119] As a result, a broker-dealer would necessarily be involved in the transfer of beneficial ownership of those securities. In addition, national banks that offer safeguarding of customer assets are responsible for maintaining adequate custody or control of their customer assets.[120] Again, as a result, national banks would have to relinquish their custody or control of an asset to transfer ownership. Similarly, the protections under section 4d(a)(2) of the Commodity Exchange Act and regulations promulgated thereunder, including, among others, CFTC regulation 1.20 (Futures customer funds to be segregated and separately accounted for), CFTC regulation 1.22 (Use of futures customer funds restricted), and CFTC regulation 1.25 (Investment of customer funds),[121] are predicated on the acceptance of, and receipt by, a futures commission merchant of futures customers money, securities, or property.[122] It is our understanding that together, these, and other regulations applicable to FCMs, holistically serve the same purpose. In each of the foregoing cases, the respective custodian is required by its functional regulator to possess or control customer assets. While functional regulators have not defined possession or control in the custody context in a manner identical to our proposed rule (*i.e.,* holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets), we view the proposed definition to be crucial to safeguarding client assets and reflective of the fundamental underlying principle of the custody industry—a custodian holds client assets for safekeeping until directed by the client or the client's duly authorized agent to enter into a transaction with a counterparty resulting in a change of the client's beneficial ownership.[123]

For purposes of an FFI, we believe that the proposed requirement would promote the institution's accountability for client assets and would thereby help to promote more comparable investor protections to those assets held with U.S. financial institutions.[124] Since FFIs are subject to a broad range of regulatory regimes, we believe that this requirement, together with the account statement contract requirement discussed below, would formalize and make more uniform the assets reported on account statements produced by an FFI, thereby better informing clients regarding their holdings and transactions.

a. Application With Respect to Crypto Assets

As discussed above, we believe that under their existing regulatory regimes, qualified custodians are generally considered to have ''possession or control'' of assets that are in their exclusive or physical possession or control. We understand, however, that proving exclusive control of a crypto asset may be more challenging than for assets such as stocks and bonds. For example, while we understand that it is possible for a custodian to implement processes that seek to create exclusive possession or control of crypto assets (*e.g.,* private key creation, maintenance, etc.), it may be difficult actually to *demonstrate* exclusive possession or control of crypto assets due to their specific characteristics (*e.g.,* being transferable by anyone in possession of a private key). Moreover, we are mindful of crypto asset custody models in which an advisory client and a qualified custodian might simultaneously hold copies of the advisory client's private key material to access the associated wallet with the client's crypto assets, and thus both have authority to change beneficial ownership of those assets.[125]

[119] *See* 17 CFR 240.15c3–3(b) and (c).

[120] National banks that fail to exercise proper control over customer securities may be subject to enforcement proceedings by the Comptroller of the Currency. *See* 12 U.S.C. 92a(k) (proceeding to revoke trust powers on account of unlawful or unsound exercise of powers). *See also* OCC, Comptroller's Handbook on Asset Management Operations and Control (Jan. 2011), *available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/asset-mgmt-ops-controls/index-asset-mgmt-ops-controls.html*; OCC regulation 12 CFR 9.13 (requiring, in connection with the custody of fiduciary assets, among other things, that ''assets of fiduciary accounts [be placed] in the joint custody or control'' of certain fiduciary officers or specially designated persons). The OCC has issued guidance relating specifically to custody of crypto assets by banks and Federal savings associations. *See* Interpretive Letter 1170, Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers (July 22, 2020), *available at https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1170.pdf* (''As with all other activities performed by national banks and FSAs, a national bank or FSA that provides cryptocurrency custody services must conduct these activities in a safe and sound manner, including having adequate systems in place to identify, measure, monitor, and control the risks of its custody services. Such systems should include policies, procedures, internal controls, and management information systems governing custody services. Effective internal controls include safeguarding assets under custody, producing reliable financial reports, and complying with laws and regulations. The OCC has previously described that custody activities should include dual controls, segregation of duties and accounting controls. A custodian's accounting records and internal controls should ensure that assets of each custody account are kept separate from the assets of the custodian and maintained under joint control to ensure that that an asset is not lost, destroyed or misappropriated by internal or external parties. Other considerations include settlement of transactions, physical access controls, and security servicing. Such controls may need to be tailored in the context of digital custody. Specialized audit procedures may be necessary to ensure the bank's controls are effective for digital custody activities. For example, procedures for verifying that a bank maintains access controls for a cryptographic key will differ from the procedures used for physical assets. Banks seeking to engage in these activities should also conduct legal analysis to ensure the activities are conducted consistent with all applicable laws.'').

[121] *See also* section 4d(a)(2) of the Commodity Exchange Act and CFTC Regulations 1.20–1.30 (Customers' Money, Securities, and Property); *and see* CFTC Regulation 1.32 (Reporting of segregated account computation and details regarding the holding of futures customer funds; CFTC Regulation 1.36 (Record of securities and property received from customers). These regulations address, among other things, segregation of customer funds, limitations on institutions in which the FCM may deposit customer funds, limitations on holding customer funds outside of the United States, limitations on the use of customer funds, and recordkeeping requirements relating to customer funds.

[122] CFTC Regulation 1.3 defines a futures commission merchant to be ''[a]ny individual, association, partnership, corporation, or trust [. . .] Who, in connection with any of the[ ] activities [identified in the regulation] *accepts* any money, securities, or property [. . . .] That regulation also defines futures customer funds to mean ''all money, securities, and property *received by* a futures commission merchant or by a derivatives clearing organization from, for, or on behalf of, futures customers [for the purposes identified in the regulation]. 17 CFR 1.3 (emphasis added).

[123] Alternatively, a custodian may return the asset to the customer.

[124] *See, e.g.,* the Undertaking for Collective Investment in Transferable Securities Regulations 2016 (UCITS V) (enhancing the rules on the responsibilities of UCITS custodians including making the UCITS custodian liable for the avoidable loss of a financial instrument held in its custody).

[125] Letter from Anchorage Digital Bank NA re Custody Rule and Digital Assets (Apr. 13, 2021) (''Proof of exclusive control can be securely achieved through a combination of software, hardware, and operational processes. However, custody models that rely on private key redundancy (maintaining multiple physical or electronic copies) and physical security as a proxy for digital asset security can't ever truly prove this.'').

As discussed above, the proposed rule's definition of possession or control turns on whether the qualified custodian is required to participate in a change in beneficial ownership of a particular asset. While demonstrating that a qualified custodian has exclusive possession or control of an asset would be one way to demonstrate that the qualified custodian is required to participate a change of beneficial ownership, it is not the only way. For example, under the proposed rule, a qualified custodian would have possession or control of a crypto asset if it generates and maintains private keys for the wallets holding advisory client crypto assets in a manner such that an adviser is unable to change beneficial ownership of the crypto asset without the custodian's involvement.[126]

Importantly, however, to comply with the proposed rule, an adviser with custody of client crypto assets would generally need to ensure those assets are maintained with a qualified custodian that has possession or control of the assets at all times in which the adviser has custody.[127] While this is true for most client assets over which an adviser has custody, it is particularly relevant with respect to crypto assets because, as we understand, much of the crypto asset trading volume occurs on crypto asset trading platforms that often directly settle the trades placed on their platforms. As a result, many crypto trading platforms require investors to pre-fund trades, a process in which investors transfer their crypto assets, including crypto asset securities, or fiat currency to such an exchange prior to the execution of any trade. Because we understand that most crypto assets, including crypto asset securities, trade on platforms that are not qualified custodians, this practice would generally result in an adviser with custody of a crypto asset security being in violation of the current custody rule because custody of the crypto asset security would not be maintained by a qualified custodian from the time the crypto asset security was moved to the trading platform through the settlement of the trade.[128] In light of our proposal to expand the rule's application from ''funds or securities'' [129] to ''assets,'' [130] this practice would also constitute a violation of the proposed rule for an adviser with custody of client crypto assets if the adviser trades those assets on a crypto asset trading platform that does not satisfy the definition of ''qualified custodian.'' Alternative Trading Systems that do not require pre-funding of trades and that trade crypto asset securities following a process that does not involve the broker-dealer operator of the Alternative Trading System providing custodial services for the crypto asset securities are discussed further below.[131]

We request comment on all aspects of the proposed possession or control requirement, including the following items.

41. Should the rule include the possession or control requirement, as proposed? Would the proposed requirement provide additional protections for clients? Possession or control would be defined to mean holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets. Do commenters agree with our view that the term ''participation'' would mean that the qualified custodian would effectuate the transaction and its involvement would be a condition precedent to the change in beneficial ownership? How else would commenters describe a qualified custodian's participation? Should we instead define possession or control to mean holding assets such that the qualified custodian is required to effectuate any change in beneficial ownership of those assets? Do commenters agree with our understanding that a qualified custodian's participation in a change in beneficial ownership may take different forms depending on the type of asset involved? Do commenters agree with our view that participation by a qualified custodian would require the qualified custodian be willing to attest to the transaction on an account statement? Do commenters agree with our understanding that a qualified custodian will customarily take custodial liability for client assets for which it participates in beneficial changes of ownership?

42. Do the types of financial institutions serving as qualified custodians under the current rule maintain client assets in a manner that would satisfy the proposed definition of ''possession or control''? Do commenters agree with our view that the proposed definition of possession or control (*i.e.,* being required to participate in any change of beneficial ownership) is consistent with how the concept of possession or control is understood currently by most qualified custodians and does not conflict with the requirements of qualified custodians' respective regulatory regimes?

43. Is our understanding correct that qualified custodians hold client assets for safekeeping until directed by the client or the client's duly authorized agent to enter into a transaction with a counterparty resulting in a change of the client's beneficial ownership or until directed to return the assets to the client, subject to duly authorized custodial charges? Is our understanding correct that this is crucial to safeguarding client assets and reflective of a fundamental underlying principle of the custody industry?

44. Should we have different possession or control requirements for different qualified custodians? If so, what should they be, and why?

45. Are we correct in our understanding that a custodian will assume custodial liability for a custodial customer's avoidable loss only if the custodian has possession or control (*i.e.,* is required to participate in any change in beneficial ownership) of the asset that is lost?

46. Unlike as proposed, should the rule explicitly state that the qualified custodian maintain ''physical'' or ''exclusive'' possession or control of the client's assets? Do commenters agree with our understanding qualified custodians may face greater challenges in their ability to demonstrate exclusivity with respect to crypto assets as compared their ability to demonstrate

[126] We note that, in the context of crypto asset securities, the Commission has stated that, ''a broker-dealer that maintains custody of a fully paid or excess margin digital asset security for a customer must hold it in a manner that complies with Rule 15c3–3, including that *the digital asset security must be in the exclusive possession or control of the broker-dealer.* A digital asset security that is not in the exclusive possession or control of the broker-dealer because, for example, an unauthorized person knows or has access to the associated private key (and therefore has the ability to transfer it without the authorization of the broker-dealer) would not be held in a manner that complies with the possession or control requirement of Rule 15c3–3 . . . .]'' Commission Statement, *supra* footnote 25 at 11629 (emphasis added).

[127] This is not only true for crypto assets, but any client asset for which an adviser has custody, subject to the exceptions in the proposed rule. *See* proposed rule 223–1(b)(1) (Shares of Mutual Funds), (2) (Certain Assets Unable to be Maintained with a Qualified Custodian), and (5) (Registered Investment Companies).

[128] This differs from the approach with a U.S. national securities exchange, which does not routinely exercise possession or control of the securities listed on a national securities exchange. In this scenario, trades are executed on a national securities exchange, establishing the contract between buyer and seller. The national securities exchange then passes transaction details on to a clearing agency or depository, which steps in to facilitate and complete settlement between each party's custodian, specifically the exchange of cash and securities per the trade's contracted terms agreed on the national securities exchange on a delivery versus payment basis.

[129] *See* rule 206(4)–2(a).

[130] *See* proposed rule 223–1(a).

[131] *See infra* footnotes 460–461 and accompanying text.

exclusive possession or control with respect to stocks and bonds? Do custodians for crypto assets routinely consider the crypto assets they service to be in their exclusive possession or control? If so, how would exclusivity be demonstrated? Are there particular safeguarding practices with respect to crypto assets that are better suited to demonstrating exclusivity than others? What kind of evidence would be necessary to demonstrate proof of exclusive possession or control of crypto assets? What type of procedures would a crypto asset custodian need to have to demonstrate exclusive possession or control of crypto assets? [132] Would requiring exclusive possession or control improve safeguarding of crypto assets? Given the nature of crypto assets, is it possible to demonstrate the exclusive possession or control of a particular crypto asset? How important do custodians view ''exclusive'' possession or control of a client asset, including a crypto asset, to be for liability reasons? How do existing custodians of crypto assets address the risk of liability for theft, fraud, or misappropriation of crypto assets when a client (and potentially others with whom the client has shared the private key material) retains the ability to effect a change in beneficial ownership of the asset without the involvement of the custodian?

47. Would a custodian for crypto assets be able to satisfy the proposed possession or control requirement? Would such a custodian be able to participate in a change of beneficial ownership for a client's crypto asset? What does it mean for a custodian to ''participate'' in a change of beneficial ownership for a client's crypto asset transaction? Does this involve only the deployment of the private key or keys associated with the public address where the client's crypto assets are recorded to transfer, as instructed, the client's crypto assets to another person with a public key? Does this also include recording or communicating a change in beneficial ownership?

48. To what extent does a custodian for crypto assets take custodial liability for a beneficial change in ownership of a client's crypto assets?

49. Is our understanding of how many crypto asset trading platforms require investors to pre-fund trades correct? How many of these trading platforms require pre-funding trades? How many rely on other custodial arrangements and how do those crypto asset trading platforms operate with such custodial arrangements? How would the proposed rule impact advisers who trade on such trading platforms currently? What, if any, impacts would the proposed rule have on the availability of crypto asset trading platforms that may be able to serve as qualified custodians? Would the proposed definition of ''possession or control'' enhance or inhibit investor protections with respect to client assets traded on crypto asset trading platforms?

50. Do custodians for crypto assets permit the customer (and potentially others with whom the customer has shared a private key) to retain the ability to effect a change in beneficial ownership of the asset without the involvement of the custodian? In these cases, do commenters believe that advisory clients would receive the benefits of the protections of the proposed rule if they contractually required a qualified custodian to be involved in any beneficial change of ownership of the crypto asset? Would crypto asset advisory clients and custodians be willing to enter into contractual agreements of that type? Would requiring that a qualified custodian have exclusive possession or control over the crypto asset have an impact on the crypto asset custody industry? How big of an impact?

51. Are there asset types other than crypto assets over which a qualified custodian may not be able to obtain ''exclusive'' possession or control? Please indicate which asset types and explain why exclusivity may not be possible.

52. Is our understanding correct that beneficial ownership change may occur at different points in the transaction lifecycle based on asset type? Is there a customary reference to when a change in beneficial ownership occurs for each asset type? For crypto assets, does the change in beneficial ownership occur when the transaction is recorded on the blockchain or when the transaction is settled off-chain on the internal ledger system of a crypto asset trading platform? Are there differences if the transaction is recorded on a private or permissioned ledger than on a public or un-permissioned ledger? Are there differences if the transaction is settled on a centralized crypto asset trading platform versus a so-called decentralized crypto asset trading platform?

53. Many market participants refer today to ''atomic settlement'' of crypto asset trades.[133] Is this is commonly understood and used term? Does it mean that both legs of the trade settle simultaneously (similar to a delivery vs. payment transaction), or that the trade settles instantly, or both? Which aspect of crypto asset settlement (simultaneous settlement or instantaneous settlement) is preferable from an investor protection standpoint? Are there drawbacks to either? Should the Commission require particular protections related to crypto asset trades or custody? What about other crypto asset transactions?

54. Is it possible for an adviser to execute any trade that settles instantly and while maintaining the assets at a qualified custodian throughout the lifecycle of that trade? If so, how? Could the adviser do so and still have the ability to trade with counterparties other than the qualified custodian? How would that work?

3. Minimum Custodial Protections

The proposed rule would promote minimum standard custodial protections for advisory clients whose advisers have custody of client assets. It generally would require that the investment adviser maintain client assets with a qualified custodian pursuant to a written agreement between the qualified custodian and the investment adviser (or between the adviser and client if the adviser is also the qualified custodian).[134] It would further require the adviser to obtain reasonable assurances in writing from the custodian regarding certain vital protections for the safeguarding of client assets. We understand that under existing market practices, advisers are rarely parties to the custodial agreement, which is generally between an advisory client and a qualified custodian, resulting in an adviser having limited visibility into the custodial arrangements of its clients. This presents several issues under the current rule and can result in an adviser being subject to the rule due to what has become known as inadvertent custody, which can occur, for example, when the custodial agreement between a client and custodian grants an adviser broader access to client funds or securities than contemplated by the adviser's own agreement with the client and the

[132] *See* Commission Statement, *supra* footnote 25, at 11629 (''A digital asset security that is not in the exclusive physical possession or control of the broker-dealer because, for example, an unauthorized person knows or has access to the associated private key (and therefore has the ability to transfer it without the authorization of the broker-dealer) would not be held in a manner that complies with the possession or control requirement of Rule 15c3–3 and thus would be vulnerable to the risks the rule seeks to mitigate.'').

[133] *See* Michael Lee, Antoine Martin, and Benjamin Müller, What Is Atomic Settlement? (Nov. 7, 2022), *available at https://libertystreeteconomics.newyorkfed.org/2022/11/what-is-atomic-settlement/.*

[134] Proposed rule 223–1(a)(1)(i).

adviser did not intend to have such access to client assets.[135] We understand that inadvertent custody often arises because a custodial agreement grants an adviser expansive authority to transact in or transfer assets held in its client custodial accounts (*e.g.,* the ability to initiate wire transfers) that are often superfluous to the advisory services being provided. However, because advisers are rarely a party to these agreements, their ability to repudiate unwanted authority is limited.

In addition, custodial market practices have evolved and expanded since the rule was last amended, as have the types of assets qualified custodians hold.[136] Some bank qualified custodians have developed custodial practices for crypto assets. However, Federal banking regulators have stated more broadly regarding crypto asset-related activities that ''[b]ased on the agencies' current understanding and experience to date [. . .] the agencies have significant safety and soundness concerns with business models that are concentrated in crypto-asset-related activities or have concentrated exposures to the crypto-asset sector.'' [137] The regulatory framework to which these institutions are subject is evolving, in part, to accommodate new entrants to the market for custodial services, including newly launched state-chartered trust companies that focus on providing crypto asset custody services.[138] In light of this evolution, we must be mindful of the extent to which many of these new entrants to the custodial marketplace offer, and are regulated to provide, the types of protections we believe a qualified custodian should provide under the rule.[139]

At the same time, we understand that some existing qualified custodians have modified their practices to remain profitable amid these changes, such as by contractually limiting their liability to their customers in a variety of ways. Others have turned to outsourcing less profitable parts of their custodial services.[140] Our staff has observed that the clients who are least likely to have bargaining power are often afforded the fewest protections. These changes in the custodial industry have caused us to reconsider the minimum protections we believe an adviser who uses a qualified custodian to maintain possession or control of client assets should provide.

Consequently, the proposed rule would require a written agreement between a qualified custodian and the investment adviser that incorporates certain minimum investor protection elements for advisory clients. Additionally, for certain protections in which the qualified custodian's duty runs primarily or exclusively to the advisory client, it would require the adviser to obtain reasonable assurances of certain minimum investor protection elements for advisory clients. We believe that this approach would have direct benefits for advisory clients and investment advisers. We acknowledge that an agreement between the custodian and the adviser would be a substantial departure from current industry practice. We also understand that certain of the protections that the rule text would promote are not *universally* provided to all custodial customers today. Nonetheless, we believe it is necessary to help protect client assets from the harms the custody rule is designed to address and would help ensure that they receive certain standard custodial protections under the rule.

The proposed requirements do not prescribe specific safeguarding procedures or require that client assets be maintained in a particular manner. Rather, they are designed to serve as guardrails that would apply irrespective of the type of asset or the type of financial institution acting as a qualified custodian. The requirements are also designed to remain evergreen as methods for safekeeping continue to evolve to reflect changes in technology, investment products, and custodial service best practices. For example, technical requirements for transacting and safeguarding crypto assets are likely to be different from those for traditional assets, such as stocks, bonds, and options. Furthermore, the design of blockchains and other distributed ledgers that require irreversibility of crypto asset transactions (without the consent of all parties to reverse), and the bearer nature of private keys make it challenging to recover assets that have been lost or stolen or to reverse benign trading errors even if an owner of a crypto asset wallet may be identified. This is unlike the traditional securities infrastructure, which has well-developed protocols allowing for the reversal and cancellation of mistaken or unauthorized transactions.

These additional risks and nuanced challenges of safeguarding emerging assets, such as crypto assets, have caused us to consider alternatives to the current rule's more asset-neutral approach. In 2020, our staff issued a statement requesting input on, among other things, the types of qualities an adviser seeks when entrusting a client's assets to a particular custodian and whether there are qualities that would

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[135] *See* Inadvertent Custody: Advisory Contract Versus Custodial Contract Authority, Division of Investment Management Guidance Update No. 2017–01 (Feb. 2017) (in which our staff discussed its views on the application of the current custody rule to various types of custodial agreements between a client and a custodian that grant an adviser broader access to client funds or securities than the adviser's own agreement with the client contemplates).

[136] *See, e.g.,* Fiduciary Capacity; Non-Fiduciary Custody Activities, 84 FR 17967 (Apr. 29, 2019) (the Office of the Comptroller of Currency estimating that the size of non-fiduciary custody assets held at national banks and Federal savings associations has increased, since it last updated its fiduciary regulation in 1996, to approximately $41.7 trillion as of December 21, 2018); Olga Kharif, Fidelity Says a Third of Big Institutions Own Crypto Assets BNN Bloomberg (June 9, 2020), *available at https://www.bnnbloomberg.ca/fidelity-says-a-third-of-big-institutions-own-crypto-assets-1.1447708* (reporting that, according to a survey by Fidelity Investments, 36 percent of institutional investors in the U.S. and Europe report holding crypto assets).

[137] *See* Joint Statement on Crypto-Asset Risks to Banking Organizations, *supra* footnote 27.

[138] *See, e.g.,* Application by Anchorage Trust Company, Sioux Falls, South Dakota to Convert to a National Trust Bank; Application for Residency Waiver (Jan. 13, 2021), *available at https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-6a.pdf;* Application by Protego Trust Company, Seattle, Washington, to Convert to a National Trust Bank; Application for Director Residency Waiver (Feb. 4, 2021), *available at https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-19a.pdf;* Application to charter Paxos National Trust, New York, New York, OCC Control Number: 2020–NE-Charter-318305, OCC Charter Number: 25252 (Apr. 23, 2021), *available at https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-49a.pdf;* New York Department of Financial Services, Financial Services Superintendent Linda A. Lacewell Announces Grant of DFS Trust Charter to Bitgo to Engage in New York's Growing Virtual Currency Market (Mar. 4, 2021), *available at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202103041. See also,* New York Department of Financial Services, *Guidance on Custodial Structures for Customer Protection in the Event of Insolvency* (Jan 23, 2023), *https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230123_guidance_custodial_structures* (issuing guidance focusing on customer protection relating to segregation of and separate accounting for customer virtual currency, custodian's use of customer virtual currency, sub-custody arrangements, and customer disclosure).

[139] *See, e.g.,* Financial Stability Oversight Council, Report on Digital Asset Financial Stability Risks and Regulation (2022), *available at https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf* (''[S]ome platforms emphasize that they are regulated through MSB laws. These laws generally are intended to address consumer protection related to money transmission and to combat illicit finance. They are not intended to address funding mismatches outside of money transmission or risks posed by platforms custodying crypto-assets internally within omnibus accounts, particularly when commingled with platform assets.'').

[140] *See* Deloitte (2019), The Evolution of a Core Financial Service: Custodian & Depository Banks, *available at https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/lu-the-evolution-of-a-core-financial-service.pdf,* at 42–43 (noting the trend with custodians and depositories outsourcing operational departments to low cost labor regions in order to lower costs and increase margins on core services that have experienced the largest margin pressures).

be important for safeguarding crypto assets that might not be important for safeguarding other types of assets.[141] Several commenters shared with the staff their views, advocating for such things as specifically tailoring the rule based on how changes in ownership of the asset are effectuated, including setting particular standards for qualified custodians of crypto assets.[142] While we agree that custodial activities may differ between traditional assets and crypto assets, we believe that the asset neutral approach of the current rule has been and will continue to be more effective because it relies on the expertise of the various types of qualified custodians and allows the rule to remain evergreen as the types of assets held by custodians evolve.

Although crypto assets are a relatively recent and emerging type of asset, this is not the first time custodians have had to adapt their practices to safeguard different types of assets.[143] The proposed rule relies on the expertise of custodians with a long history of developing different procedures for safeguarding a variety of assets. It is also not the first time custodians have grappled with a new method of transacting in or holding assets.[144] These custodians also have a long history of innovating and modernizing their practices as methods of transacting in or holding client assets have evolved. Rather, the proposed rule recognizes that there are certain fundamental protections that should be provided to a custodial customer when the adviser has custody:

- A qualified custodian should exercise due care and implement appropriate measures to safeguard the advisory client's assets;
- A qualified custodian should indemnify an advisory client when its negligence, recklessness, or willful misconduct results in that client's loss;
- A qualified custodian should not be relieved of its responsibilities to an advisory client as a result of sub-custodial arrangements;
- A qualified custodian should clearly identify an advisory client's assets and segregate an advisory client's assets from its proprietary assets;
- The client's assets should remain free of liens in favor of a qualified custodian unless authorized in writing by the client;
- A qualified custodian should keep certain records relating to those assets;
- A qualified custodian should cooperate with an independent public accountant's efforts to assess its safeguarding efforts;
- Advisory clients should receive periodic custodial account statements directly from the qualified custodian;
- A qualified custodian's internal controls relating to its custodial practices should be evaluated periodically for effectiveness; and
- A custodial agreement should reflect an investment adviser's agreed-upon level of authority to effect transactions in the advisory client's account.

We believe that financial institutions that act as qualified custodians under the current rule already provide some of the protections that would be required under the proposed rule's requirements, either to satisfy regulatory requirements, or pursuant to their existing contracts with their clients. For example, we understand that some qualified custodians usually provide quarterly account statements to their custodial customers. We also understand that qualified custodians often obtain periodic reports of their internal controls. Further, we understand that qualified custodians may currently indemnify their custodial customers against the risk of loss, but we understand that the indemnification standard—for example, ordinary negligence or gross negligence—often varies by institution and by customer. To the extent an element is not typical for a particular custodian, it may create practical difficulties (*e.g.,* higher costs of compliance, or market contraction for custodial services). On balance, however, we believe the proposed rule promotes key protections to which every custodial customer should be entitled when the adviser has custody.

Some of these protections are best promoted via written agreement between the adviser and custodian; others are best promoted via the adviser obtaining reasonable assurances in writing from the qualified custodian that the protections will be provided to the advisory client. We view the safekeeping protections that would be required in the proposed written agreement to be duties owed to both the client and adviser, while we view the safekeeping protections in the proposed reasonable assurances requirements to be duties owed primarily to the client and, therefore, are proposing these protections in a manner that we believe appropriately reflects the respective obligations. We are also proposing to require that the adviser reasonably believe that the contractual provisions and reasonable assurances obtained by the adviser have been implemented by the qualified custodian.[145] We understand that many of the obligations under the contractual provisions and reasonable assurances obtained by the adviser rest on the qualified custodian, and that implementation for each requirement may vary widely depending on the facts and circumstances of the parties in interest and assets in interest. Nonetheless, advisers should enter into a written agreement with a qualified custodian based upon a reasonable belief that the qualified custodian is capable of, and intends to, comply with the contractual provisions. The adviser should have the same reasonable belief regarding the reasonable assurances obtained from the qualified custodian. Further, during the term of the written agreement and related advisory relationship, advisers should have a reasonable belief that the qualified custodian is complying with the contractual obligations of the agreement and continuing to provide

[141] *See* Staff Statement on WY Division of Banking's ''NAL on Custody of Digital Assets and Qualified Custodian Status'' (Nov. 9, 2020), *available at https://www.sec.gov/news/public-statement/statement-im-finhub-wyoming-nal-custody-digital-assets* (the Staff Statement used the term ''digital'' assets rather than the term ''crypto'' assets as used in this release).

[142] *See, e.g.,* Letter from Coinbase re Custody Rule and Digital Assets (May 25, 2021) (stating that qualified custodians for digital assets should, at a minimum have: institutional technical expertise; personnel with technical expertise; minimum size; authority to custody digital assets; robust staffing; audited control environment; and annual certified audits); Letter from Anchorage re Custody Rule and Digital Assets (Apr. 13, 2021) (advocating for standard requirements for a qualified custodian that maintains digital assets including proof of exclusive control, proof of existence of digital assets in custody, hardware security, and blockchain monitoring).

[143] For example, bank custodians have traditionally provided safekeeping to a variety of physical objects, such as valuable papers, rare coins, and jewelry. *See,* OCC, Comptroller's Handbook on Asset Management Operations and Control (Jan. 2011), *available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/asset-mgmt-ops-controls/index-asset-mgmt-ops-controls.html,* at 15. *See also* Thevenoz, Luc, Intermediated Securities, Legal Risk, and the International Harmonization of Commercial Law, 13 Stan. J.L. Bus. & Fin. 384, 386 (Spring 2008) (''Intermediated Securities'') (''Immobilization and dematerialization of securities have made the physical delivery of certificates nearly irrelevant. In just a few decades, the issuance of securities has shifted from the physical to a virtual world, to which financial intermediaries hold the key.'').

[144] *See,* James Rogers, *Policy Perspectives on Revised UCC Article 8,* 43 UCLA L. Rev. 1431 (1996) (discussing the role large broker-dealers or banks acting as dealers or custodians played during the evolution from a manual securities settlement process focused on the processing of physical securities certificates to highly automated electronic settlement centered on processing and transfer of electronic book-entry securities); Adam Back, *Lien on Me, Uniformity Is Coming to Crypto-Backed Transactions,* 41–12 Am. Bankr. Inst. J. 16 (Dec. 1, 2022) (discussing proposed UCC Article 12 governing property rights in a ''controllable electronic record'').

[145] *See* proposed rule 223–1(a)(1)(i), (ii).

the protections to client assets for which the adviser obtained reasonable assurances from the qualified custodian. For example, if the qualified custodian fails to properly provide the adviser with the required quarterly account statement or the required annual internal control report discussed below, the adviser could not reasonably believe that the qualified custodian is complying with the contractual obligations of the written agreement.

Finally, as under the custody rule, the safeguarding rule would continue to permit an adviser or its related person to serve as a qualified custodian for client assets. We continue to believe that self-custody and related person safeguarding arrangements provide practical benefits for advisory clients; however, we remain wary of the potential risks of such arrangements that do not have an independent party involved in safeguarding client assets.[146] Accordingly, heightened protections similar to those required under the custody rule would continue to be required in such an arrangement.[147] Moreover, the following elements would all be required to be part of a written agreement with the client.[148]

a. Reasonable Assurances

We believe that requiring an adviser to obtain the reasonable assurances in writing [149] that the custodian will comply with the client protections required in the proposed rule and discussed below would improve safekeeping of client assets. Similarly, we believe that requiring the adviser to maintain an ongoing reasonable belief that the custodian is complying with such client protection requirements will improve safekeeping of client assets.[150] It is our understanding that many current custodial agreements address these issues and, therefore, custodians are already familiar with these concepts. For example, we understand that many custodial agreements address the attachment of a lien on, or security interest in, client assets, in some cases for the protection of the qualified custodian for nonpayment of fees by a custodial client. Similarly, many custodial agreements address indemnification between the advisory client and the custodian, but we understand that the indemnification standard—for example, ordinary negligence or gross negligence—often varies by institution and by customer. The proposed reasonable assurances requirements—and the requirement for the adviser to maintain the ongoing reasonable belief that the reasonable assurances provided by the qualified custodian are being implemented—in the rule are important protections for client assets that, together with the client protections contained in the written agreement, are designed to expand and formalize the standard of protections to advisory clients' assets held by qualified custodians in a manner that would provide consistent investor protections across all qualified custodians under our proposed rule.

i. Due Care

The proposed rule would require that the adviser obtain reasonable assurances in writing from the qualified custodian that the qualified custodian will exercise due care in accordance with reasonable commercial standards in discharging its duty as custodian and will implement appropriate measures to safeguard client assets from theft, misuse, misappropriation, or other similar types of loss.[151] The requirement that the adviser obtain reasonable assurances that a qualified custodian will exercise due care in accordance with reasonable commercial standards is similar to the standard required of certain custodians under Investment Company Act rules.[152] The Commission has had experience with the standard of care under rule 17f–4 under the Investment Company Act and believes that advisory clients should receive protections similar to those afforded under that rule. In addition, we believe that this investor protection element would provide an important standard for evaluating the qualified custodian's custodial practices.

We also believe that it is crucial for a qualified custodian to implement appropriate measures to safeguard assets from theft, misuse, misappropriation, or other similar types of loss based on the asset type and manner in which ownership is evidenced.[153] We recognize that the appropriateness of the measures required to safeguard assets varies depending on the asset.[154] For instance, the exercise of due care may require that a bearer instrument, such as a physical coupon bond, a physical security certificate, or a commodity such as gold, be kept in a vault. Likewise, an investment that is evidenced in electronic book-entry form, such as an exchange-traded note, could be maintained in line with robust cybersecurity standards. And the exercise of due care may require, in many cases, that crypto assets be stored in a cold wallet, but depending on the facts and circumstances, such as when a client seeks to buy and sell crypto assets very frequently, due care may mean the use of hot wallets in combination with robust policies and procedures.[155] Other facts and

[146] *See* 2009 Adopting Release, *supra* footnote 11, at section II.C.1 (discussing the benefits and associated risks of maintaining client investments with advisers or their related persons and suggesting that the use of an independent custodian would be an impractical requirement for many types of advisory accounts).

[147] The proposed rule would require a qualified custodian that is a related person to the adviser to enter into a written agreement with the adviser.

[148] A rulemaking petition submitted to the Commission requested that we adopt a rule prohibiting related person custody. We have considered the petition and share certain of the petition's concerns regarding custody arrangements not involving independent parties. However, we believe that the protections proposed in the rule appropriately limit those risks. Kaswell, Stuart J *Re: Petition for Rulemaking; Custody Rule 206(4)(2),* Oct. 30, 2020 [File No. 4–767, Nov. 9, 2020], *available at https://www.sec.gov/rules/petitions/2020/petn4-767.pdf* (''[I]t is my view that the SEC should take the next step and require the adviser to use a custodian that is unaffiliated in any way with the adviser.''); and see Kaswell, Stuart J. *Supplement to Petition for Rulemaking; Custody Rule 206(4)(2); File No. 4–767* (Apr. 19, 2021), *available at https://www.sec.gov/comments/4-767/4767-8685524-235622.pdf* (''As indicated in my rule petition, I respectfully suggest that the Commission should amend the Custody Rule to require that each investment adviser use a custodian that is independent of that adviser.'').

[149] Exchange Act section 13(b)(7) defines ''reasonable assurance'' and ''reasonable detail'' as ''such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.'' 15 U.S.C. 78m(b)(7). *See* Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (Jun. 27, 2007) [72 FR 35323] (discussing meaning of ''reasonable assurance'').

[150] *See* proposed rule 223–1(a)(1)(ii).

[151] Proposed rule 223–1(a)(1)(ii)(A).

[152] *See, e.g.,* rule 17f–4 of the Investment Company Act.

[153] *See, e.g.,* Customer Protection Rules 17 CFR 240.15c3–3 (requiring appropriate measures to protect and preserve customer property held at broker-dealers).

[154] We also recognize that while the understanding of appropriate safeguarding measures is generally expected to be within the expertise of the qualified custodian, advisers also generally should seek to become sufficiently familiar with safeguarding practices to identify concerns or red flags in order to, among other things, form an opinion as to whether the assurance that they receive from the qualified custodian that the qualified custodian is acting with due care is reasonable. More broadly, identifying concerns and red flags is an important factor in the adviser forming a reasonable belief that the protections in the proposed written agreement have been implemented.

[155] *See, e.g.,* R. Travis Leppky and Guy Sadeh, Matthew Bender and Co., Blockchain and Smart Contract Law: U.S. and International Perspectives; Ch. 7, Sec. 7 (Security and Custody: Security Issues for Cryptographic Asset Wallets) (2022) (''[T]he difference between a hot and cold wallet is whether or not they are connected to the internet. Generally speaking, hot wallets are less secure because of threats that come with being connected to the internet and additional indirect threats if the cryptocurrency wallets are held by an external provider (*i.e.,* hacks, phishing, external provider

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circumstances may require a hybrid of the two.[156] Further, because crypto assets and distributed ledger technology are still evolving, we expect the methods used to safeguard crypto assets will likewise evolve, which may lead to reevaluation of best practices in the future.

The proposed standard of care is not uncommon in the custodial market and we believe that financial institutions acting as qualified custodians are familiar with it.[157] We believe, however, that the standard of care is not universal in the custodial market, and that this requirement may result in some qualified custodians changing the terms of their custodial agreements with advisory clients to incorporate this standard. We believe that this provision would promote this important protection in a consistent manner across all advisory client assets [158] and would discourage the qualified custodian from establishing contractual performance standards that are less stringent.[159]

ii. Indemnification

The proposed rule would require that the adviser obtain reasonable assurances in writing from the qualified custodian that the qualified custodian will indemnify the client (and will have insurance arrangements in place that will adequately protect the client) against the risk of loss in the event of the qualified custodian's own negligence, recklessness, or willful misconduct.[160] The goal of this proposed requirement would be for the client to be compensated in the event of a loss for which the qualified custodian is responsible.

Our staff has observed that custodians often include indemnification clauses in their custodial agreements with customers. Generally, the provisions indemnify custodial customers from losses arising out of or in connection with the custodian's execution or performance under the agreement to the extent the loss is caused by, among other things, the custodian's negligence, gross negligence, bad-faith, recklessness, or willful misconduct. Our staff has observed that the contractual limitations on custodial liability vary widely in the marketplace. Our staff has also observed that the negotiating power of the investor appears to play an outsized role in the type of misconduct for which a custodian will provide indemnity and that retail investors appear to have limited ability to negotiate these terms effectively.

Custodial misconduct is one of the primary risks that can undercut or eliminate the protections of a custody account.[161] The proposed rule seeks to create a minimum floor of custodial protection for investors—including those investors that have little or no power to negotiate for those protections—in the event of custodial misconduct. We question the extent to which investors, and particularly retail investors, understand that they may have limited recourse against the financial institution that was hired to safeguard their assets in the event they suffer a loss because of that institution's misconduct.[162] As such, we believe that it is reasonable to require an adviser to obtain reasonable assurances from a qualified custodian that it will provide the required indemnification for advisory clients.

The current practice in the custodial marketplace reflects a broad range of contractual limitations on the qualified custodian's liability to its customers to reduce exposure and may result in sub-optimal safeguarding protections for client assets. While we understand that custodians, as a gesture of goodwill or to avoid headline exposure, may cover losses caused by their own misconduct even if the customer is ineligible for indemnification under the custodial agreement, such gestures are at the sole discretion and ability of the custodian and we believe that this does not provide sufficient, consistent, reliable investor protection.[163] Custodians may not always be willing to extend such goodwill, such as in the event of an extremely large loss caused by, for example, custodial negligence under a custodial contract providing for indemnification of the custodial client only in the event that the custodian's misconduct constitutes gross negligence, during a general downturn in the economy, or at a time that the custodian is otherwise not sufficiently capitalized to easily absorb the loss. Requiring an adviser to obtain reasonable assurances from the qualified custodian that the qualified custodian will indemnify the client (and will have insurance arrangements in place that will adequately protect the client) against the risk of loss in the event of the qualified custodian's own negligence, recklessness, or willful misconduct, as proposed, will help protect clients from custodial misconduct and reduce the need to rely on the goodwill of a custodian to make a client whole in the event of the custodian's misconduct.

In our view, the proposed indemnification requirement would likely operate as a substantial expansion in the protections provided by qualified custodians to advisory clients, in particular because it would result in some custodians holding advisory client assets subject to a simple negligence standard rather than a gross negligence standard. We believe that this requirement is justified because of the important investor protection benefits it will provide.

iii. Sub-Custodian or Other Similar Arrangements

The proposed rule would require that the adviser obtain reasonable assurances in writing from the qualified custodian that the existence of any sub-custodial, securities depository, or other similar arrangements with regard to the client's assets will not excuse any of the qualified custodian's obligations to the client.[164] This requirement is designed to help ensure that the qualified custodian would remain responsible in circumstances where a loss or other failure to satisfy its obligations to the client, whether contractual or otherwise,

stability issues, etc.). Hot wallets are generally better for day-to-day transactions and trading, since near instant access is provided. Cold wallets, meanwhile, are stored offline, which provides additional security. They are generally better for holding crypto assets for the long term.''); Deborah A. Sabalot & Madeleine Yates, *Cryptoassets and custody: an elephant in the room?,* 9 Journal of International Banking and Financial Law 580 (Sept. 24, 2019) (''Hot storage means devices connected with the internet and generally means that the asset can be transferred quickly but will also be at greater risk of loss through hacking. Cold storage devices are physically offline and disconnected from the internet but are generally considered less accessible although are arguably more secure in that they cannot be attacked in the way that online systems can. Other arrangements include hybrid systems which allow the temporary storage of cryptoassets in a hot facility before being moved to cold storage.''); *see generally* Cryptopedia Staff, Hot Wallets vs. Cold Wallets, GEMINI (July 4, 2021), *available at https://www.gemini.com/cryptopedia/crypto-wallets-hot-cold* (''A hot wallet is connected to the internet and could be vulnerable to online attacks—which could lead to stolen funds—but it's faster and makes it easier to trade or spend crypto. A cold wallet is typically not connected to the internet, so while it may be more secure, it's less convenient.'').

[156] *See id.*

[157] The proposed contractual requirement is the same as the standard that automatically applies to custodians under Article 8 of the Uniform Commercial Code. *See* UCC sections 8–504(c)(2) and 8–509 (a) and (b).

[158] The requirement of due care, of course, may impose on a qualified custodian a number of practices not expressly addressed in this release.

[159] *See, e.g.,* UCC section 8–504(c)(2) (allowing alteration of the standard of care by agreement).

[160] Proposed rule 223–1(a)(1)(ii)(B).

[161] Klees Article, *supra* footnote 24, at 106.

[162] *See, e.g.,* Klees Article, *supra* footnote 24, at 103 (''clients bear several significant legal and operational risks that could limit recovery of their custodied assets'').

[163] We also do not know whether the willingness of custodians to cover losses for which they may not be contractually liable depends on whether the advisory client is retail or institutional.

[164] Proposed rule 223–1(a)(1)(ii)(C).

can be attributed to a sub-custodian or other third party selected by the qualified custodian.

As discussed above, outsourcing has become increasingly common in the custodial space, whether outsourcing of back-office functions or the core function of holding a custodial client's assets.[165] Additionally, we understand that the delegation of safeguarding to sub-custodians can result in opaque structures, for example involving several FFI sub-custodians in different countries.[166] Further, our staff has observed that custodial agreements addressing the use of sub-custodians seek to limit contractually the custodian's liability for acts or omissions of the sub-custodian in a variety of ways, including expressly limiting the contractual liability of the custodian for acts of the sub-custodian, as well as limiting the affirmative steps the custodian may be required to take in connection with any loss of client assets as a result of the sub-custodian's willful default or insolvency. We view the increase in use of sub-custodians to similarly increase the risk to client assets because, among other things, an adviser and a client are not likely to have a direct contractual relationship with the sub-custodian and are not likely to be able to have decision-making authority with respect to which sub-custodian a qualified custodian uses. The client and adviser, therefore, are more likely to experience challenges in recovering losses caused by the sub-custodian in the event of a loss of client assets. We similarly believe that this is true for a securities depository or other third-party arrangement implemented by the custodian with respect to client assets over which the advisory client has no control.

We believe that requiring the proposed reasonable assurances requirement would help reduce the ability of a qualified custodian to avoid responsibility for the other important safeguarding obligations it has to the advisory client by delegating custodial responsibility to a sub-custodian, securities depository, or other similar arrangements. We believe these requirements are justified because a qualified custodian should not be able to disclaim liability for a third-party it hires.

iv. Segregation of Client Assets

The proposed rule would require the adviser to obtain reasonable assurances in writing from the qualified custodian that the qualified custodian will clearly identify the client's assets as such, hold them in a custodial account, and segregate them from the qualified custodian's proprietary assets and liabilities.[167] We are proposing this requirement because we continue to believe that segregation is a fundamental element of safeguarding client assets.[168] We believe that some financial institutions that serve as qualified custodians, particularly FFIs, are not required to segregate and identify their client assets.[169] In addition, for those qualified custodians that are required to segregate and identify their client assets, the extent of those activities varies.[170] The proposed requirement is designed to help ensure that client assets are at all times readily identifiable as client property and remain available to the client even if the qualified custodian becomes financially insolvent or if the financial institution's creditors assert a lien against the qualified custodian's proprietary assets (or liabilities).[171] We believe this proposed requirement would help protect client assets from claims by a third party looking to secure or satisfy an obligation of the qualified custodian, including in cases of insolvency or bankruptcy.[172] We believe that the proposed requirement would help to identify clearly client assets as belonging to the appropriate client and, in the context of an FFI, we believe these actions would help to preserve the client's interests in the event of a government taking.

We also understand that for administrative convenience and other reasons qualified custodians often hold client assets in omnibus accounts containing assets of more than one client or similar commingled-style accounts. We understand that practice may be even more common when a qualified custodian uses a sub-custodian to hold client assets. We do not intend the segregation requirement to preclude traditional operational practices in which client assets are held in omnibus accounts or otherwise commingled with assets of other clients because we recognize that custodians regularly maintain assets in a manner that allows such assets to be identified as held for a particular client, distinct from assets of other clients, and not subject to

[165] *See, e.g.,* Deloitte Outsourcing Article, *supra* footnote 140; U.S. Bank, 5 questions you should ask your custodian about outsourcing (May 19, 2022), *available at https://www.usbank.com/financialiq/plan-your-growth/find-partners/outsourcing-questions-ask-custodian.html* (''It's fairly common for custody banks to outsource day-to-day securities processing work to external vendors—both domestically and overseas.''); Avantage Reply, Outsourcing in the Asset Servicing Industry: Custodian and Depositary Banks, Evolving regulatory requirements and industry practices in the Eurozone and the UK (Nov. 2015), *available at https://www.reply.com/en/topics/risk-regulation-and-reporting/Shared%20Documents/Outsourcing%20Working%20Paper.pdf* (''Custodian banks have traditionally outsourced high-volume operational tasks. While these still form the bulk of outsourcing, activities that contribute to the running of banks themselves are now also being routinely outsourced, including significant chunks of Customer Services, Human Resources, Risk and Finance.''); Geis, George S., *Traceable Shares and Corporate Law,* 113 Nw. U.L. Rev. 227 (2018), at 233–234 (discussing the largest custodial banks performing recordkeeping and information dissemination functions for smaller custodian banks).

[166] *See* Thomas Droll, Natalia Podlich, and, Michael Wedow (2015) *Out of Sight, Out of Mind? On the Risk of Sub-Custodian Structures*. Bundesbank Discussion Paper No. 31/2015, *available at* SSRN: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2797055*.

[167] Proposed rule 223–1(a)(1)(ii)(D). In contrast to the requirements we are proposing to include in the written agreement, and as with the other reasonable assurances requirements, we believe this safekeeping obligation runs primarily to the client.

[168] Segregation of client investments has been a fundamental element of the custody rule since its inception. *See, e.g.,* 1962 Adopting Release, *supra* footnote 2 (requiring advisers to segregate and identify securities beneficially owned by each client, and to hold them in a ''reasonably safe'' place). *See also,* Klees Article, *supra* footnote 24 (describing segregation as a pillar of custody that has generally been recognized in the United States).

[169] The custody rule requires a foreign financial institution to segregate client assets in order to meet the definition of qualified custodian. As discussed above and below, we propose to replace and strengthen the segregation requirement for FFIs in the custody rule that would complement the proposed segregation requirements of the safeguarding rule.

[170] *See, e.g.,* 12 U.S.C. 92(c) and 12 U.S.C. 1464(n)(2) (requiring national banks and Federal savings associations to segregate all assets held in any fiduciary capacity from their general assets and to keep a separate set of books and records showing all transactions in these accounts); section 4d(a)(2) of the Commodity Exchange Act (requiring FCMs to segregate from their own assets all money, securities and other property deposited by futures customers to margin, secure, or guarantee futures contracts and options on futures contracts traded on designated contract markets).

[171] The proposed segregation requirements are drawn from rule 15c3–3 of the Exchange Act, which requires broker-dealers to safeguard their customer assets and keep customer assets separate from the firm's assets, to prevent investor loss or harm in the event of the broker-dealer's failure. *See* Financial Responsibility Rules of Broker-Dealers, Exchange Act Release No. 70072 (Jul. 30, 2013) [78 FR 51824 (Aug. 21, 2013)] (''Financial Responsibility Adopting Release''). In addition, other regulatory regimes have adopted similar requirements. *See, e.g.,* rule 1.20 [17 CFR 1.20] under the Commodity Exchange Act, which requires a futures commission merchant to segregate customer assets from its own assets.

[172] *See, e.g.,* Report of the Trustee's Investigation and Recommendations, In re MF Global Inc., No. 11–2790 (MG) SIPA (Bankr. S.D.N.Y. June 4, 2012) (noting that about $1.6 billion in customer funds were found to be missing after the financial institution's bankruptcy). Crypto asset trading platforms have also experienced failures resulting in bankruptcy, raising questions as to whether investors' funds will be returned. *See, e.g., In re Celsius Network LLC,* 2023 Bankr. LEXIS 2, at *60 (Bankr. S.D.N.Y., Jan 4, 2023) (holding that customer crypto assets in ''Earn Accounts'' were property of the bankruptcy estate).

increased risk of loss arising from a custodian's insolvency.

We understand that the current rule's account requirements in 206(4)–2(a)(1) pose certain compliance challenges when client assets are commingled, including in the context of sweep accounts, escrow accounts, and loan servicing accounts. We believe the proposed segregation requirements [173] along with the proposed written agreement and other reasonable assurances requirements more directly and comprehensively achieve our policy goal than the custody rule's account requirements in rule 206(4)–2(a)(1). In light of the proposed segregation requirements, the safeguarding rule would not include the custody rule's requirement to maintain client funds and securities with a qualified custodian (1) in a separate account for each client under the client's name; or (2) in accounts that contain only client funds and securities under an adviser's name as agent or trustee for the clients.[174]

We believe that proper identification of client assets, as required by the segregation requirement of the proposed rule, would mitigate concerns regarding the safety of a client's assets. Sub-accounting of commingled accounts allows qualified custodians to identify readily an owner's commingled assets at any point in time. Eliminating the custody rule's requirement to maintain accounts that contain only clients' funds and securities also should alleviate certain compliance challenges when client and non-client assets are commingled for administrative convenience and efficiency purposes, such as in the context of sweep accounts, escrow accounts, and loan servicing accounts.[175] We understand that some custodial agreements between advisory clients and qualified custodians contain a contractual provision requiring segregation of client assets from the custodian's proprietary assets and liabilities. We believe that the reasonable assurances requirement in the proposed rule may result in qualified custodians adding such a contractual provision to custodial agreements that do not contain this language. However, we believe that some custodial agreements already contain language addressing the requirement. Moreover, because we understand that many qualified custodians are required by their functional regulator to segregate assets, we believe that an adviser obtaining reasonable assurances regarding segregation as required under the proposed rule would not result in a substantial change in the operational practices of many custodians. More importantly, we believe that the proposed rule's requirement that an adviser obtain reasonable assurances from the qualified custodian regarding the segregation requirement provides vital protections.

v. No Liens Unless Authorized in Writing

The proposed rule would require the adviser to obtain reasonable assurances in writing from the qualified custodian that the qualified custodian will not subject client assets to any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors, except to the extent agreed to or authorized in writing by the client.[176] This requirement is designed to protect client assets by discouraging qualified custodians from using those assets in a manner not authorized by the client. This provision would help ensure that client assets maintained with the qualified custodian are protected and are free of any claims by the qualified custodian, or a third party looking to secure or satisfy an obligation of the qualified custodian, including in cases of the qualified custodian's insolvency or bankruptcy.

Liens and the other claims addressed in the proposed rule can arise in favor of a qualified custodian in a variety of circumstances. For example, in a margin account, a type of brokerage account, a qualified custodian may lend cash to a client to allow the client to purchase securities. The qualified custodian's loan is typically collateralized by the securities purchased by the client, other assets in a client account, and cash, all of which are typically subject to a security interest in favor of the qualified custodian.[177] Similarly, qualified custodians often have contractual or other rights to liens or similar claims arising from unpaid client fees. The rule would not prohibit arrangements like these. Rather, the rule would require that the adviser obtain reasonable assurances from the qualified custodian that the client has authorized in writing any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors that would arise in connection with these arrangements or others. While we recognize that these and similar arrangements involve some level of risk to client assets, we recognize that they can also be beneficial, and should be permitted when authorized.

We believe that many qualified custodians maintain their custodial customer assets free of liens and similar claims, other than those agreed to or authorized in writing by the client. Further, we understand that some custodial agreements contain contractual language addressing when a lien or similar claim will attach to client assets. Therefore, we believe requiring an adviser to obtain this reasonable assurance from the qualified custodian would provide important client protections.

b. Written Agreement

As discussed above, the proposed rule would require an adviser to enter into a written agreement with a qualified custodian containing certain terms that we view as critical to safeguarding client assets.[178] The rule would require that the written agreement contain the terms described in more detail below.

i. Provision of Records

The proposed rule would require that the written agreement with the qualified custodian include a provision requiring the qualified custodian promptly, upon request, to provide records relating to client assets to the Commission [179] or an independent public accountant for purposes of compliance with the rule.[180] Custodial account records provide information that is critical to an independent public accountant's ability to perform its role under the current rule, and would be similarly critical under the proposed rule. We understand, however, that accountants often struggle to obtain—or to obtain timely—information from qualified custodians when performing surprise examinations under the current rule unless the advisory client requests that

[173] The safeguarding rule would also require certain additional segregation requirements related to, among other things, segregating client assets from the adviser's assets, discussed in more detail in section D, below. *See* proposed rule 223–1(a)(3).

[174] Custody rule 206(4)–2(a)(1).

[175] *See* 2014 IM Guidance, *supra* footnote 17; Madison Capital Funding, Inc., SEC Staff No-Action Letter (Dec. 20, 2018) (''Madison Capital No-Action Letter'').

[176] *See* proposed rule 223–1(a)(1)(ii)(E).

[177] *See* Uniform Commercial Code, section 8–504 and cmt. 2 (''Margin accounts are common examples of arrangements in which an entitlement holder authorizes the securities intermediary to grant security interests in the positions held for the entitlement holder.'').

[178] Proposed rule 223–1(a)(1)(i).

[179] All custodians, including foreign custodians, must provide records of custody and use of the securities, deposits, and credits related to an investment adviser's client to representatives of the Commission upon request. Advisers Act section 204(d)(1). The Commission believes that formalizing this requirement in the written agreement between a qualified custodian and an investment adviser will ensure qualified custodians are aware of the requirements of the Advisers Act.

[180] Proposed rule 223–1(a)(1)(i)(A).

the qualified custodian share the information. We realize this is likely because the qualified custodian has no contractual agreement with the adviser or the accountant that has been hired by the adviser. We believe the proposed contractual requirement would substantially mitigate these complications.

We understand that qualified custodians do not often provide third parties access to custodial account records in light of privacy concerns for their customers, unless there is contractual privity with those third parties or their customers request they do so. We believe that the proposed contractual requirement would mitigate these record access challenges because the qualified custodian would be in direct contractual privity with the adviser and would have a contractual obligation to provide the records required by the rule.

ii. Account Statements

The proposed rule would require that the written agreement with the qualified custodian provide that the qualified custodian will send account statements (unless the client is an entity whose investors will receive audited financial statements as part of the financial statement audit process pursuant to the audit provision of the proposed rule),[181] at least quarterly, to the client and the investment adviser, identifying the amount of each client asset in the custodial account at the end of the period as well as all transactions in the account during that period, including advisory fees.[182]

The custody rule requires an adviser to have a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each of the adviser's clients for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period.[183] We continue to believe that qualified custodians' delivery of account statements *directly* to advisory clients—without involvement of the adviser—helps provide clients with confidence that any erroneous or unauthorized transactions by an adviser would be reflected in the account statement and, as a result, would deter advisers from fraudulent activities. In a change from the current custody rule, the qualified custodian would also now be required to send account statements, at least quarterly, to the investment adviser, which would allow the adviser to more easily perform account reconciliations. We also believe that, because of custody rule 206(4)–2(a)(3), the account statement contract provision is consistent with longstanding custodial practices and would easily be incorporated by qualified custodians into the written agreement. The account statements could also be delivered to the client's (or pooled investment vehicle investor's) independent representative.

In circumstances where an investor is itself a pooled vehicle that is controlling, controlled by, or under common control with the adviser or its related persons (a ''control relationship''), the contract with the qualified custodian must require the quarterly account statement to be delivered by the qualified custodian to all of the investors in each pooled investment vehicle client, which includes investors in the underlying pools by looking through that pooled vehicle (and any pools in a control relationship with the adviser or its related persons, such as in a master-feeder fund structure).[184] Advisers to pooled investment vehicles may from time to time establish special purpose vehicles (''SPVs'') or other pooled vehicles for a variety of reasons, including facilitating investments by one or more private funds that the advisers manage. If a qualified custodian did not look through each pool in a control relationship with the adviser, the qualified custodian would be essentially delivering the quarterly statement to the adviser rather than to the parties the quarterly statement is designed to inform. Outside of a control relationship, such as if a private fund investor is an unaffiliated fund of funds, this same concern is not present, and the qualified custodian would not need to look through the structure to make meaningful delivery. The qualified custodian would just distribute the quarterly statement to the unaffiliated fund of funds' adviser or other designated party. We believe that this approach would lead to meaningful delivery of the quarterly statement to advisory clients. Also in a change from the current custody rule, the proposed rule would require the written agreement to contain a provision prohibiting the qualified custodian from identifying assets on account statements for which the qualified custodian lacks possession or control, unless requested by the client. If a client requests such assets be included on its account statement, the account statement may identify the assets, but only if the account statement clearly indicates that the custodian does not have possession or control of the assets.[185] Advisers have, at times, requested a qualified custodian to include particular holdings and transactions on the custodial account statements for a variety of reasons, including in an attempt to demonstrate compliance with the custody rule. For example, it is our understanding that custodians have been unwilling or unable to take possession or control of certain investments, such as a variety of privately issued securities. Advisers sometimes request that custodians report these securities as an ''accommodation'' on a custodial account statement so that the client is aware of their existence.

We recognize that account statements provided by a qualified custodian on a so-called ''accommodation basis'' may offer a client the ability to review all of its investments in a single consolidated account statement and potentially alert a client or an auditor to the existence of an investment.[186] We are concerned, however, that the practice of a qualified custodian including investments that it is not safeguarding on an account statement may be misleading and confusing to clients. To evaluate the holdings and transactions reported on an account statement, a client must have confidence in the statement's integrity and accuracy. Accordingly, we would prohibit an adviser from participating in a practice that we believe undermines that integrity and utility.[187]

[181] *See* proposed rule 223–1(b)(4).

[182] Proposed rule 223–1(a)(1)(ii)(B). The proposed requirement is similar to the approach in the current rule with regard to the investment adviser forming a reasonable belief after due inquiry that the qualified custodian sends account statements, at least quarterly, to the client. *See* rule 206(4)–2(a)(3).

[183] Custody rule 206(4)–2(a)(3).

[184] *See* proposed rule 223–1(c).

[185] To the extent that a *client* requests that a qualified custodian report in account statements holdings and transactions to which the custodian is not attesting as a custodian and for which the custodian is disclaiming liability, the proposed rule would not disrupt this practice, though it would require them to be clearly identified as such.

[186] The rule proposes a process and protections for certain assets unable to be maintained with a qualified custodian, thereby making accommodation reporting unnecessary. *See* section II.C, *infra.*

[187] Other regulatory regimes have raised concerns about this practice including the potential for communicating inaccurate, confusing or misleading information to customers, lapses in supervisory controls, and the use of these reports for fraudulent or unethical purposes. *See, e.g.,* FINRA's Regulatory Notice 10–19 (reminding broker-dealer firms of their responsibilities to ensure that they comply with all applicable rules when engaging in providing customers with consolidated financial account reporting).

iii. Internal Control Report

The proposed rule would require that the written agreement with the qualified custodian provide that the qualified custodian, at least annually, will obtain, and provide to the investment adviser a written internal control report that includes an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, are suitably designed, and are operating effectively to meet control objectives relating to custodial services (including the safeguarding of the client assets held by that qualified custodian during the year).[188] Consistent with an adviser's fiduciary duty, an adviser should review the report for control exceptions and take appropriate action where necessary.[189]

Although the custody rule requires an internal control report only when the adviser or its related person acts as a qualified custodian,[190] we believe expanding this requirement to all qualified custodians under the proposed rule would mitigate risks to client assets regardless of the affiliation of the qualified custodian.[191] We believe the proposed requirement would help protect client assets by ensuring that the qualified custodian's controls with respect to its safeguarding practices are routinely evaluated by a third party that is independent of the custodian. We drew the proposed requirement from our experience with the internal control report requirement under the custody rule, understanding of requirements currently applicable to some types of qualified custodians, as well as best practices.[192]

The objective of the examination supporting the internal control report is to obtain reasonable assurance that the qualified custodian's controls have been placed in operation as of a specific date, and are suitably designed and operating effectively to meet control objectives related to safeguarding of client assets during the period specified.[193] Based on our experience with the custody rule, we believe that the benefits and protections that we initially believed were warranted for a more limited group of qualified custodians should be expanded to include all qualified custodians.[194]

We understand that not all qualified custodians obtain internal control reports, although we believe many do. We also understand that for those qualified custodians that currently obtain internal control reports, the scope of those reports may not cover the financial institutions' safeguarding activities that this proposed requirement is designed to cover. Nonetheless, we believe this requirement is justified because the proposed internal control report requirement would provide meaningful investor protection benefits by, among other things, providing advisers with information regarding the control practices of the qualified custodian that would enable advisers to assist advisory clients in making more informed decisions concerning holding assets with particular qualified custodians.

We are not requiring the provision of a specific type of internal control report as long as the required objectives are addressed.[195] This flexibility would permit qualified custodians to leverage existing audit work to satisfy regulatory requirements, or work currently performed as part of internal control reports prepared to meet client demand.

The proposed rule would define ''independent public accountant'' to mean a public accountant that meets the standards of independence described in rule 2–01 of Regulation S–X (17 CFR 210.2–01).[196] The Commission has long recognized that an audit by an objective, impartial, and skilled professional contributes to both investor protection and investor confidence.[197] We understand that qualified custodians currently obtaining internal control reports voluntarily or pursuant to requirements of the qualified custodian's functional regulator may need to engage a new accountant if the qualified custodian's current accountant is not independent as defined by the proposed rule.[198] We believe that adherence to the bedrock principle that auditors must be independent in fact and in appearance [199] contributes to investor protection and investor confidence in connection with the relationship between an auditor and the qualified custodian. We therefore believe that this requirement is appropriate.

In connection with our concerns noted above regarding circumstances in which an adviser or related person is the qualified custodian, we are proposing to retain the current rule's approach that if the qualified custodian is a related person or the adviser, the independent public accountant that prepares the internal control report

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[188] This requirement would apply as a control objective of the internal control report rather than a requirement in the rule, thereby expanding the requirement to all qualified custodians, not just a qualified custodian that is the adviser or its related person. *See* generally, Commission Guidance Regarding Independent Public Accountant Engagements Performed Pursuant to Rule 206(4)–2 Under the Investment Advisers Act of 1940, Advisers Act Release No. 2969 (Dec. 30, 2009) [75 FR 1492 (Jan. 11, 2010)] (''Accounting Guidance'').

[189] *See supra* footnote 57.

[190] Current rule 206(4)–2(a)(6).

[191] An introducing broker that is also an adviser or the adviser's related person would not be considered as acting as a qualified custodian under the proposed rule if all client investments are maintained with a carrying broker (which is not a related person of the adviser) and thus the introducing broker would not be subject to the internal control report requirement.

[192] Rule 206(4)–2(a)(6)(ii). *See* 2009 Proposing Release, *supra* footnote 11, at n.88 (noting that custodians often provide internal control reports to clients who demand a rigorous evaluation of internal controls as a condition of obtaining their business and that obtaining such report is an ''industry best practice.''). *See also* United States Government Accountability Office, Investment Advisers; Requirements and Costs Associated with the Custody Rule (July 2013), *available at https://www.gao.gov/assets/gao-13-569.pdf* (stating that representatives from two industry associations discussed that institutional investors commonly require custodians to obtain internal control reports).

[193] *See* Accounting Guidance, *supra* footnote 188, at section III.

[194] *See* rule 206(4)–2(a)(6)(ii).

[195] For example, we believe that a report on the description of controls placed in operation and tests of operation effectiveness, commonly referred to as a ''SOC 1 Type 2 Report,'' would be sufficient to satisfy the requirements of the internal control report, provided that the report covers whether the controls have been placed in operation as of a specific date, are suitably designed, and are operating effectively in order to meet control objectives as required by the rule. A report that simply provides a report of procedures or controls a qualified custodian has put in place as of a point in time, commonly referred to as a ''SOC 1 Type 1 Report,'' would not satisfy the requirements of the internal control report because it does not test operation effectiveness of the controls. In addition, a report issued in connection with an examination of internal control conducted in accordance with AT–C section 315: Compliance Attestation (''AT–C section 315'') or AT–C section 320: Reporting on an Examination of Controls at a Service Organization Relevant to User Entities' Internal Control over Financial Reporting (''AT–C section 320'') under the standards of the American Institute of Certified Public Accountants would also be sufficient provided that the report covers whether the controls have been placed in operation as of a specific date, are suitably designed, and are operating effectively in order to meet control objectives as required by the rule. *See* 2009 Adopting Release, *supra* footnote 11, at section II.C.1. Similarly, a report based on an examination in accordance with PCAOB AT–1 of a broker-dealer's compliance report prepared pursuant to rule 17a–5 of the Exchange Act would be sufficient to satisfy the internal control requirement. *See* 17 CFR 240.17a–*5;* Broker-Dealer Reports, Exchange Act Release No. 34–70073 (July 30, 2013) [78 FR 51910 (Aug. 21, 2013)].

[196] *See* proposed rule 223–1(d)(5). The definition in the proposed rule would be amended to reference Rule 2–01 in its entirety rather than the more limited reference in the current custody rule (see rule 206(4)–2(d)(3), referencing 2–01(b) and (c)), which amendment is designed to clarify that the entirety of the auditor qualification and independence requirements in Rule 2–01 apply.

[197] *See* Revision of the Commission's Auditor Independence Requirements, Release No. 33–7919 (Nov. 21, 2000) [65 FR 76008 (Dec. 5, 2000)].

[198] *See* proposed rule 223–1(a)(1)(i)(C); 223–1(d)(5).

[199] *See* Qualifications of Accountants, Release No. 33–10876 (Oct. 16, 2020) [85 FR 80508 (Dec. 11, 2020) (discussing bedrock principles).

must verify that client assets are reconciled to a custodian other than you or your related person. In addition, we would continue to require that if the qualified custodian is a related person or the adviser, the independent public accountant is registered with and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board (''PCAOB''), in accordance with the rules of the PCAOB.[200] We believe that qualified custodians routinely retain accountants that satisfy this requirement because of this requirement under the custody rule. In light of our experience with this requirement of the current rule, we believe that registration and the periodic PCAOB inspection of an independent public accountant's overall quality control system will provide us greater confidence in the quality of the internal control report in the context of an affiliated adviser and custodian.

iv. Adviser's Level of Authority

The proposed rule would require that the written agreement with the qualified custodian specify the investment adviser's agreed-upon level of authority to effect transactions in the custodial account as well as any applicable terms or limitations.[201] We are also proposing that this contract provision permit the adviser and the client to reduce the specified level of authority. Our understanding is that investment advisers often are given authority over the custodial account in the custodial agreement between the custodian and the client that is broader than what the adviser and client agreed to in the advisory agreement. For example, an adviser may not have authority under its advisory agreement with a client to instruct the client's custodian to disburse client assets. If, however, the client's agreement with its qualified custodian grants the adviser broad authority over the client's account, including to disburse or transfer assets, the adviser would be able to effect a change in beneficial ownership of the client's assets.[202] In these circumstances, from the qualified custodian's perspective, the client has authorized the adviser to withdraw the client's assets and, while there may be constraints contained in the advisory agreement between the adviser and a client, the custodian may not be aware of these constraints or may be unwilling or unable to treat the terms of the advisory agreement as controlling.[203] In this scenario, believing the adviser to have authority over the client's assets, the custodian could accept the adviser's instructions to direct the disposition of the client's assets.[204] We are concerned this puts clients at risk, such as in the event a rogue advisory employee misuses the authority to direct the disposition of a client's assets held by the custodian. We understand that advisers have had little success in modifying or eliminating their unwanted authority either because a custodian is reluctant to accept the adviser's request to modify its agreement with its client, or the client may lack the bargaining power to negotiate more limited terms on the adviser's authority over the client's assets because the custodian may refuse to modify its standard forms.[205] This contractual requirement of the proposed rule is designed to mitigate these concerns and empower advisers to modify this aspect of the custodial agreement to better reflect client intentions and to be consistent with the adviser's contractual obligations to its clients.

Our staff has observed that qualified custodians have been reluctant to modify or customize the level of authority investment advisers have with respect to customer accounts. It increases their need to monitor customer accounts, and to accept liability, for unauthorized transactions by an adviser and its personnel. We believe that the risks of inadvertent custody, the related risk that a custodian may follow an instruction with respect to client assets presuming authority that the adviser does not have under its advisory contract with the client, and our staff's observation of the reluctance of qualified custodians to modify adviser authority, warrant the proposed requirement. Ultimately, we believe this requirement would better protect advisory clients than the current default broad authority provisions in current contracts.

We request comment on all aspects of the proposed reasonable assurances and written agreement requirement, including the following:

55. Is our understanding correct that custodians are familiar with the concepts addressed by the reasonable assurances and written agreement requirements?

56. Should the rule include the due care reasonable assurances requirement? Is this standard of care common practice in the custodial marketplace and, if so, would custodians be willing to provide information to an adviser sufficient to satisfy the proposed rule? Instead of the proposed approach, should the rule require generally that an adviser obtain reasonable assurances that a qualified custodian meets certain minimum commercial standards and then specify some but not all applicable standards? Would the proposed requirement provide additional protections for clients when an adviser has custody of client assets and further the policy goals of the rule?

57. Should the rule include the reasonable assurances requirement that the qualified custodian will indemnify the client (and will have insurance arrangements in place that will adequately protect the client) against the risk of loss in the event of the qualified custodian's own negligence, recklessness, or willful misconduct? Would this requirement provide additional protections for clients when an adviser has custody of client assets and further the policy goals of the rule? Alternatively, should we require reasonable assurances of a different indemnification standard? If so, what standard and how would that standard protect investors consistent with the policy goals of the rule?

58. Would the proposed indemnification standard be a substantial departure from current industry practice? Would it be expensive for qualified custodians and would those costs be passed on to custodial clients? If so, are there less expensive ways of achieving the policy goals of the rule? Would this requirement result in custodians ceasing operations in the custody business? If so, what proportion of custodians would commenters expect to stop providing custody services as a result of this proposed rule? Should the safeguarding rule, instead, require disclosure to clients that they could lose their assets in the event of custodian misconduct?

[200] Proposed rule 223–1(a)(1)(i)(C)(1).

[201] Proposed rule 223–1(a)(1)(i)(D).

[202] *See, e.g.,* Inadvertent Custody: Advisory Contract Versus Custodial Contract Authority, Division of Investment Management Guidance Update No. 2017–01 (Feb. 2017) (''2017 IM Guidance'') in which our staff discussed its views on the application of the current custody rule to various types of custodial agreements between a client and a custodian that grant an adviser broader access to client funds or securities than the adviser's own agreement with the client contemplates.

[203] Our staff took a similar view. *See id.*

[204] While the advisory agreement between the adviser and its client may constrain the adviser's authority, the custodian may not be aware of such constraints. A separate bilateral restriction between the adviser and the client is insufficient to prevent the adviser from having custody where the custodial agreement enables the adviser to withdraw or transfer client funds, securities or similar investments upon instruction to the custodian. Our staff took a similar view. *See* 2017 IM Guidance, *supra* footnote 202.

[205] *See supra* footnote 202 and accompanying text.

We understand that retail clients were often afforded the fewest protections. If we were to require disclosure, instead of indemnification, would such retail clients be able to negotiate with custodians for better protection?

59. Do commenters agree with our understanding that custodians may cover losses caused by their own misconduct even if the customer is ineligible for indemnification under the custodial agreement to avoid headline exposure or as a gesture of goodwill to their custodial customers? Do insurers contribute compensation as part of these payouts? If so, how frequently? Do advisers step in to compensate customers in these circumstances? If so, how frequently?

60. Should the proposed rule include the reasonable assurances requirement requiring the qualified custodian to provide indemnity and have insurance arrangements in place to adequately protect its clients? Should the rule include additional safeguards regarding the indemnification requirement, such as stating that insurance proceeds will be solely for the benefit of the client, and will not be considered an asset of anyone other than the client? Should the rule include any safeguards around the type of insurance a qualified custodian could maintain for those indemnification purposes? If yes, what types of safeguards should be imposed? For example, should the insurance company be of a certain type or hold a certain qualification or rating? What alternatives should we require to achieve our policy goals? Are there any particular challenges for FFIs meeting this requirement? If so, what are they?

61. Should the proposed rule include the reasonable assurances requirement that the existence of any sub-custodial, securities depository, or other similar arrangements with regard to the client's assets will not excuse any of the qualified custodian's obligations to the client? Would that requirement help ensure that a qualified custodian could not avoid responsibility for the other important safeguarding obligations it owes to the client by delegating custodial responsibility to a sub-custodian or other responsibilities to other third parties? Would the requirement provide additional protections for clients when an adviser has custody of client assets and further the policy goals of the rule?

62. Should the rule include the proposed reasonable assurances of segregation of client assets requirements? Are these requirements sufficiently clear?

63. Would the proposed reasonable assurances of segregation of client assets requirements impose appropriate limitations to safeguard client assets? Should we eliminate or modify any of them? Alternatively, are there other limitations that would be appropriate?

64. Would the proposed reasonable assurance of segregation of client assets requirement increase the likelihood that client assets will be available to be returned to clients if a qualified custodian experiences financial events such as insolvency or bankruptcy? For example, do commenters believe the requirements would help ensure that client assets are more readily identifiable as client property?

65. Should certain assets be excluded from these reasonable assurances of segregation of client assets requirements? If so, which assets and why? Would limiting these requirements to certain types of assets present compliance challenges? If so, which assets and why?

66. In particular, would the proposed reasonable assurances of segregation of client assets requirement present challenges with respect to crypto assets? Should we address crypto asset segregation and/or custody with separate requirements? Do crypto assets raise specific segregation issues not presented by other assets? If so, what are they and why? Would the proposed requirements offer substantial protections in the event of a bankruptcy or financial losses involving a custodian with custody of crypto assets? Would the proposed reasonable assurances of segregation of client assets requirement present challenges with respect to other types of assets?

67. Does the proposed reasonable assurance of segregation requirement guard against loss, misappropriation, misuse, theft, and the risk of client assets being subject to creditor claims in the insolvency or bankruptcy of the qualified custodian, while permitting the flexibility that would address some of the compliance challenges that the current rule presents (*e.g.,* commingling of client and non-client assets)?

68. Should we instead retain the custody rule's requirement to maintain client funds and securities with a qualified custodian in a separate account for each client under the client's name or in accounts that contain client funds and securities under the adviser's name as agent or trustee? If so, should any of the custody rule's requirements be modified in any way? If we were to retain the custody rule's requirement, should we expand the scope of the separate account requirement to assets from funds and securities?

69. Is our understanding correct that, for administrative convenience and other reasons, qualified custodians often hold client assets in omnibus accounts containing assets of more than one client or similar commingled-style accounts? Do commenters agree that this practice may be even more common when a qualified custodian uses a sub-custodian to hold client assets?

70. Should the rule require that an adviser obtain reasonable assurances that the qualified custodian will not commingle client and non-client assets, similar to the custody rule?[206] Alternatively, should the rule be modified to permit the commingling of client and non-client assets for administrative convenience and efficiency? If so, what should be considered ''administrative convenience and efficiency''? Does allowing client and non-client assets to be commingled (*e.g.,* in the same omnibus account) increase the risk that client assets will be lost, misused, stolen, or misappropriated? Could an advisory client's assets be used to satisfy the debts of someone else in a bankruptcy event if client and non-client assets are commingled?

71. Do commenters agree that there are circumstances when qualified custodians' services require them to commingle advisory client assets and assets of non-advisory customers? For example, when a qualified custodian uses sweep accounts, escrow accounts, and loan servicing accounts? In these circumstances, should the rule require additional protections? Which protections and why and would they differ depending on the type of commingled account?

72. Should the rule require that an adviser obtain reasonable assurances from the qualified custodian regarding the sub-accounting of commingled accounts? Would such a requirement provide additional protection to client assets?

73. Are there instances where commingling or pooling of certain assets by qualified custodians may occur via certain omnibus and sub-accounting arrangements that may present compliance challenges under the reasonable assurances of segregation of client assets requirement? What are those instances and what are the challenges?

74. Do commenters think that qualified custodians will include contractual segregation provisions in their custodial agreements with advisory clients if they do not already do so? Should the rule require an

[206] *See* rule 206(4)–2(a)(1)(i).

express contractual requirement between the adviser and custodian to identify and segregate client investments? Would a contractual requirement help ensure that advisory client assets are protected?

75. Do commenters agree with our belief that not all financial institutions that serve as qualified custodians, particularly FFIs, are currently required to segregate and identify their client investments? Do commenters agree that requiring an adviser to obtain reasonable assurances that a qualified custodian will segregate client assets from the custodian's proprietary assets and liabilities would be critical to protecting client investments in the event of a qualified custodian's insolvency as well as in the event of a taking by a foreign government? Do commenters believe there may be reluctance by some financial institutions to segregate client assets? Are there circumstances in which segregation might not be important? If so, which circumstances?

76. Would this segregation provision present practical challenges? For example, would it present practical challenges in the context of omnibus accounts or temporary sweep accounts? Would financial institutions be able to satisfy the segregation provision? For example, we know that national banks and Federal savings associations are required to segregate all assets held in any fiduciary capacity from their general assets. Is this also true of national banks and Federal savings associations that hold custodial assets in a non-fiduciary capacity? Are there other compliance challenges that this proposed segregation requirement would pose? Are there circumstances in which qualified custodians' services require them to commingle advisory client assets with other assets?

77. In the context of requiring an FFI to segregate client investments, do commenters believe that the reasonable assurances segregation requirement would help to preserve the client's interests in the event of a government taking?

78. In the event of the insolvency or bankruptcy of a qualified custodian, do commenters agree with our understanding that the sub-accounting of commingled accounts allows a qualified custodian to readily identify the rightful owner of any investment at any point in time? Are there any particular assets or services for which such identification via sub-accounting is difficult or burdensome? If so, what are the reasons for these difficulties?

79. Is our approach in requiring a qualified custodian to maintain client assets pursuant to a written agreement between the qualified custodian and the investment adviser appropriate? Would the proposed approach provide additional protections for clients when advisers have custody of client assets and further the policy goals of the rule? Would this requirement increase costs to maintain client assets with a qualified custodian? Would this approach limit the pool of financial institutions that are able to serve as qualified custodians? Would financial institutions currently acting as qualified custodians exit the business as a result of the written agreement requirement? Do commenters agree that custodial practices, types of instruments custodians hold, and the regulatory framework to which these financial institutions are subject have evolved, in part to accommodate new entrants to the market for custodial services? Do commenters agree that this evolution, including new custodians and new custodial practices, has resulted, in at least some cases, in a general reduction in the level of protections offered by custodians, often resulting in advisory clients with the least amount of bargaining power (*i.e.,* retail investors) receiving the most limited protections? Are there other reasons that commenters believe custodial practices have evolved to result in a general reduction in the level of protections offered by custodians? Would the proposed approach mitigate some of our concerns with regard to these custodial market changes?

80. Is our belief correct that financial institutions that act as qualified custodians under the current rule already provide some of the protections that would be required under the proposed rule's contractual requirements, either to satisfy regulatory requirements or pursuant to their existing contracts with their clients? Do these qualified custodians already provide the protections that would be required in the proposed written agreement to every customer? Are some protections provided to customers more often than others? If so, which protections and why?

81. Should the rule permit an adviser or its related person to be a qualified custodian, as under the custody rule, or should we prohibit the adviser or its related person from being the qualified custodian? Do commenters agree that an adviser or related person acting as the qualified custodian presents risks to client assets that are not present when a qualified custodian is not the adviser or a related person of the adviser? Do commenters agree that the proposed requirements in the rule, including the proposed internal control report requirements applicable to qualified custodians that are the advisers or a related person, would help to reduce those risks? If the rule prohibits the adviser or its related person from being the qualified custodian, would it result in additional costs or operational burdens on advisory clients? For example, would the requirement cause advisory clients to lose access to services or other efficiencies they currently receive? Would the requirement result in higher costs for advisory clients?

82. Given that the written agreement and reasonable assurances approach would be applicable equally to the different types of qualified custodians, should the rule identify other financial institutions such as securities depositories, transfer agents, credit unions, insurance companies, or other intermediaries as qualified custodians?

83. Are the contractual requirements and reasonable assurances requirements sufficiently clear? Are there additional contractual requirements or reasonable assurances related to the safeguarding of client investments that should be included in the written agreement or obtained by the adviser? If so, what are they, and why? Should we eliminate any of the contractual requirements or reasonable assurances requirements? If so, which ones, and why? Should all of the requirements be contractual or reasonable assurances, rather than a mix of these two categories as we proposed? Should any be re-categorized?

84. Are there alternatives to all or any of the contractual requirements or reasonable assurances requirements that would support the policy goals of the proposed requirements while obviating the need for one or more specific contractual provisions or reasonable assurances? If so, what are the alternatives? Specifically, would we be able to achieve the same policy goals by requiring that an adviser adopt and implement policies and procedures reasonably designed to ensure that a qualified custodian was providing certain protections to client assets, rather than requiring a contractual clause for the protection? For example, would requiring advisers to adopt and implement a policy and procedure reasonably designed to ensure that a qualified custodian would promptly, upon request, provide records relating to the adviser's clients' assets held in the account at the qualified custodian to the Commission or to an independent public accountant provide protection equivalent to the proposed contractual obligation to provide these records? What about the proposed internal control report contractual obligation?

Would a client be able to obtain equivalent protection provided by an adviser's adoption and implementation of a policy and procedure reasonably designed to ensure that the qualified custodian will provide the internal control report required in the proposed contractual requirement? Are there other alternatives to any of the contractual requirements, such as requiring that an adviser obtain reasonable assurances from the qualified custodian that the qualified custodian has contractually agreed to provide account statements, internal control reports, or any of the other requirements we are proposing to be included in the written agreement? Are there any other alternatives that we should require?

85. Are there circumstances in which the written agreement and reasonable assurances requirements should not be required? For example, should the written agreement and reasonable assurances requirements not apply in instances where an advisory client has a custodial relationship with a qualified custodian that precedes the client's engagement of the adviser? If so, how long should the custodial relationship precede the advisory relationship in order for an exception of this type to apply?

86. Should the proposed rule include the contractual provision that the qualified custodian will promptly, upon request, provide records relating to client investments to an independent public accountant for purposes of compliance with the rule? Are we correct in our belief that this proposed provision would facilitate the public accountant's ability to obtain custodial account records? Would this requirement provide additional protections when the adviser has custody of client assets and further the policy goals of the rule?

87. Should we require a more specific time period in which a qualified custodian would be required to provide records? For example, should we require that a qualified custodian provide records within three days of a request?

88. Is our understanding correct that qualified custodians do not often provide third parties access to custodial account records in light of privacy concerns for their customers, unless there is contractual privity with those third parties or their customers request they do so? If so, would the proposed contractual requirement mitigate these record access challenges because the qualified custodian would be in direct contractual privity with the adviser and would have a contractual obligation to provide records?

89. Should the proposed rule include the contractual requirement that the qualified custodian will send account statements, at least quarterly, to the client and the investment adviser? The current rule requires an investment adviser to have a reasonable basis, after due inquiry, for believing that the qualified custodian maintaining client investments sends an account statement, at least quarterly, to the client. Is the proposed requirement regarding sending account statements to the adviser necessary or helpful? Would that requirement have a significant cost impact on qualified custodians and would those costs be passed on to advisory clients? Are there alternatives to the proposed contractual provision that we should require? For example, would the client have sufficient protection when an adviser has custody of its assets if we were to require that an adviser must have reasonable assurance that the qualified custodian maintaining client assets sends an account statement, at least quarterly, to the client?

90. To what extent would the proposed requirement to provide custodial account statements to advisers increase costs to advisory clients?

91. To what extent do commenters believe that the requirement to provide custodial account statements to advisers would have an impact on an adviser's duty to monitor? Do commenters believe that it would increase the frequency at which some advisers would be required to monitor activity in client accounts? Would this enhance protection of client assets? Could it increase advisory costs?

92. Do commenters agree that custodians regularly send account statements to their custodial customers attesting to the holdings and transactions in the account during a particular period? Do commenters agree that advisory clients use these account statements to identify erroneous or unauthorized transactions or withdrawals in their accounts*?*

93. Many advisers or their related persons serve as advisers to pooled investment vehicles or to other similar entities (*e.g.,* general partner of a limited partnership). The proposed rule would continue to except these advisers from the requirement to have a qualified custodian send account statements with respect to pooled investment vehicles that are audited annually and distribute their audited financial statements to the investors in the pool. Should we continue to except these advisers from the account statement requirement? Would the investors in those pools find the account statement useful to monitor the pool's account activity? Should we extend this exception to all entities that are audited annually and distribute audited financial statements to investors in the entities pursuant to the audit provision, as proposed, provided the entity complies with all of the requirements in the proposed audit provision?[207] Are there other persons that we should except from this requirement?

94. In circumstances where an investor is itself a pooled vehicle that is controlling, controlled by, or under common control with the adviser or its related persons (a ''control relationship''), should the contract with the qualified custodian require the quarterly account statement to be delivered by the qualified custodian to investors in the underlying pools by looking through that pooled vehicle (and any pools in a control relationship with the adviser or its related persons, such as in a master-feeder fund structure)? Do commenters agree with our understanding that if a qualified custodian did not look through each pool in a control relationship with the adviser, the qualified custodian would be essentially delivering the quarterly statement to the adviser rather than to the parties the quarterly statement is designed to inform? Do commenters agree with our view that requiring the qualified custodian to ''look through'' in these instances would lead to meaningful delivery of the quarterly statement to advisory clients?

95. Is our understanding correct with respect to current practices of reporting certain custodial customer holdings for which the qualified custodian lacks possession or control on an accommodation basis?

96. Should the proposed rule prohibit account statements from identifying clients' investments for which the qualified custodian lacks possession or control unless the client requests otherwise? Do commenters agree that the practice of a qualified custodian including on an account statement assets that it is not safeguarding may be misleading to clients? Are there challenging practical implications of this proposed prohibition? For instance, our staff has previously taken the view that, under some arrangements, an adviser that is a qualified custodian may send its advisory clients account statements that include assets maintained with a sub-custodian that is also a qualified custodian.[208] Would the proposed contract provision preclude

[207] *See* proposed rule 223–1(b)(4) and section II.G.1, *infra.*

[208] *See* Custody Rule FAQs, *supra* footnote 17, at Question IX.1.

this type of arrangement? Similarly, some qualified custodians (regardless of whether they are related persons of the adviser) send consolidated account statements that include the holdings of sub-custodians. Would the proposed contract provision disrupt this practice? Are there ways of improving account statement integrity without eliminating qualified custodians' ability to send consolidated account statements in these circumstances? For example, should we permit an adviser to request that these assets be included on the account statement but require that such request instruct a qualified custodian to include disclosure on the statement explaining that the qualified custodian does not have custodial liability for those investments? Are there are other disclosures that would appropriately distinguish how the qualified custodian maintains investments?

97. Should we include the contractual requirement that the qualified custodian, at least annually, obtain, and provide to the investment adviser a written internal control report? Would the proposed internal control requirement provide additional protections where the adviser has custody? Would the proposed internal control requirement raise costs for advisory clients? Should the contractual requirement require some additional notification of any material discrepancies identified in an examination supporting the internal control report? For example, should the contractual requirement require that the accountant performing the examination notify the Commission of any material discrepancies by submitting a form such as Form ADV–E to the Commission? Should the contractual requirement require the accountant to notify the clients of the material discrepancies? Should the contractual requirement include any other provisions with respect to the written internal control report?

98. Should we prescribe particular steps an adviser should take to review internal control reports for control exceptions? For example, should we require an annual review of these reports by the adviser's Chief Compliance Officer or an adviser personnel with the skill set to review such reports?

99. Should we specify the internal control report to be obtained at least annually, as proposed? Alternatively, should the internal control report be obtained more or less frequently?

100. Should the proposed internal control report be based on an assessment of the same control objectives outlined in the 2009 Accounting Guidance?[209] Are these control objectives applicable to all qualified custodians? Should certain of the control objectives be required only when the adviser uses a related party qualified custodian? Have custodial practices changed since the 2009 Accounting Guidance was published which would necessitate the addition or removal of control objectives in order to meet the policy goals of the proposed rule? Would additional control objectives be necessary in order to appropriately safeguard all client assets as required under the proposed rule, compared to funds and securities as required under the current custody rule?

101. When preparing an internal control report for a related party qualified custodian, should an accountant continue to be required to verify that client assets are reconciled to a custodian other than the adviser or its related person? Should this required reconciliation be limited to only securities? Are there custodians (like a securities depository) unaffiliated with the adviser that can hold all client assets when a related party qualified custodian is utilized? Is further guidance needed on this reconciliation requirement?

102. Should the contractual provision require that the independent public accountant that prepares or issues the report be registered with the PCAOB when the adviser serves as, or is a related person of, the qualified custodian, as proposed? If so, should the independent public accountant also be subject to regular inspection by the PCAOB, as proposed? Would using independent public accountants registered with, and subject to regular inspection by, the PCAOB increase the costs to obtain these reports or make it too difficult to obtain a qualified accounting firm to provide an internal control report? Should there be a different independence standard for accountants performing the engagement? Rather than the independence standard proposed, should the rule require an accountant to not be a related person of the qualified custodian as that term is defined under the safeguarding rule?[210]

103. The current rule[211] and proposed rule[212] define an independent public accountant as a public accountant that meets the standards of independence described in rule 2–01 of Regulation S–X (17 CFR 210.2–01). Do custodians that voluntarily obtain internal control reports or obtain them to satisfy other requirements often obtain them from independent public accountants that are independent according to this standard? If not, do they have another standard for determining independence? For example, do custodians require auditors to meet the independence standard set by the Association of International Certified Professional Accountants? Do custodians require an independent public accountant to be unaffiliated from the custodian?

104. Rather than the contractual provision requiring that the independent public accountant that prepares or issues the report be registered with the PCAOB when the adviser serves as, or is a related person of, the qualified custodian, as proposed, should this requirement apply to all qualified custodians, regardless of whether the qualified custodian is the adviser or a related person? If so, should the rule contain different requirements for a qualified custodian that is the adviser or a related person?

105. Is it appropriate, as proposed, to require that an adviser that is also the qualified custodian include all of the proposed reasonable assurances protections in the written agreement with the client? Should we require similar protections for any related person qualified custodian? For example, should the rule require the written agreement of any related person that is the qualified custodian to include all of the proposed reasonable assurances requirements? Would doing so provide enhanced protections for client assets? Would it result in any additional burdens on advisers, related persons, or clients?

106. Do commenters agree with our proposed requirement that the accountant who prepares the internal control report should be ''independent'' from the qualified custodian? Should it, instead, require independence from adviser?

107. Would obtaining or receiving an internal control report present additional issues if the qualified custodian for client assets is located outside of the United States? Would the requirement that the independent public accountant be registered with, and subject to regular inspection by, the PCAOB in affiliated or self-custody situations make it more difficult to obtain such an internal control report?

108. Instead of making it a term of the required written agreement, should we permit an adviser to rely on the representations of a qualified custodian that it has obtained the required internal control report?

[209] *See* Accounting Guidance, *supra* footnote, 188 at section III.

[210] Proposed rule 223–1(d)(11).

[211] Current rule 206(4)–2(d)(3).

[212] Proposed rule 223–1(d)(5).

109. Should the proposed rule include the contractual requirement that the qualified custodian will specify the investment adviser's agreed-upon level of authority to effect transactions in the custodial account as well as any applicable terms or limitations? Are there other ways in which we could accomplish our objective to help empower advisers to modify or eliminate their unwanted ability in a custodial agreement to better reflect their client intentions? Would the requirement provide additional protections where the adviser has custody of client assets and further the policy goals of the rule?

110. Is it difficult for advisers that have custody, including inadvertent custody, pursuant to a client's custodial agreement with a qualified custodian, to reduce or eliminate their authority over the client's custodial account? Would the proposed qualified custodian contractual requirement make it easier for advisers to reduce or repudiate this authority? Do qualified custodians often reject an adviser's request to modify its agreement with its client to reduce or eliminate the adviser's authority?

111. Do qualified custodians sometimes lend, invest, or otherwise use their custodial customers' investments? Do advisers with custody of client assets have knowledge of these transactions? Do these transactions present risk to custodial customers? Do advisers consider whether a custodian engages in these transactions, or has sufficient insurance coverage to cover the risk of loss arising from these transactions when involved in selecting a qualified custodian for an advisory client? Should we include in the final rule a contractual requirement requiring qualified custodians to record a liability and maintain sufficient capital and/or insurance when lending, investing, or otherwise using their custodial customers' investments? Would qualified custodians be able to satisfy the requirement? If not, what type of financial institutions would be unable to satisfy it? Are there other ways of protecting custodial customers when an adviser has custody from risk of loss when those financial institutions lend, invest, or otherwise use client investments?

112. Should the proposed rule include other contractual provisions or reasonable assurances? For example, should we require the written agreement to contain a contractual provision requiring the qualified custodian to make and keep adequate records? Would that provision facilitate compliance with the contractual provision requiring that the qualified custodian provide records to the Commission or independent public accountant? Would this requirement provide additional protections for clients where the adviser has custody and further the policy goals of the rule?

113. Are there other risks that the rule should require the written agreement to address? For example, should the rule require that the written agreement expressly address the transfer of custodial assets in the event of the custodian's bankruptcy or insolvency? Should the written agreement be required to state, or should the adviser be required to obtain reasonable assurances, that the intent of parties is to enter into a custodial relationship, and under no circumstances should the relationship be considered a debtor-creditor relationship?

114. Investment companies registered under the Investment Company Act (''RICs'') are subject to a comprehensive regime for the custody of their assets under the Investment Company Act and Commission rules thereunder, with specific requirements that vary based on the type of custodian. Should we continue to except accounts of RICs under proposed rule 223–1 in light of this regime for RICs? Should we apply any of the provisions of proposed rule 223–1 to RIC custodial arrangements, particularly the proposed contractual provisions for the qualified custodian agreement? Should the required contractual provisions depend on the type of custodian involved? For example, should RICs be required to include some or all of the proposed contractual provisions in agreements with bank custodians because the Commission has not adopted a rule related to bank custodians specifically?

115. Does the custody rule contain any safeguards that the safeguarding rule retains that are not necessary and which we should not require?

C. Certain Assets That Are Unable To Be Maintained With a Qualified Custodian

We believe that the bulk of advisory client assets are able to be maintained by qualified custodians; however, we understand that is not universally the case, particularly for two types of assets: certain physical assets and certain privately offered securities.

It is not uncommon for physical assets, such as precious metals, physical commodities, and real estate, to be held in client portfolios, and thus there are likely circumstances in which advisers would have custody of these physical assets as a result of the expanded scope of the safeguarding rule. We understand that these assets are sometimes unable to be maintained by qualified custodians, and that some qualified custodians may refuse to custody such assets, in part, because the inherent physical characteristics of the items increase the expenses associated with their maintenance and safekeeping. Some of these assets by their very nature or size may not easily be subject to theft or loss, and that may reduce the need for the safeguarding protections offered by a qualified custodian, but when an adviser has an ability or authority to change beneficial ownership of these assets, there is still a risk of misuse, misappropriation, or loss associated with the adviser's insolvency or bankruptcy.

Similarly, it is increasingly common for advisory clients to have privately offered securities in their portfolio.[213] We understand that advisers with trading authority of privately offered securities that do not settle DVP often have custody of these securities because of the broad, general power of attorney-like authority required to trade these securities.[214] There are certain impediments to transferability typically associated with certain privately offered securities—specifically, the need to obtain the consent of the issuer or other securities holders prior to any transfer of ownership—that make certain of these assets less susceptible to some of the risks the rule is designed to address. In particular, they would be less likely to be stolen by a third party or simply lost. These characteristics reduce the need for the safeguarding protections offered by a qualified custodian. These characteristics, however, do little, if anything, to protect a client against misuse, misappropriation, or losses that

[213] *See, e.g.,* Form ADV data current as of [Nov. 30, 2021] (showing that there are currently 5,037 registered private fund advisers with over $18 trillion in private fund assets under management); *See also,* Vanguard, The role of private equity in strategic portfolios (Oct. 2020), *available at https://corporate.vanguard.com/content/dam/corp/research/pdf/Role-of-private-equity-in-strategic-portfolios-US-ISGRPE_102020_US_F_online.pdf* (''[T]he asset size of the private equity market has been gradually growing on an absolute basis and relative to the public equity market over the last 20 years. Private equity has risen from 2% to 7% of total investable global equity assets.''); *see also* Scott Bauguess et al., Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009- 2017 (2018), *available at https://www.sec.gov/files/dera-white-paper_regulation-d_082018.pdf* (noting that an analysis of issuer self-reported data through electronic Form D filings indicates that the number of unregistered offerings and corresponding amounts raised have been increasing over the years 2009–2017); Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33–10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)], at n.37 (stating that the amounts raised in exempt markets have increased both absolutely and relative to public markets).

[214] See *supra* footnote 71 and accompanying text.

may result from the adviser's insolvency or bankruptcy.

We understand that the current market for custodial services of privately offered securities is fairly thin. We also understand that, although some custodians will custody these securities by holding them in nominee form, many do not custody them. We similarly understand that demand for these services may also be thin. Moreover, we understand that many advisers with custody of these assets do not seek to maintain them with a qualified custodian—at least in part—because the custody rule contains the ''privately offered securities exception'' [215] from the qualified custodian requirement.

To qualify for the privately offered securities exception today, the security must meet the exception's description of ''privately offered securities.'' This definition includes securities acquired from the issuer in a transaction or chain of transactions not involving any public offering; uncertificated, and ownership thereof is recorded only on the books of the issuer or its transfer agent in the name of the client; and transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer. This custody rule exception contains one additional condition: for an adviser to a limited partnership or similar pooled investment vehicle to rely on this exception, the adviser must also comply with the custody rule's audit provision. In adopting this exception, the Commission had expressed its concern that these safeguards may be ineffective in the case of limited partnerships (or other pooled investment vehicles), noting that because the private securities are held in the name of the limited partnership and the adviser acts for the partnership, the adviser has apparent authority to arrange transfers that would be recognized by the issuer of the securities.[216]

However, the Commission adopted this exception in 2003, following concerns raised by commenters that a requirement to maintain certain privately offered securities with qualified custodians could pose difficulties; particularly given that ownership of such assets generally was recorded only on the books of the issuer (*e.g.,* investments in limited partnerships where clients receive only a copy of the partnership agreement as evidence of their investment or assignment agreements for debt or equity interests in a private company).[217] In support of its decision to adopt the exception, the Commission stated that some of the impediments to transferability typically associated with certain privately offered securities provide some external safeguards against the kinds of abuse the rule seeks to prevent.[218]

When this exception was adopted, the size of the privately held securities market was much smaller than it is now on an absolute basis as well as in relation to the size of the publicly traded securities market.[219] In addition, the type, nature, structure, and prevalence of private issues have also changed and expanded in recent years, all of which have led the Commission to reconsider the current rule's exception.[220] We have become concerned over the years since its adoption that this exception may not adequately protect an advisory client from the broad types of risks the custody rule is intended to address: chiefly, misappropriation.[221]

When an asset cannot be maintained with a qualified custodian, a client may not have a full understanding of its holdings or receive periodic account statements reflecting transactions in those assets. This reduces the likelihood that a client will be able to identify suspicious activity in its account or notice that its assets are gone. Moreover, these assets may not be included in the sample of assets subject to verification procedures during a surprise examination or meet the materiality threshold for verification during a financial statement audit. As a result, a loss could similarly go undetected by an independent public accountant for a substantial period.

Ideally, a robust market for custodial services would develop for physical assets and privately offered securities. Absent such a development and the exception, however, advisers would be faced with the inability to comply with a Commission requirement or a need to transition to providing nondiscretionary advice or take certain other actions in

[215] *See* rule 206(4)–2(b)(2).

[216] *See* 2003 Adopting Release, *supra* footnote 2.

[217] *See* 2003 Adopting Release, *supra* footnote 2, at section II.B. (''Commenters [ ] pointed out that, *on occasion,* a client may purchase privately-offered securities and that maintaining certain of these assets in accounts with qualified custodians poses difficulties because the client's ownership of the security is recorded only on the books of the issuer.'') (emphasis added).

[218] *Id.* The 2003 Adopting Release identified a specific and limited range of securities to which commenters referred. *See* 2003 Adopting Release, *supra* footnote 2, at n.26 (''Commenters specifically mentioned clients' investments in limited partnerships, where clients receive only a copy of the partnership agreement as evidence of their investment. Commenters also mentioned assignment agreements for debt or equity interests in a private company, or other types of customized agreements.'').

[219] *See* Vanguard, The role of private equity in strategic portfolios (Oct. 2020), *available at https://corporate.vanguard.com/content/dam/corp/research/pdf/Role-of-private-equity-in-strategic-portfolios-US-ISGRPE_102020_US_F_online.pdf* (''[T]he asset size of the private equity market has been gradually growing on an absolute basis and relative to the public equity market over the last 20 years. Private equity has risen from 2% to 7% of total investable global equity assets.''); *see also* Scott Bauguess et al., Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009- 2017 (2018), *available at https://www.sec.gov/files/dera-white-paper_regulation-d_082018.pdf* (noting that an analysis of issuer self-reported data through electronic Form D filings indicates that the number of unregistered offerings and corresponding amounts raised have been increasing over the years 2009–2017); Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33–10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)], at n.37 (stating that the amounts raised in exempt markets have increased both absolutely and relative to public markets).

[220] For example, our staff has received several questions over the years about whether certain securities would still qualify for the exception if the securities were not acquired from the issuer but were transferred, for instance, in a subsequent private offering, from one owner to the next. Our staff has also responded to other questions concerning the application of the exception. *See, e.g.,* 2013 IM Guidance, *supra* footnote 17 (providing staff views regarding security evidenced by a private stock certificate).

[221] *See* 2009 Adopting Release, *supra* footnote 11, at section II.B.3 (noting the difficulty for advisory clients to verify that assets actually exist because ownership is recorded only on the issuers' books). In the 2009 Adopting Release, the Commission expanded the protections of the surprise examination to privately offered securities. *See id.* The growth of the privately offered securities market since our 2009 amendments to the custody rule has increased our concerns regarding the risks we identified in the 2009 Adopting Release to these client assets. We have also taken into account concerns expressed by others. *See, e.g.,* Dodd Frank Regulating Hedge Funds and other Private Investment Pools Testimony of James S. Chanos, *supra* footnote 14, at 50 (''These instruments are privately issued uncertificated securities, bank deposits, real estate assets, swaps, and interests in other private investment funds, as well as shares of mutual funds, which, under current law, can simply be titled in the name of the private investment fund care of the manager, and the evidence of ownership held in a file drawer at the manager of the private investment fund. The issuers of those assets are permitted to accept instructions from the manager to transfer cash or other value to the manager. This gaping hole in current Advisers Act custody requirements can allow SEC-registered advisers easily to abscond with money or other assets and falsify documentation of ownership of certain categories of assets, and makes it difficult for auditors, investors and counterparties to verify the financial condition of advisory accounts and private investment funds. Requiring independence between the function of managing a private investment fund and controlling its assets, by requiring that all assets be titled in the name of a custodian bank or broker-dealer for the benefit of the private fund and requiring all cash flows to move through the independent custodian, would be an important control. Similarly, requiring an independent check on the records of ownership of the interests in the private investment fund, as well as imposing standards for the qualification of private investment fund auditors—neither of which currently is required by the Advisers Act—would also greatly reduce opportunities for mischief.'').

order to avoid a violation of Commission rules, which could be disruptive or result in client harm. We are therefore proposing to reform the privately offered securities exception to address our concerns about the lack of protections and transparency that could result when privately offered securities and physical assets cannot be maintained by a qualified custodian and to reduce the likelihood that a loss of these assets could be undetected for an indeterminate amount of time. The safeguarding rule would provide an exception to the requirement to maintain client assets with a qualified custodian where an adviser has custody of privately offered securities or physical assets, provided it meets the following conditions: [222]

- The adviser reasonably determines and documents in writing ownership cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession, or control transfers of beneficial ownership, of such assets;
- The adviser reasonably safeguards the assets from loss, theft, misuse, misappropriation, or the adviser's financial reverses, including the adviser's insolvency;
- An independent public accountant, pursuant to a written agreement between the adviser and the accountant,
  - Verifies any purchase, sale, or other transfer of beneficial ownership of such assets promptly upon receiving notice from the adviser of any purchase, sale, or other transfer of beneficial ownership of such assets; and
  - Notifies the Commission within one business day upon finding any material discrepancies during the course of performing its procedures;
- The adviser notifies the independent public accountant engaged to perform the verification of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day; and
- The existence and ownership of each of the client's privately offered securities or physical assets that is not maintained with a qualified custodian are verified during the annual surprise examination or as part of a financial statement audit.

1. Definition of Privately Offered Security and Physical Assets

The proposed rule's definition of privately offered securities would retain the elements from the custody rule's description that require the securities to be acquired from the issuer in a transaction or chain of transactions not involving any public offering, and transferable only with prior consent of the issuer or holders of other outstanding securities of the issuer.[223] Like the custody rule, the safeguarding rule would also require the securities to be uncertificated and would require ownership to be recorded only on the books of the issuer or its transfer agent in the name of the client. However, the safeguarding rule would also require that the securities be capable of only being recorded on the non-public books of the issuer or its transfer agent in the name of the client as it appears in the records the adviser is required to keep under Rule 204–2. This definitional requirement would enhance the assurance of the existence of the client asset provided by the verification required by proposed 223–1(b)(2)(iii)(A) and will make the verification process more efficient. The term ''uncertificated'' would generally have the same meaning as set forth in article 8 of the Uniform Commercial Code.[224] Additionally, we would not view a security to be certificated where the certificate cannot be used to redeem, transfer, purchase, or otherwise effect a change in beneficial ownership of the security for which the certificate is issued.[225] We understand that transactions and ownership involving crypto asset securities on public, permissionless blockchains are generally evidenced through public keys or wallet addresses.[226] As proposed, in order for a security to be a privately offered security under the proposed safeguarding rule, among other conditions, it must be uncertificated, and the ownership can only be recorded on the non-public books of the issuer or its transfer agent in the name of the client as it appears in the adviser's required records. As a result, we believe that such crypto asset securities issued on public, permissionless blockchains would not satisfy the conditions of privately offered securities under the proposed safeguarding rule.[227]

We are not providing a definition of the term ''physical asset'' or including specific types of assets in the proposed rule. Rather, we believe that the plain language of the phrase, along with a principles-based facts and circumstances approach that requires an adviser to look to the characteristics and nature of a particular physical asset is more appropriate. We believe that what constitutes a ''physical asset'' is often self-evident, particularly when compared to other assets that are certificated, maintained digitally, or in book-entry form. For example, real estate and physical commodities [228] such as, corn, oil, and lumber are physical assets, while assets like cash, stocks, bonds, options, futures and funds are not, even if they provide exposure to physical assets. Physical evidence of ownership of non-physical assets that can be used to transfer beneficial ownership, like stock certificates, private keys, and bearer or registered instruments do not, themselves, qualify as physical assets and would not qualify for the exception from the qualified custodian requirement. Similarly, certain physical evidence of physical assets such as a warehouse receipt for certain commodities would not qualify for the exception if they can be used to transfer beneficial ownership even though the commodities documented by the warehouse receipt may qualify for the exception. Or in the real estate context, a deed or similar indicia of ownership that could be used to transfer beneficial ownership of a property would not qualify for the exception, but the physical buildings or land would qualify.

2. Adviser's Reasonable Determination

In order to be eligible for the exception, the rule would require an adviser to determine, and document in writing, that ownership cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can

[222] *See* proposed rule 223–1(b)(2).

[223] Rule 206(4)–2(b)(2)(i). ''Privately offered securities'' are defined by rule 206(4)–2(b)(2) as securities that are (1) acquired from the issuer in a transaction or chain of transactions not involving any public offering, (2) uncertificated, and ownership thereof is recorded only on the books of the issuer or its transfer agent in the name of the client, and (3) transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer. *See also* proposed rule 223–1(d)(9).

[224] *See* UCC Sec. 8–102(a)(18) (''Uncertificated security' means a security that is not represented by a certificate.'').

[225] Our staff took a similar view. *See* 2013 IM Guidance, *supra* footnote 17.

[226] *See generally,* PwC, Demystifying cryptocurrency and digital assets (accessed Dec. 5, 2022), *available at https://www.pwc.com/us/en/tech-effect/emerging-tech/understanding-cryptocurrency-digital-assets.html* (describing storage, ownership, and transactions, of crypto assets).

[227] Crypto assets that are not crypto asset securities would not qualify for the exception because they do not satisfy the definition of privately offered security under proposed 223–1(d)(9).

[228] *See, e.g.,* International Organization of Securities Commissions, Principles for the Regulation and Supervision of Commodity Derivatives Markets—Consultation Report at 82 (Nov. 2021), *available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD689.pdf* (defining physical commodity as ''[a] tangible product or raw material, as opposed to an instrument which references a physical commodity.'').

maintain possession or control of such assets. Such a determination necessarily depends on the facts and circumstances in issue. Moreover, these determinations would necessarily evolve over time as assets and the custodial industry change, allowing the proposed rule to remain evergreen.

An adviser's reasonable determination of whether a qualified custodian is able to maintain possession or control of a particular asset would generally involve an analysis of the asset and the available custodial market. An adviser's reasonable determination generally would not require the identification of every conceivable qualified custodian and an evaluation of its custodial services. Fundamentally, to determine whether an asset can or cannot be maintained by a qualified custodian under the proposed rule, an adviser generally should obtain a reasonable understanding of the marketplace of custody services available for each client asset for which it has custody. The adviser's written documentation of its determination would generally contain material facts concerning its understanding of the custodial marketplace and a description of the client asset in issue.

The proposed rule does not specify the frequency with which an adviser must make this determination. What frequency would be reasonable for any determination would depend on the particular assets and the facts and circumstances. For example, an adviser might develop policies and procedures for conducting this analysis, and those policies and procedures might reasonably call for an annual assessment of one type of asset for which there have been no indicators of a developing custodial market. On the other hand, it would likely be unreasonable for an adviser to annually assess the custodial market for an asset for which developing custodial services are well publicized as imminent.

As discussed above, we believe that many privately offered securities are not currently maintained by qualified custodians. However, we understand that a substantial portion of securities—privately and publicly held—are uncertificated (*i.e.,* paper stock certificates are largely a relic from a prior era, replaced by more modern methods of recording ownership).[229] Particularly as a result of the growth of uncertificated publicly traded securities, we understand that custodians have refined safeguarding and reporting practices with respect to uncertificated securities. Therefore, we believe that this experience has made it increasingly possible for qualified custodians to provide custody services for privately offered securities. Accordingly, while today it may be reasonable under appropriate circumstances for an adviser to determine that a qualified custodian cannot maintain possession or control of a particular privately offered security, we believe that determination may be more difficult to support as the custodial industry continues to evolve.

Whether an adviser can make the reasonable determination regarding a particular physical asset necessarily depends on the asset type and the availability of custody services. For example, an adviser could likely conclude that qualified custodian services are unavailable for unharvested wheat or a shopping center. Similarly, custody of certain tangible agricultural commodities may be impossible to insure at a qualified custodian.[230] In these circumstances, an adviser may reasonably determine that ownership cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control of such asset. Conversely, it is likely that a qualified custodian can hold gold bullion,[231] and it would therefore be difficult for an adviser to make the determination required to invoke the proposed exception.

3. Adviser Reasonably Safeguards Assets

To rely on the exception, the adviser would be required to reasonably safeguard any privately offered securities or physical assets that are not maintained with a qualified custodian from loss, theft, misuse, misappropriation, or the adviser's financial reverses, including the adviser's insolvency. While the specific procedures implemented to safeguard assets may vary depending on the asset, advisers must satisfy their fiduciary duty in safeguarding any particular asset.[232]

With respect to privately offered securities, an adviser might ''reasonably safeguard'' an asset by looking to reasonable commercial standards, which we understand presently may draw from a variety of protections such as enhanced recordkeeping, additional change of control terms in governance agreements, designation of an agent required to be involved in transfers of beneficial ownership, among others. For

[229] *See* Paech, Philipp, *Securities, Intermediation and the Blockchain: An Inevitable Choice Between Liquidity and Legal Certainty?* 21(4) Unif. L. Rev. 612 (Dec. 1, 2016) (''The practice of securities holding, transfer, and collateral has changed significantly over the past 200 years-moving from paper certificates and issuer registers, to an intermediated environment, and from there to computerization and globalization.''); Intermediated Securities, *supra* footnote 143, at 386 (''Immobilization and dematerialization of securities have made the physical delivery of certificates nearly irrelevant. In just a few decades, the issuance of securities has shifted from the physical to a virtual world, to which financial intermediaries hold the key.''); DTCC, From Physical to Digital: Advancing the Dematerialization of U.S. Securities (Sept. 2020), *available at https://www.dtcc.com/~/media/Files/PDFs/DTCC-Dematerialization-Whitepaper-092020.pdf* (''the crushing mountain of paper of the paperwork crisis in the 1960s and 1970s was addressed by the two-pronged approach of immobilization and dematerialization''). While the terminology is sometimes used interchangeably, ''dematerialized securities'' generally refer to securities, sometimes certificated, that are represented by entries in securities accounts maintained by financial intermediaries for investors, while ''uncertificated securities'' refer to securities that are not represented by a certificate but are registered on an issuer's books. *See generally,* Thevenoz, Intermediated Securities, *supra* footnote 143 at 386 (''Certificated securities do not need to move if they are immobilized in the custody of reliable depositories and represented by entries in securities accounts maintained by financial intermediaries for investors. When needed, immobilized securities can be transferred by way of book-entries in investors' accounts, which substitute for their physical delivery. Where corporate law and investor preferences allow, physical individual securities can become wholly unnecessary. A whole issue can be replaced by one global certificate, or it can even be recorded in an 'issue account' without the need for any certificate, against which the dematerialized securities can be credited to the securities accounts of market participants and, here again, be transferred by way of book-entries. Immobilization and dematerialization of securities have made the physical delivery of certificates nearly irrelevant. In just a few decades, the issuance of securities has shifted from the physical to a virtual world, to which financial intermediaries hold the key.''); *and see* UCC section 8–102(18) (''' 'Uncertificated security' means a security that is not represented by a certificate.'').

[230] Though such physical assets may be unable to be held with a qualified custodian as defined under the proposed rule, we understand that agricultural commodities and other physical commodities do have certain non-qualified custodians, exchange-approved warehouses or clearing houses that provide substantial record keeping and safeguarding protections for such assets. These often include secure storage facilities, internal control procedures, and relevant insurance coverages.

[231] It is our understanding that banks are able to custody gold bullion and other precious metals, but that other non-bank custodians provide secure storage and transportation services for gold bullion and other precious metals, including vault custody and related transportation services. *See, e.g.,* The Brinks Company, SEC Staff No-Action Letter (Feb. 3, 2014). We also understand that, from time to time, bank custodians or others may exit the precious metals custody business, but that other custodians may become available to perform those custody services. *See, e.g.,* Depository Trust Company of Delaware, LLC, SEC Staff No-Action Letter (Sept. 12, 2016).

[232] The principles-based requirement to reasonably safeguard a client's physical assets is drawn from an adviser's fiduciary duty including its duty of care or duty of loyalty under the Advisers Act, which extends to the entirety of the adviser-client relationship. *See supra* footnote 57.

example, one critical safeguard that advisers should consider is the types of internal controls that they can implement to reasonably safeguard clients' privately offered securities. If possible, an adviser may consider separating duties of the person responsible for recording investments in privately offered securities from the person responsible for authorizing the buying and selling of privately offered securities from the person responsible for holding certificates or other legal records evidencing ownership of privately offered securities.[233] An adviser may also consider implementing procedures to regularly review and reconcile the following documents to the adviser's records: legal documents demonstrating evidence of ownership of privately offered securities, including any changes year over year; board meeting minutes, if available, for any activity that may evidence a change in a client's ownership of privately offered securities; and records of share ownership maintained by the issuer or its transfer agent in the name of the client. An adviser may also consider periodically reviewing and documenting that the privately offered securities are transferable only with the prior consent of the issuer or its shareholders. Importantly, the rule recognizes that the privately offered securities vary, as do the relationships between an adviser and its advisory clients, and the rule retains the flexibility necessary for advisers to make reasonable determinations concerning the safeguarding of those privately offered securities that are unable to be maintained with a qualified custodian.

With respect to physical assets, an adviser might ''reasonably safeguard'' such assets by looking to reasonable commercial standards, which may include storage in a secure facility or vault that adheres to exchange, clearing house, or other licensing requirements for participation in certain commodities markets; dual control procedures for access to assets in safekeeping; maintenance of records to evidence movement or transfer of assets (including details on depositor, beneficiary and/or the legal owner); periodic reconciliation of records with assets held (*e.g.,* vault counts); separation of duties for movement or transfer of assets, recordkeeping and reconciliation; periodic audits; smoke detection and fire suppression systems; and insurance coverage for any custody-related losses incurred by its clients. Advisers may need to tailor their standards for safeguarding to each particular physical asset depending on the relative common standards for its market.[234] For example, reasonable commercial standards for safeguarding and taking delivery of an agricultural commodity like a bushel of wheat [235] necessarily would be different from the appropriate maintenance gold bullion [236] or of personal property like jewelry, antiques, or art.[237] We believe this approach will give advisers the flexibility to develop and implement safeguarding practices with respect to assets not maintained with a qualified custodian that are appropriately tailored, while helping to ensure client assets receive appropriate protections.

When an adviser has custody of client physical assets that are not maintained with a qualified custodian, the ultimate obligation to safeguard those assets falls to the adviser. In some circumstances, an adviser might conclude that it could safeguard the asset itself, provided it can do so in accordance with reasonable commercial standards. In other circumstances, the adviser could instead determine that it could permissibly maintain physical assets with a third party that the adviser concludes could safeguard the assets in accordance with reasonable commercial standards. The proposed rule does not require a particular approach.

More broadly, an adviser might demonstrate that it is reasonably safeguarding a client asset itself or through a third party, by adopting, implementing, and regularly reassessing policies and procedures that include robust due diligence and ongoing oversight designed to ensure the adviser has assessed and evaluated the safeguarding measures put in place by itself or the third party maintaining physical assets. Such policies and procedures might include procedures to assess whether the person maintaining the client asset has exercised and is likely to continue to be able to exercise due care in accordance with reasonable commercial standards in safeguarding the asset.

4. Notification and Prompt Independent Public Accountant Verification

The exception to the requirement to maintain assets with a qualified custodian would also require an adviser to enter into a written agreement with an independent public accountant.[238] The proposed rule would require the adviser to notify the independent public accountant of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day.[239] The written agreement would require the independent public accountant to verify the purchase, sale, or other transfer promptly upon receiving the required transfer notice.[240] The written agreement would also require the accountant to notify the Commission by electronic means directed to the Division of Examinations within one business day upon finding any material discrepancies during the course of performing its procedures.[241] We believe that these requirements would provide advisory clients meaningful and much-needed protection when their advisers have custody of assets that are not maintained with a qualified custodian.

It has been our longstanding view that the involvement of independent public accountants in the review and verification of client assets of which advisers have custody is an important safeguarding tool and reduces the risk of loss of client assets.[242] Consistent with

[233] We recognize in some smaller organizations it may be more challenging to separate these functions.

[234] *See, e.g.,* The Board of the International Organization of Securities Commissions, *Commodity Storage and Delivery Infrastructures: Good or Sound Practices* (Feb. 2019), *available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD622.pdf* (encouraging the adoption of ''Good or Sound Practices'' in member jurisdictions, but noting that ''[n]ot all of the Practices described may be relevant to all market participants. It is for market participants to determine the applicability of any particular Practice and to apply it as their circumstances require.'').

[235] For example, in the agricultural context, clearing members and delivery facilities are subject to the various rules of the exchange or clearing house as well as inspection by the exchange and the Department of Agriculture. *See,* Chapter 7, Delivery Facilities and Procedures, Chicago Board of Trade Rule Book (2022) *available at: https://www.cmegroup.com/rulebook/CBOT/.*

[236] *See* Global Previous Metals Code Global Precious Metals Code *available at https://www.lbma.org.uk/market-standards/global-precious-metals-code.*

[237] The OCC notes in its Handbook that miscellaneous assets (*e.g.,* jewelry, art, coins) should be maintained in a vault consistent with applicable law and sound custodial management. Vault control procedures should ensure physical security, dual control procedures, maintenance of records evidencing access to the vault, proper asset transfer ticketing, and periodic vault counts. *See,* Custody Services, Comptrollers Handbook (Jan. 2002) available here: *https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/custody-services/pub-ch-custody-services.pdf* (''OCC Custody Handbook''). See also Inland Marine Underwriters Association, Evaluating the Risk in the Storage and Shipping of Fine Art: Insights into the Art Service Industry at *https://www.imua.org/Files/reports/2019reports/EvaluatingRiskinStorageandShippingofFineArtsUpdateFinal1_4_2019.pdf.*

[238] *See* proposed rule 223–1(b)(2)(iii).

[239] *See* proposed rule 223–1(b)(2)(iv).

[240] *See* proposed rule 223–1(b)(2)(iii)(A).

[241] *See* proposed rule 223–1(b)(2)(iii)(B).

[242] *See, e.g.,* Adoption of Rule 206(4)–2 under the Investment Advisers Act of 1940, IA Release No. 123 (Feb. 27, 1962) [27 FR 2149 (Mar. 6, 1962)] (requiring advisers with custody of client securities

that view, we believe that an independent public accountant's involvement in the verification and notification requirements in the proposed rule enhances the reliability and integrity of the verification and would help identify problems that clients may not, and thus would provide deterrence against fraudulent conduct by advisers.

We believe that the timing requirement for the notice—that the adviser would be required to provide notice to an independent public accountant within one business day of a transfer of beneficial ownership—is important to inform an independent public accountant as soon as practicable of a transfer of beneficial ownership of client assets that are not held with a qualified custodian. This timing will build a record for the accountant to review in connection with an annual surprise examination or financial statement audit and, therefore, would reduce the likelihood of loss or misappropriation of client assets. Moreover, we anticipate the timing of these requirements in close proximity to the timing of a transaction, coupled with the annual confirmation during a surprise examination or financial statement audit, would also reduce the likelihood that any loss would go undetected for an extensive time. Further, we believe that this notice would not be challenging for any adviser to provide to the independent public accountant, especially considering the limited nature of the requirement relative to the more involved aspects of many of the closings related to privately offered securities or physical assets such as the preparation or review of closing memos, confirmation of receipt of funds, execution of signature pages, and many other more time-consuming tasks related to closings for these types of assets.

Based on our experience with the audit provision in the current rule,[243] we understand that independent public accountants are familiar with a wide variety of transaction verification and tracing transaction activity as this is a normal audit procedure. We recognize, however, that the verification and transaction tracing process of any purchase, sale, or other transfer of beneficial ownership of the assets would necessarily vary depending on the type of asset. For example, for a privately offered security purchased or sold by an advisory client, the independent public accountant could contact the issuer of the security or its agent to verify the existence of the asset and relevant information concerning the transfer of beneficial ownership of the client asset. The independent public accountant may also take a wide array of additional steps depending on the nature of the security—and the transaction—along with other relevant facts and circumstances. For example, the independent public accountant may review a private placement memorandum, the issuer's Regulation D filings,[244] or take other steps to assist in verifying the existence and transfers of beneficial ownership of the asset.

For a physical asset purchased or sold by an advisory client, such as a commercial shopping center, the independent public accountant may confirm the existence of the asset through a variety of reliable means. To confirm the transfer of beneficial ownership of the asset, the independent public accountant may review deeds or other land recordation materials, or seek to obtain other reliable information concerning the transfer of the asset. The independent public accountant may use similar methodologies in connection with the verification of the existence, and purchase or sale, of physical commodities. For example, an independent public accountant may seek to confirm existence and the relevant transfers of beneficial ownership of grain by reviewing a warehouse receipt for the assets held in a grain elevator.

The written agreement required by the proposed rule would require the accountant to notify the Commission within one business day upon finding any material discrepancies during the course of its examination.[245] This requirement is effectively identical to the notification requirement for material discrepancies found during a surprise examination under the custody rule [246] and would require an effectively identical decision-making process by the independent public accountant: the independent public accountant may first take reasonable steps to establish the basis for believing a material discrepancy exists. The obligation to notify the Commission arises once the accountant has a basis for believing there is a material discrepancy. Ordinarily, an accountant should be able to determine promptly whether it has a basis for believing there is a material discrepancy.[247] The reporting by the independent public accountant of a material discrepancy would provide the staff with timely notice of a potential issue with the adviser's custodial practices, providing the staff with an earlier opportunity to examine an adviser or take other action against an adviser, as appropriate, in an effort to help safeguard client assets. This proposed requirement also bears similarities to the proposed notification requirement for an audit under the proposed safeguarding rule.[248]

5. Surprise Examination or Audit

Like the custody rule, the safeguarding rule would require advisers relying on the exception to undergo an annual surprise examination or rely on the audit provision.[249] In a change from the custody rule, however, the proposed rule would require each privately offered security or physical asset not maintained with a qualified custodian to be verified.[250] This change from the custody rule is designed to address our concerns that a loss of these assets could go undetected for an extended period of time as a result of a not being included within the accountant's sample to be tested during a surprise examination or verified during an audit if they do not meet the threshold for materiality. Moreover, this proposed requirement would supplement the proposed requirement to verify transactions promptly after they occur, operating similarly to an annual ''bring down.'' This would help ensure the client has some comfort regarding the status and ultimate disposition of these assets over time despite the lack of ability to monitor quarterly custodial statements. We

or funds to engage an independent public accountant to conduct an annual surprise examination); 2009 Adopting Release, *supra* footnote 11, at section II.B.1. (''Because advisers with custody often have authority to access, obtain and, potentially, misuse client funds or securities, we believed the additional review provided by an independent public accountant would help identify problems that clients may not, and thus would provide deterrence against fraudulent conduct by advisers.'').

[243] Rule 206(4)–2(a)(4) and 206(4)–2(b)(4).

[244] *See* Form D, Notice of Exempt Offering of Securities, *available at https://www.sec.gov/files/formd.pdf.*

[245] *See* proposed rule 223–1(b)(2)(iii).

[246] *See* rule 206(4)–2(a)(4)(ii).

[247] *See* 2003 Adopting Release, *supra* footnote 2, at note 34; 2009 Proposing Release, *supra* footnote 11, at note 10.

[248] *See infra,* section II.F.

[249] *See* rule 206(4)–2(a)(4); 2009 Adopting Release, *supra* footnote 11, at section II.B.3. (''Because clients are more dependent on the adviser with respect to the safeguarding of these securities, advisory clients may be exposed to additional risks when their advisers acquire these securities on their behalf. To mitigate these risks and to provide assurance that privately offered securities are properly safeguarded, we believe that it is appropriate to require an independent third-party to verify client ownership with the issuers of the securities by requiring that these securities be subject to the surprise examination requirement under the amended rule.'').

[250] *See* proposed rule 223–1(b)(2)(v).

recognize that this proposed requirement likely constitutes a departure from current practice for most surprise examinations and audits, but believe that the protective benefits of the surprise examination and annual audit are critical to the safeguarding of client assets, especially where these assets do not have the additional protections afforded by the oversight of a qualified custodian.

We request comment on all aspects of the proposed exception, including the following:

116. Should the rule retain the privately offered securities exception of the custody rule without any modifications?

117. Do commenters agree with our understanding that, today, the overwhelming majority of securities are uncertificated, that the volume of privately offered securities has vastly expanded since 2003, and that custodians have developed safeguarding and reporting practices, particularly with respect to publicly-traded securities? Are we correct that the custodial market for privately issued securities is less developed? Do commenters also agree that some custodians will presently custody privately issued securities and that new custodial services are being developed?

118. Should the rule eliminate the current rule's privately offered securities exception to the requirement to maintain securities with a qualified custodian, as proposed? Rather than eliminating the custody rule exception and creating the new safeguarding rule exception for privately offered securities and physical assets, should the custody rule exception be retained, but modified in a different way? For example, should it be made available solely to advisers whose clients' financial statements are audited and distributed to investors in accordance with the requirements of this rule? If so, what standard of independence should an auditor be required to satisfy?

119. Are we correct in our belief that the privately offered securities exception may not adequately protect an advisory client from the broad types of risks the rule is intended to address? If not, in what ways does the exception provide adequate protections? Are there alternatives to eliminating the exception and creating the new exception as proposed that would better serve the proposed rule's policy goals?

120. Is our understanding correct that advisers with trading authority of privately offered securities that do not settle DVP often have custody of these securities because of the broad general power of attorney-like authority required to trade these securities?

121. Are qualified custodians able to provide custody services for privately offered securities? If so, what services? Would maintaining these securities with qualified custodians be practically challenging and/or costly? If so, what are the challenges or cost constraints?

122. Do commenters agree that the custody rule exception's restrictions on transferability of privately offered securities do not provide comparable protections to those provided under the proposed rule? If commenters disagree, how do these restrictions protect against misappropriation by the adviser or theft by a third party? Do issuers and other holders of outstanding securities evaluate whether a transaction in the securities would result in misappropriation by the adviser or theft by a third party? Do they have an incentive to evaluate a transaction for misappropriation or any of the other policy goals of the rule?

123. We are proposing to retain the mutual fund shares exception because, in our experience, this exception has not raised similar types of investor protection concerns that we are seeking to address in this proposal.[251] Do commenters believe that the mutual fund shares exception raises investor protection risks? Should we eliminate the exception for mutual fund shares? To what extent do advisory clients purchase mutual fund shares through qualified custodians such as broker-dealers such that the exception may not be necessary?

124. Our understanding is that certain assets cannot be maintained with a qualified custodian, but that the bulk of client assets that advisers service are able to be held by a qualified custodian. Do commenters agree with this understanding? What are some examples of assets that cannot be held by a qualified custodian? If an asset cannot be maintained with a qualified custodian, should an adviser be permitted to have custody of the asset, as that term is defined in the proposed rule? Should advisers, instead, be required to relinquish the authority that triggers the application of the definition of custody in the context of the asset that is unable to be maintained with a qualified custodian? Alternatively, should they be required to provide alternative safeguards for the asset, such as those proposed?

125. Are there currently assets that qualified custodians will maintain, but doing so would be cost-prohibitive for advisers or their clients? If so, what are some examples of these assets? At what point does it become cost-prohibitive? Is it measured based on a percentage of the value of the asset? Is it based on a percentage of the adviser's fee for providing advisory services with respect to that asset? Is it the point at which it becomes unprofitable for the adviser to provide advice to the client?

126. Should the proposed rule permit an adviser to conclude that an asset is eligible for the exception if it would be prohibitively expensive to custody the asset with a qualified custodian? What would be considered prohibitively expensive?

127. Is the proposed definition of privately offered securities clear? Should it include any additional factors? Should any of the proposed factors be removed? For example, is the description of the meaning of uncertificated clear? Should it be revised? Are there securities that qualify for the custody rule's description of this term that would be unable to rely on the proposed exception as a result of the differences of the proposed definition? Please explain.

128. Do commenters agree with our belief that ownership of crypto asset securities that is evidenced through public keys or wallet addresses on public blockchains would not qualify for the proposed privately offered securities exception? If not, why? Could the rationale for the privately offered securities exception—namely, that impediments to transferability present with certain privately offered securities mitigate some of the risks and provide some external safeguards against the kinds of abuse the rule seeks to prevent (loss and third-party theft) when those assets cannot be maintained by a qualified custodian—also apply to the custody of crypto asset securities, the ownership of which is evidenced through public keys or wallet addresses on public, permissionless blockchains?[252] If so, how do the protections work? How do they mitigate some or all of the risks the rule is designed to address—loss, theft, misappropriation, misuse, and adviser insolvency or bankruptcy?

129. Should we provide a more prescriptive definition of physical asset? Do commenters believe that there are certain physical assets that are unable to be maintained with a qualified custodian? If so, do commenters believe that those assets will remain static as the custody industry evolves?

[251] *See* rule 206(4)–2(b)(1) and proposed rule 223–1(b)(1).

[252] *See* 2003 Adopting Release, *supra* footnote 2 at nn. 26–28 and accompanying text.

130. Is the term ''physical assets'' sufficiently clear such that advisers will be able to understand its application and appropriately utilize the exception? Should we define the term ''physical assets'' or use another term for this exception, such as ''tangible assets''? If so, should such a definition include or exclude specific asset types? What assets are commonly considered to be physical assets that are unable to be held at a qualified custodian?

131. Should the proposed rule provide flexibility for advisers to make a reasonable determination that a privately offered security or physical asset is eligible for the exception? Are there concerns that providing advisers with the ability to make a reasonable determination as to whether a privately offered security or physical asset is eligible for the exception will allow some advisers to avoid using qualified custodians to protect client assets? Should the Commission take a different approach instead?

132. Should we limit the exception to privately offered securities and physical assets as proposed? Should we expand the scope of the exception to other types of assets? If we expanded the scope, which types of assets should we include and why? Specifically, are there impediments to transferability present with other types of assets that mitigate some of the risks and provide some external safeguards against the kinds of abuse the rule seeks to prevent (loss, third-party theft, misuse, misappropriation, adviser insolvency/bankruptcy) when those assets cannot be maintained by a qualified custodian? Please explain your answer. Alternatively, should we not create an exception for privately offered securities and physical assets?

133. Is our understanding correct that the current market for custodial services of privately offered securities is limited? Is our understanding correct that demand for these services is also limited? Do commenters agree with our understanding of the market for custodial services for physical assets? Please explain.

134. To be ''reasonable,'' how frequently should advisers determine whether a qualified custodian can maintain possession or control of an asset? Should the rule provide flexibility as proposed? Should it instead specify intervals, such as monthly, quarterly, semi-annually, or annually?

135. If we expanded the scope of the exception beyond privately offered securities and physical assets to other assets that an adviser reasonably determines cannot be held at a qualified custodian what requirements should we put in place to ensure the assets are properly safeguarded? Should such measures include some or all of the protections for qualified custodians that we discuss in section II.3.C above?

136. Rule 206(4)–7 requires advisers to adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules, which will include the safeguarding rule. Should we, nonetheless, prescribe specific written policies and procedures to be adopted and implemented for determining when privately offered securities or physical assets would be eligible for the exception? For example, should any such written policies and procedures be designed to help ensure that any party involved in maintaining client assets be required to exercise due care in accordance with reasonable commercial standards to safeguard client assets? Would this requirement improve safeguarding of client assets not maintained with a qualified custodian?

137. How do advisers currently safeguard securities for which they rely on the privately offered securities exception under the custody rule? Do these practices differ from what would be required under the proposed rule? Please explain. Should these practices be prescribed under the final rule?

138. Should we define the term ''reasonably safeguard'' in the rule text? Do commenters believe that reasonable safeguards are generally within reasonable commercial standards for particular physical assets or privately offered securities? Are advisers able to ascertain what safeguards are within such reasonable commercial standards for particular physical assets or privately offered securities they may hold on behalf of clients?

139. How would an adviser document that it is satisfying its fiduciary duty to an advisory client when maintaining client assets not with a qualified custodian under the proposed exception? How frequently would it be required to provide this evidence?

140. Should we require a particular standard of care? Should we require particular safeguards or practices?

141. Should the rule require an independent public accountant, pursuant to a written agreement between the adviser and the accountant, to verify transfers of privately offered securities or physical assets promptly upon receiving notice from the adviser of any purchase, sale, or other transfer of beneficial ownership of such assets? Would the requirement enhance the safeguarding of client assets not maintained with a qualified custodian and reduce the risk of loss or misappropriation?

142. Is the proposed rule's timing requirement that the written agreement require an independent public accountant to ''promptly'' verify any purchase, sale, or other transfer of beneficial ownership of such assets sufficiently clear? Is the meaning of the term ''promptly'' in this context sufficiently understood in practice? Is additional guidance needed? In lieu of the ''promptly'' requirement proposed, should we require an independent public account to verify any purchase, sale, or other transfer of beneficial ownership within a set number of days? If so, how many days? For example, within 24 hours of the transfer of beneficial ownership? Within 24 hours of receipt of notice from adviser? Within two days of the transfer of beneficial ownership or notice from the adviser? Within one week of the transfer of beneficial ownership or notice from the adviser?

143. Are we correct in our understanding that independent public accountants are familiar with asset verification and transaction tracing procedures? Do commenters believe that there are alternative procedures that would achieve the policy goals of the rule? Should we require the independent public accountant to be the same as the independent public accountant hired to conduct the annual surprise examination or financial statement audit? Conversely, should we prohibit this? Would there be benefits to using the same accountant, such as an ability to leverage work papers from the verification when performing annual surprise examination or audit procedures? Would there be benefits to using a different accountant?

144. Would the 2009 Accounting Guidance contain sufficient guidance for an accountant that is engaged to perform the proposed verification procedures around privately offered securities and physical assets that are not maintained with a qualified custodian? What changes, if any, do you believe would be necessary to provide adequate direction with respect to the proposed verification procedures?

145. Should we require the independent public accountant employed by the adviser under this exception to verify the transfers to be registered with and subject to inspection by the PCAOB?

146. Should the rule require the adviser to notify the accountant of a transaction within one business day as proposed? Should we require these notices to be in writing? Alternatively, should the rule require that the written

agreement between the adviser and the accountant require the adviser to notify the accountant of a transaction within one business day?

147. Do commenters agree with our view that this notification should occur as soon as practicable after the closing of a transfer of beneficial ownership of assets not custodied with a qualified custodian? If not, what timeframe do commenters recommend that would achieve the policy goals of the proposed rule? For example, should we require the notice be no later than a certain number of hours after the transaction date? After the settlement date? After money or asset(s) are sent to a counterparty? After receipt of proceeds of a redemption?

148. Do commenters agree with our belief that it would not be challenging for advisers to provide the required notification, as proposed?

149. Is there a way to mitigate the risk that an adviser intending to misappropriate client assets does not comply with the notification requirement? Should we require other safeguards that limit the risk that an adviser intentionally or unintentionally fails to comply with the notification requirement?

150. Rather than requiring verification by an accountant promptly after each purchase, sale, or other transfer, as proposed, should we require timely notification to the auditor and require the auditor to reconcile each reported purchase, sale, or other transfer reported to the books and records subject to the annual audit or surprise examination? Would this provide the same level of protection for client assets not maintained with a qualified custodian as the prompt verification requirement proposed? If not, are there nonetheless good reasons to require annual verification rather than prompt verification? If we were to require only annual verification, are there other safeguards that we should require to mitigate the risk of misappropriation?

151. Rather than requiring verification by an accountant promptly after each transfer, as proposed, should the rule require, as part of the annual surprise examination or annual audit, an accountant to verify holdings of privately offered securities from one year to the next and evaluate discrepancies? For example, if a client's account held assets X, Y, and Z in one year, but only X the following year, the accountant would evaluate the disposition of assets Y and Z.

152. Should the rule require the written agreement between the adviser and the accountant to require the accountant to notify the Commission within one business day upon finding any material discrepancies during the course of its examination? Is the material discrepancy requirement clear or should we provide further guidance regarding how accountants should make the materiality determination? In light of the fact that the requirement is effectively identical to the notification requirement for material discrepancies found during a surprise examination under the current custody rule, do commenters believe that the requirement for the accountant to notify the Commission within one business day upon finding any material discrepancies would result in ''false positives'' or unnecessary notifications to the Commission as a result of the one-business-day reporting timeframe? If so, do commenters recommend a different timeframe?

153. Rather than the form of verification and asset tracing proposed, should the rule require verification procedures substantially in the form used by independent public accountants under custody rule 206(4)–2(a)(4)?

154. Should the rule require the independent public accountant to file a certificate on Form ADV–E stating that it has verified the transactions and describing the nature and extent of its verification? If so, when should the certificate be filed? Promptly upon completion of the verification? Within one business day? Within a certain period of time after being notified by the adviser? Would such a requirement enhance the safeguarding of client assets not maintained with a qualified custodian and reduce the risk of loss or misappropriation?

155. Should the rule permit other persons or entities to perform the verification that the rule proposes be performed by the independent public accountant? For example, should an independent representative be permitted to perform this function? If so, should the rule retain the independent representative definition from the current rule? [253] If not, what changes should be made? What, if any, procedures should we require to be performed to verify the transaction, especially for the broad array of physical assets that may be covered by the rule? Would an independent representative be equipped to perform verification? Would such an approach be more or less burdensome than the proposed approach?

156. If an independent representative should be permitted to perform the role we are proposing for an independent public accountant, should the rule require or prohibit certain parties from acting as an independent representative? What persons and entities do commenters believe might act as independent representatives? Do commenters believe that qualified custodians would be willing to act as independent representatives? Do commenters believe that a client could serve as its own independent representative? If so, would that further the policy goals of the rule? Should there be limits on which clients could serve as their own independent representative? For example, should those clients be required to be a qualified purchaser, accredited investor, or satisfy certain other tests (*e.g.,* net worth, education, licensing)? Would there be difficulties in locating a sufficient number of independent representatives to perform this function?

157. Should we require that the proposed verification procedures provide a certain level of assurance to investors? If so, what level of assurance should we require? Should we require the written agreement specify a required assurance framework that would be applied? Should we require a reporting mechanism requiring the auditor to communicate the results of the ongoing verification procedures to the adviser? If so, how frequently should we require reports and what information should we require to be included?

158. As an alternative to the notification and verification elements of the proposed rule, should we instead require periodic examinations for privately offered securities and physical assets that are not maintained with a qualified custodian? If so, should the procedures be substantially similar as those required for surprise examinations under current rule 206(4)–2(a)(4)? How frequently should these examinations occur? Would quarterly be sufficient to reduce the risk of misappropriation and loss of client assets? Would quarterly surprise examinations be more or less expensive than the notification and verification proposed rules?

159. Are there other challenges with these aspects of the rule, as proposed? Would this requirement be expensive for advisers, and would advisers pass those costs along to advisory clients?

160. Should the rule require asset verification of all client assets not maintained with a qualified custodian? Would this help reduce the risk of theft, loss, or misappropriation of client assets? How common is asset verification for privately held securities? For physical assets? Should the verification requirement permit sampling of client accounts, as opposed to verification of assets for all client

[253] *See* rule 223–1(d)(4).

accounts? Should advisers with custody of assets not maintained with a qualified custodian be required to obtain more surprise examinations? If so, how frequently? Would quarterly or bi-annual asset verification be more appropriate? Is 100% asset verification of assets in all client accounts common in other contexts or performed for other purposes unrelated to the requirements of the custody rule?

161. Should the rule require that the audit verify all client assets not maintained with a qualified custodian, which would thus bar the accountant engaged by the adviser from performing asset sampling with respect to such assets? Would this help reduce the risk of theft, loss, or misappropriation of client assets? How common is 100% asset verification for audits of privately held securities? For physical assets? Should advisers with custody of assets not maintained with a qualified custodian be required to obtain more audits? If so, how frequently? Would quarterly or bi-annual asset audits be more appropriate? Is 100% asset verification of client assets common in other contexts or audits performed for other purposes unrelated to the requirements of the custody rule?

162. Do audits provide an appropriate level of protection for clients where an adviser is unable to keep certain assets with a qualified custodian? If not, why not? In addition to the requirement that all assets be verified during the annual audit, should we recommend any specific audit procedures to test that client assets not kept at a qualified custodian are appropriately safeguarded from loss or misappropriation?

163. If an adviser has any assets not maintained with a qualified custodian, should the rule require asset verification of all assets, including those assets that are maintained with a qualified custodian to ensure a complete accounting of all assets occurs as of the audit date? Are there other controls that could be put in place to ensure assets are not transferred to satisfy an audit and then returned to their original location?

164. Are there risks not discussed above created when an adviser has custody of privately offered securities or physical assets that are not maintained with a qualified custodian? If so, what are those risks? Would the proposed rule sufficiently mitigate those risks? If not, what additional safeguards should be required?

165. As an alternative or in addition to any of the safeguards in the proposed exception, should we require advisers to promptly deliver a written notice to each client whose assets are not maintained with a qualified custodian (or the client's independent representative) containing certain specified information regarding the assets, such as to inform the client that the assets are not kept by a qualified custodian and to explain how the client can verify the existence and ownership of those holdings? Should the notice be required to be delivered within a certain time to allow an adviser to enter into an agreement with an entity to maintain the assets? If so, what should that timing be? Should it be similar to the timing the proposed exception would require for the adviser to provide notice to the accountant? Is there additional information that should be required to be included in the notice?

166. As an alternative or in addition to any of the safeguards in the proposed rule, should the rule require that an adviser provide a quarterly summary of a client's transactions involving assets that are not maintained with a qualified custodian? Should the summary be more or less frequent? Should the summary be in a prescribed format or should certain specific information be required? If the Commission adopts requirements to send quarterly statements to investors in private funds as recently proposed,[254] should that satisfy the requirement to send these account statements? Should those quarterly statements be required to be audited as an additional or alternative condition of the proposed exception?

167. As an alternative or in addition to any of the safeguards in the proposed rule, should we require the adviser to obtain an internal control report for assets not maintained with a qualified custodian? If so, what type(s) of internal control report(s) should we require and why? For example, should it have similar control objectives to the internal control report we would require of qualified custodians? Who should prepare such internal control report(s)? For example, should it be an independent public accountant registered with and subject to inspection as of the commencement of the engagement period by the PCAOB? Should we require an adviser to obtain an internal control report covering all of its internal controls, not just internal controls relating to the safeguarding of assets not maintained with a qualified custodian, or is the proposed exception sufficient to address our policy goals? Would requiring an adviser to obtain an internal control report be sufficient to mitigate the risks created when an adviser has custody of client assets that are not maintained with a qualified custodian?

168. As an alternative or in addition to any of the elements of the proposed safeguarding rule, should we require advisers to maintain insurance to reimburse clients for losses as a result of the advisers' misconduct? For example, should we require fidelity bonds? Should the insurance policy limits correspond to the amount of assets not maintained with a qualified custodian? Should the insurance policy limits correspond to the amount of all of the assets of which the adviser has custody? Are policies of this nature common? What costs would be associated with this kind of insurance? Who would be the payee of any claims—the client who suffered the loss or the adviser? What would be the advantages or disadvantages of either approach to payee? Are these policies occurrence based (the policy that pays on a claim is the one that is in effect at the time the incident occurred) or based on when the claims are made (the policy that pays on a claim is the one that is in effect at the time the claim is made regardless of when the incident occurred)? What would be the advantages and disadvantages to occurrence-based or claims-made policies in this context? What are common exclusions under these policies? Do they cover simple/ordinary negligence? Does the underwriting process for these policies involve an evaluation of the adviser's internal controls? Does the underwriting process take place annually and if so, does it differ from the initial underwriting assessment? Should the insurance policy be obtained from an insurer with certain credentials or subject to certain regulatory or other standards? Please explain.

169. As an alternative or in addition to any of the elements of the proposed rule, should we require advisers to have certain capital requirements? Should capital requirements be required to correspond to the amount of assets not maintained with a qualified custodian? Should capital requirements correspond to the amount of all of the assets of which the adviser has custody? Do advisers often maintain capital reserves in the event of a client loss as a result of their misconduct? If yes, is the capital maintained in escrow? If we were to require financial reserves, should the reserves be maintained in escrow? Who would be an appropriate escrow agent? And what would be appropriate terms of the escrow, particularly for release of funds? Should the capital be maintained

[254] *See,* Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Release No. IA–5955 (Feb. 9, 2022) [87 FR 16886] (Mar. 24, 2022).

in a particular type of bank account? If yes, what kind of account is commonly used or would be appropriate for these purposes? Should such a requirement be conditioned upon using a particular type of bank? What type? For example, should it be chartered by the OCC? Subject to Federal Deposit Insurance Corporation oversight? What costs are associated with escrow accounts and financial reserve/net capital requirements?

170. Are there compliance challenges to this proposed exception? If so, what are they?

D. Segregation of Client Assets

Though advisers must attain reasonable assurance of segregation of client assets at a qualified custodian,[255] the proposed rule also would require advisers to segregate client assets from the adviser's assets and its related persons' assets in circumstances where the adviser has custody. Specifically, the proposed rule would require that client assets over which an adviser has custody:

(1) Be titled or registered in the client's name or otherwise held for the benefit of that client;

(2) Not be commingled with the adviser's assets or its related persons' assets; and

(3) Not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the adviser, its related persons, or its creditors, except to the extent agreed to or authorized in writing by the client.[256]

Segregation of client assets from the assets of others continues to be a fundamental element of safeguarding client assets.[257] This aspect of the proposed rule is designed to ensure the client's continued ownership and authorized use of its assets. This proposed requirement is intended to complement, but serves a slightly different purpose than the proposed requirement that the adviser obtain reasonable assurance from the qualified custodian that the client's assets are similarly segregated. This proposed adviser segregation provision is critical in light of the fact that some client assets are not maintained with a qualified custodian.[258] Moreover, we view it as essential not only for the custodian, but also for the adviser, to keep its own proprietary assets and liabilities segregated from client assets to prevent misuse or misappropriation of client assets.

The proposed requirement that a client's assets be titled or registered in the client's name is designed to ensure that the client's assets are clearly identified as belonging to the appropriate client, regardless of whether a qualified custodian is holding the assets. The proposed rule would also permit advisers to identify the assets ''for the benefit of'' a particular client where assets may not be ''titled or registered'' in the client's name. For example, an adviser acting as a trustee would generally maintain client assets in trust for the benefit of a particular client for estate planning or other purposes.[259] ''For the benefit of'' is also meant to recognize various ways advisory clients can title or register their investments. For example, clients may hold securities in ''street name'' or ''nominee name'' through a book-entry account with a broker-dealer, and the broker-dealer will keep records showing the client as the real or ''beneficial'' owner.[260] This requirement would protect client assets even if the assets are maintained with a broker-dealer in such a manner that gives the broker-dealer legal ownership of, or access to, the assets.

Similarly, if an adviser purchases privately offered securities that are held on the books of the issuer or the issuer's transfer agent, the adviser should ensure that the issuer or transfer agent properly records and registers the adviser's client as owner. For example, if the adviser invests in a private fund or purchases private debt for a client, the records at the private fund's transfer agent or the private debt issuer should reflect the client as the owner of the investment. We believe this requirement would safeguard the client's assets from intentionally or inadvertently becoming someone else's property as well as prevent circumstances that could result in the misuse or misappropriation of client assets.

The proposed rule would also require that client assets not be commingled with the adviser's assets, or those of its related persons. The proposed requirement is designed to help ensure that client assets are isolated and more readily identifiable as client property.[261] Consequently, we believe the proposed prohibition on commingling would help protect client assets from claims by a third party looking to secure or satisfy an obligation of the adviser, including in cases of insolvency or bankruptcy of the adviser, or its related persons.[262] We do not intend the prohibition on commingling to preclude traditional operational practices in which client assets are held together with other clients' assets. We recognize that some advisers and custodians regularly service assets in a manner where such assets are reasonably identifiable from other clients' assets and not subject to increased risk of loss from adviser misuse or in the case of adviser insolvency. Accordingly, we request comment on some of these practices and the potential impact of this prohibition below.

Under the proposed rule, client assets would also be required to remain free from any right, charge, security interest, lien, or claim of any kind in favor of the adviser, its related persons, or their creditors. These requirements are designed to protect client assets by limiting the ability of an adviser, or its related persons, to use client assets for their own purposes or in a manner not authorized by the client. However, we do not intend this condition to limit or prohibit authorized actions by clients. We are therefore proposing an exception to these requirements to the extent a client agrees to or authorizes such arrangements in writing.[263] In our understanding, some clients authorize these types of arrangements depending on the types of assets, products, or strategies in which they invest resulting in the subject assets being commingled and potentially subject to certain claims. For example, such an authorization might allow assets to be subject to a securities lending arrangement authorized by the client.[264] In a typical securities lending transaction, the legal title to loaned securities passes to the borrower for the loan term. The lender regains title to the securities when the securities are returned, either upon demand or at the end of a specified

[255] *See* discussion of qualified custodian segregation requirements at *supra* section II.(C)(4).

[256] Proposed rule 223–1(a)(1). *See also supra* footnote 171.

[257] *See supra* footnote 168.

[258] *See* proposed rule 223–1(a)(1)(ii)(D).

[259] The client would maintain the beneficial interest in the trust property and the trustee would hold only legal title without the benefits of ownership; the trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. *See* section 507 of the Uniform Trust Code (Jan. 2013).

[260] *See, e.g.,* Concept Release on the U.S. Proxy System, Investment Advisers Act Release No. 3052 (July 14, 2010) [75 FR 42981 (July 22, 2010)] (''Proxy Concept Release'').

[261] We have taken a similar approach in other contexts. *See, e.g.,* Financial Responsibility Adopting Release, *supra* footnote 171 (discussing similar requirements under Rule 15c3–3 that would cause a broker-dealer to keep customer securities and cash isolated and readily identifiable as ''customer property'' and, consequently, available to be distributed to customers in the event that the broker-dealer is liquidated in a formal proceeding under the Securities Investor Protection Act of 1970).

[262] *See, e.g., supra* footnote 172.

[263] *See* proposed rule 223–1(b)(7).

[264] *See* proposed rule 223–1(a)(1)(iii).

term. Similarly, in a margin account, which is a type of brokerage account, a broker lends cash to a client to allow the client to purchase securities. The loan is collateralized by the securities purchased, other assets in a client account, and cash, and the broker charges a periodic interest rate.[265] This proposed exception would also allow arrangements in which an adviser deducts fees directly from client assets for the payment for services rendered by the investment adviser or its related persons, so long as the client authorizes such payments in writing.

To the extent a client agrees to or authorizes in writing one of these, or similar, arrangements, it would be excepted from the proposed prohibition against subjecting the client's assets to any right, charge, security interest, lien, or claim in favor of the investment adviser or a qualified custodian.[266] Although these activities may implicate the types of risks the proposed rule is designed to address, we believe the client is aware of, and consents to, the arrangement for ease or by necessity to effect a desired activity with respect to its assets.[267] Without the ability to authorize such arrangements, clients would be unable to engage in these potentially beneficial, authorized activities.

We believe that proper segregation of client assets, as required by the three-part requirements of the proposed rule, would mitigate concerns regarding the safety of a client's assets, particularly when coupled with the requirement described above that the adviser obtain reasonable assurance from the qualified custodian that the custodian is similarly segregating the client's assets.

We request comment on all aspects of the proposed rule's requirements for the segregation of investments, including the following items.

171. Should the rule include the proposed segregation requirements? Are these requirements sufficiently clear?

172. Do the proposed segregation requirements properly align with the proposed qualified custodian contract provisions and the reasonable assurance requirements, especially those proposed in subsections 223–1(a)(2)(ii)(D) and (E)?

173. Is the scope of the proposed segregation requirement's application to the adviser and its related persons appropriate? Should this section also apply to the qualified custodian, or are the proposed reasonable assurance requirements in 223–1(a)(2)(ii) sufficient to ensure segregation and protection of assets in a custodial account?

174. Would advisers be able to ensure that assets are held in the client's name or for the client's benefit in situations that involve recording of interests at a transfer agent or in circumstances involving the custody of privately offered securities or physical assets?

175. Would the proposed segregation requirements impose appropriate limitations to safeguard client assets? Should we eliminate or modify any of them? Alternatively, are there other limitations that would be appropriate?

176. Would the proposed requirements increase the likelihood that client assets will be available to be returned to clients if an adviser or its related persons experience any financial reverses, such as insolvency or bankruptcy? For example, do commenters believe the requirements would help ensure that client assets are more readily identifiable as client property?

177. Should certain assets be excluded from these requirements? If so, which assets and why? Would limiting these requirements to certain types of assets present compliance challenges? If so, what assets and why?

178. In particular, would the proposed segregation requirements present challenges with respect to crypto assets? Should we address crypto asset segregation and/or custody with separate requirements? Do crypto assets raise specific segregation issues not presented by other assets? If so, what are they and why? Would the proposed requirements offer substantial protections in the event of a bankruptcy or financial losses involving an adviser or custodian with custody of crypto assets? Would the proposed segregation requirements present challenges with respect to other types of assets?

179. Would the proposed requirements ensure that a third party's lien against one client's assets would not be improperly attached to other clients' investments? Are there any other rights, charges or claims that should be expressly identified in the proposed segregation requirements?

180. The proposed requirements would provide an exception to the provision that client assets not be subject to right, charge, security interest, lien, or claim of any kind to the extent it is authorized by the client in writing. Is this exception appropriate? Is it sufficiently clear? Would it properly account for assets that are subject to a securities lending arrangement or margin trading agreement? Is the proposed exception too broad? For example, should the proposed exception apply to only certain types of assets or arrangements? Should we prescribe specific conditions that must be included in any client authorization?

181. Is it sufficiently clear from the rule text that client assets are not to be subject to any claim except claims for payment of services rendered by the investment adviser or related person that is agreed to or authorized by the client? Should we explicitly exempt such claims for certain types of fees?

182. Do the proposed segregation requirements to be titled in the client's name, not to be commingled, and not to be subject to any right, charge, security interest, lien or claim guard against loss, misappropriation, misuse, theft, and the financial reverses of the adviser, permit the adviser with reasonable operational flexibility to use omnibus and other similar accounts?

183. Should the rule prohibit commingling client and non-client assets, as does the current rule? Alternatively, should it permit the commingling of client and non-client assets for administrative convenience and efficiency? If so, what should be considered ''administrative convenience and efficiency''? Does allowing client and non-client assets to be commingled (*e.g.,* in the same escrow account) increase the risk that client assets will be lost, misused, stolen, or misappropriated? Could an advisory client's assets be used to satisfy the debts of someone else in a bankruptcy event if client and non-client assets are commingled?

184. Should the rule include express requirements regarding the sub-accounting of commingled accounts if the rule permits commingling of client and non-client assets?

185. We recognize there are some instances where commingling or pooling of certain assets may occur via certain omnibus and sub accounting arrangements that may present compliance challenges under the segregation requirements. We also understand that though such commingling may occur, the client assets may still be considered to be identifiable via omnibus recordkeeping though they sit among non-client assets. In what circumstances may such a requirement restricting commingling

[265] *See* Uniform Commercial Code, section 8–504 and cmt. 2 (''Margin accounts are common examples of arrangements in which an entitlement holder authorizes the securities intermediary to grant security interests in the positions held for the entitlement holder.'').

[266] Proposed rule 223–1(a)(3)(iii).

[267] *See also,* Standard of Conduct for Investment Advisers Release, *supra* footnote 57, page 8 (noting that although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that the fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship and necessarily depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal).

place burdens on advisers? Are there certain assets or transaction types for which such a requirement may be particularly burdensome? Should we include any exceptions to the prohibition on commingling?

186. Do commenters agree that there are circumstances when advisers' services require them to commingle client assets and non-client assets? For example, when an adviser uses sweep accounts, escrow accounts, or when an adviser serves as administrative agent to a loan syndicate where the lenders consist of advisory clients and non-advisory clients? [268] In these circumstances, should the rule require additional protections? Which protections and why and would they differ depending on the type of commingled account? For example, should the rule include specific requirements to allow an adviser to hold a percentage of the proceeds from the sale or merger of a portfolio company owned by one or more client pooled investment vehicles (*e.g.,* private equity funds) and other non-clients for a limited period? If so, should we limit the types of proceeds that could be included in the escrow account or the period in which the escrow exists? Should we require the portion of the escrow attributable to the pooled investment vehicle client to be included on financial statements that are audited? Should we require any contract governing the escrow or other commingled account to include certain terms (such as requiring a seller's representative or administrative agent to distribute the funds in the escrow or commingled account promptly on a predetermined formula)? [269]

E. Investment Adviser Delivery of Notice to Clients

The proposed rule, like the custody rule, would require an investment adviser to notify its client in writing promptly upon opening an account with a qualified custodian on its behalf.[270] The notice is designed to alert a client to the existence of the qualified custodian that maintains possession or control of client assets and whom to contact regarding such assets. Based on our experience with the custody rule, we continue to believe it provides important client protections.

The notice would continue to include the qualified custodian's name, address, and the manner in which the investments are maintained. The proposed rule would also explicitly require that the notice include the custodial account number to improve the utility of the notice. If the client is a pooled investment vehicle, the notice must be sent to all of the investors in the pool, provided that, if an investor is a pooled investment vehicle that is in a control relationship with the adviser or the adviser's related persons, the sender must look through that pool (and any pools in a control relationship with the adviser or its related persons) in order to send the notice to investors in those pools.[271] As discussed above, this is intended to promote meaningful delivery of this important information. As is permitted under the current rule, the notice could also be delivered to the client's (or pooled investment vehicle investor's) independent representative and the adviser would continue to be required to provide the notice promptly when an account is opened and following any changes in the information contained in the notice. If adopted, this provision would require advisers to send account opening notices only to clients for which it has opened new client accounts with a qualified custodian after the effective date of the rule. Advisers would not have to provide new notices to existing clients for which it has already opened accounts as these clients are likely already aware of the location of their assets at the qualified custodian from prior notices.

We request comment on all aspects of the proposed rule's investment adviser notice requirement, including the following items.

187. Should the notice include the qualified custodian's account number? Should we require other types of information to be included in the notice? If so, what information, and why? Should we eliminate any of the proposed types of information from the notice? If so, why?

188. If an adviser uses several qualified custodians for one of its clients, should the proposed rule permit the adviser to provide the client a one-time notice for these qualified custodians rather than providing a new notice each time the assets move among the qualified custodians? [272] If yes, should the rule require the adviser also to provide the client a new notice promptly upon using a new qualified custodian to maintain the client's investments?

189. Should we require advisers to provide notice to clients when assets are not held at a qualified custodian? If yes, what form should these notices take? Should they be provided on a one-off or periodic basis?

F. Amendments to the Surprise Examination Requirement

We are proposing changes to the surprise examination requirement.[273] Under the current custody rule advisers with custody, subject to certain exceptions, must undergo an annual surprise verification by an independent public accountant to put ''another set of eyes'' on client assets.[274] In circumstances where the adviser or a related person maintain client assets as a qualified custodian, the independent public accountant must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by the PCAOB in accordance with its rules. Currently, the surprise examination requirement does not require the adviser explicitly to have a reasonable belief about the implementation of the written agreement between the adviser and the accountant. The surprise examination requirement would be amended to state that the adviser must reasonably believe that a written agreement has been implemented (*i.e.,* that the accountant will perform the surprise examination pursuant to the agreement and comply with the section's ADV–E filing and notification requirements when required). We are also proposing to amend the language concerning notice upon the finding of any material discrepancies during the course of an examination that the notice be sent by electronic means to the newly designated Division of Examinations as opposed to the current rule's requirement to send to the Director of the Office of Compliance Inspections and Examinations.[275]

In a change from the current rule, we are proposing an amendment requiring that an adviser ''must reasonably believe'' that the written agreement has been implemented. We designed this to address circumstances where, in our experience, there is an adviser that has entered into the agreement with the accountant, but failed to ensure the surprise examination occurs and the requirements of the rule are met. Entering into the contract with the

[268] *See, e.g.,* Madison Capital No-Action Letter.

[269] *See* 2014 IM Guidance, *supra* footnote 17, in which our staff discussed its views on application of the current rule to various situations involving special purposes vehicles SPVs and escrows.

[270] *See* proposed rule 223–1(a)(2).

[271] *See* proposed rule 223–1(c).

[272] Our staff has taken a similar view under the current custody rule. *See* Custody Rule FAQs, *supra* footnote 17, at Question V.1.

[273] *See* proposed rule 223–1(a)(4).

[274] 2009 Adopting Release, *supra* footnote 11.

[275] *See* proposed rule 223–1(a)(4)(v).

accountant alone would not satisfy the rule. Accordingly, advisers generally should enter into a written agreement with the accountant based upon a reasonable belief that the accountant is capable of, and intends to, comply with the agreement and the obligations the accountant is responsible for under the surprise examination requirement. For example, after securing a written agreement for the engagement, the adviser generally should ensure that the accountant is able to access the Commission's filing system so that it can perform its Form ADV–E filing functions properly under the rule.

It has been our longstanding view that the involvement of independent public accountants in the review and verification of client assets of which advisers have custody is an important safeguarding tool and reduces the risk of loss of client assets.[276] Consistent with that view, we believe that the adviser must ensure that the independent public accountant's involvement in the verification and notification requirements in the proposed rule are implemented effectively so as to ensure the reliability and integrity of the surprise exam.

We request comment on the proposed rule's modifications to the surprise exam requirement, including the following:

190. Should the rule require that an adviser must reasonably believe that the written agreement with the accountant has been implemented to satisfy the Form ADV–E and notice requirements of the provision? Are advisers able to ensure that an accountant fulfills the surprise examination requirements, or are there certain limitations that would make satisfaction of this requirement difficult?

191. What difficulties do accountants have when fulfilling their obligations on behalf of advisers under this section of the proposed rule? Should we make other amendments to this paragraph of the rule to ensure that accountants are able to fulfill their duties under the rule? Does the expansion of the scope of the rule from funds and securities to assets raise any problems for advisers and auditors that would need to comply with the surprise examination requirement?

G. Exceptions From the Surprise Examination

In light of the proposed changes to the rule's scope to cover all assets, the proposal seeks to balance better the costs associated with obtaining a surprise examination with the investor protections it offers by providing exceptions to the surprise examination requirement when the adviser's sole reason for having custody is because it has discretionary authority or because the adviser is acting according to a standing letter of authorization, each subject to certain conditions. We are also proposing modifications to the current rule's audit provision that we believe will expand the availability of its use, enhance investor protection, and facilitate compliance. These exceptions are discussed below.

1. Entities Subject to Audit (''Audit Provision'')

a. Scope of the Audit Provision

Similar to the custody rule, an adviser that obtains an audit at least annually and upon an entity's liquidation under the proposed rule would be deemed to have complied with the surprise examination requirement and would eliminate the need for an adviser to comply with the client notice requirement.[277] Although the requirement to deliver account statements to clients would be different under the proposed rule than under the custody rule, the audit provision would still eliminate the adviser's need to comply with the account statement aspect under the proposed rule as well. Specifically, for the adviser to qualify for the audit provision under the proposed rule, its client that is a limited partnership (or limited liability company, or another type of pooled investment vehicle or any other entity) would need to undergo a financial statement audit that meets the terms of the rule at least annually and upon liquidation.[278] Under the proposed rule:

(1) The audit must be performed by an independent public accountant that meets the standards of independence 17 CFR 210.2–01 (in rule 2–01 of Regulation S–X) that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the PCAOB in accordance with its rules;

(2) The audit meets the definition in 17 CFR 210.1–02(d) (rule 1–02(d) of Regulation S–X),[279] the professional engagement period of which shall begin and end as indicated in Regulation S–X Rule 2–01(f)(5); [280]

(3) Audited financial statements must be prepared in accordance with U.S. Generally Accepted Accounting Principles (''U.S. GAAP'') or, in the case of financial statements of entities organized under non-U.S. law or that have a general partner or other manager with a principal place of business outside the United States, must contain information substantially similar to statements prepared in accordance with U.S. GAAP and material differences with U.S. GAAP must be reconciled;

(4) Within 120 days (or 180 days in the case of a fund of funds or 260 days in the case of a fund of funds of funds) of an entity's fiscal year end, the entity's audited financial statements, including any reconciliations to U.S. GAAP or supplementary U.S. GAAP disclosures, as applicable, are distributed to investors in the entity (or their independent representatives); and

(5) Pursuant to a written agreement between the auditor and the adviser or the entity, the auditor notifies the Commission upon certain events.[281]

Elements of the proposed rule's audit provision are largely unchanged from the audit provision of the custody rule.[282] Differences include: (1) expanded availability from ''pooled investment vehicle'' clients to ''entities''; (2) a requirement for the financial statements of non-U.S. clients to contain information substantially similar to statements prepared in

[276] *See,* 2009 Adopting Release, *supra* note 11.

[277] *See* proposed rule 223–1(b)(4). As under the custody rule, an adviser that relies on an exception from the surprise examination requirement, such as the exception for fee deduction under proposed rule 223–1(b)(3) or the proposed exception for discretionary trading under proposed rule 223–1(b)(8) and *see* Discretionary Authority, *infra,* need not rely on the audit provision.

[278] *See* proposed rule 223–1(b)(4).

[279] Under the definition in rule 1–02(d) of Regulation S–X, an ''audit'' of an entity (such as a private fund) that is not an issuer as defined in section 2(a)(7) of the Sarbanes-Oxley Act of 2002 means an examination of the financial statements by an independent accountant performed in accordance with either the generally accepted auditing standards of the United States (''U.S. GAAS'') or the standards of the PCAOB. When conducting an audit of financial statements in accordance with the standards of the PCAOB, however, the auditor would also be required to conduct the audit in accordance with U.S. GAAS because the audit would not be within the jurisdiction of the PCAOB as defined by the Sarbanes-Oxley Act of 2002, as amended, (*i.e.,* not an issuer, broker, or dealer). *See* AICPA auditing standards, AU–C section 700.46. We believe most advisers would choose to perform the audit in accordance with U.S. GAAS only rather than both standards, though it would be permissible under the proposed audit rule to perform the audit in accordance with both standards.

[280] This provision reflects the existing process. Among other things, rule 2–01(f)(5) of Regulation S–X indicates that the professional engagement period begins at the earlier of when the accountant either signs an initial engagement letter (or other agreement to review or audit a client's financial statements) or begins audit, review, or attest procedures; and the period ends when the audit client or the accountant notifies the Commission that the client is no longer that accountant's audit client.

[281] Proposed rule 223–1(b)(4).

[282] *Compare* rule 206(4)–2(b)(4) *with* proposed rule 223–1(b)(4).

accordance with U.S. GAAP and material differences with U.S. GAAP to be reconciled; and (3) a requirement for there to be a written agreement between the adviser or the entity and the auditor requiring the auditor to notify the Commission upon the auditor's termination or issuance of a modified opinion.[283]

We request comment on all aspects of the proposed rule's annual audit provision, including the following:

192. Should the rule continue to permit an adviser to satisfy certain elements of the rule by relying on the audit provision as proposed? Should the rule require an audit upon an entity's liquidation as proposed? Should we modify either or both of these requirements? If so, how should we modify these requirements, and why?

193. Should the rule require audits to cover a period of 12 months? Would investors derive value from audits that cover periods longer or shorter than 12 months? If so, what time periods, and why?

194. Should the proposed rule allow newly formed and liquidating entities to perform an audit less frequently than annually, provided that the audit period does not exceed 15 consecutive months, with no more than three months of such period occurring immediately before or after the entity's fiscal year end? Is 15 months the appropriate audit period limit for newly formed and/or liquidating entities? Should we increase or decrease this limit? If so, what time period should we require, and why? Should we include additional restrictions or requirements for newly formed entities and/or liquidating entities under the audit provision? If so, what restrictions or requirements, and why? Would allowing for less frequent auditing during liquidation—for example, requiring an audit every 18 months or two years in such circumstances—result in a meaningful cost reduction to advisers or investors?

195. Should the proposed rule require investment advisers to provide investors with a form of interim financial reporting when an entity's audit period will be in excess of 12 months? If so, what information should be included in this reporting and who should receive this reporting? Should the reporting be audited?

196. Should the rule permit advisers to satisfy the audit provision by relying on an audit on an interval other than annually when an entity is liquidating? For example, should we allow advisers to rely on an audit of an entity every two years during the liquidation process? If so, should we modify the proposed rule to require investment advisers to create and distribute alternative financial reporting for the entity to investors (*e.g.,* cash-flow audit or asset verification)? Alternatively, or in addition to alternative financial reporting, should the rule require investment advisers to obtain a third-party examination of the liquidating entity? If so, what should the examination consist of, and why? For example, an independent auditor could examine a liquidating entity to confirm existence of the entity and that cash flows were appropriate.

197. Would allowing investment advisers to satisfy the audit provision by relying on an audit less frequently than annually during a liquidation raise any investor protection concerns that additional requirements could address? If so, what additional requirements, and why? For example, should advisers be required to provide notice to investors of their intent to liquidate an entity in these circumstances? Should advisers be required to obtain investor consent prior to satisfying the audit requirement by relying on audits on less than annual basis?

198. The custody rule does not define liquidation or liquidating entity for purposes of the liquidation audit requirement. Should it? If so, how? For example, should the definition be based on (1) a certain percentage of assets under management of the entity from or over previous fiscal period(s), (2) a stated threshold based on an absolute dollar amount of the entity's assets under management, (3) a calculation of the ratio of the management fees assessed on assets under management of the entity, (4) some combination of the foregoing, or (5) some other basis?

199. Are there risks posed to investors when an entity is liquidating that the proposed rule does not address? If so, please describe those risks and how the rule should be modified to address such risks.

200. Are there some types of investments that pose a greater risk of misappropriation or loss to investors during a liquidation that the rule should specifically address to provide greater investor protection? If so, please describe (1) the investment type; (2) the particular risk poses to investors by the investment type during liquidation; and (3) how to modify the proposed rule to address such investor risk.

201. Should we define ''fund of funds''? [284] If so, how should we define ''fund of funds''? For example, should we define a ''fund of funds'' as a pooled investment vehicle that invests 10 percent or more of its total assets in other pooled investment vehicles that are not, and are not advised by, a related person of the pool, its general partner, or its adviser? [285] Are there other circumstances in which the proposed 180-day deadline might be appropriate?

202. Should we define ''fund of funds of funds''? If so, how should we define ''fund of funds of funds''? For example, should we define fund of funds of funds as a fund of funds that invests 10 percent or more of its total assets in one or more fund of funds that are not, and are not advised by, a related person of the fund of funds, its general partner, or its adviser.[286] Are there other circumstances in which the proposed 260-day deadline might be appropriate?

b. The Expanded Availability of Audit Provision

The current audit provision is available only to advisers to a limited partnership (or limited liability company or another type of pooled investment vehicle).[287] Historically, we have relied on financial statement audits to verify the existence of pooled investment vehicle investments.[288] Based on our experience since introducing the custody rule's audit provision, we have come to believe that audits provide substantial benefits to pooled investment vehicles and their investors because audits test assertions associated with the investment portfolio (*e.g.,* completeness, existence, rights and obligations, valuation, presentation). Audits may also provide a check against adviser misrepresentations of performance, fees, and other information about the pool. We are thus proposing to expand the availability of the audit provision from limited partnerships, limited liability companies, and other types of pooled investment vehicle clients to any

[283] *See* proposed rule 223–1(b)(4)(v). *See also* AICPA auditing standard, AU–C section 705, which establishes three types of modified opinions: a qualified opinion, an adverse opinion, and a disclaimer of opinion.

[284] For example, we have described funds that invest in other funds as a ''fund of funds'' arrangement under rule 12d1–4 under the Investment Company Act. *See* Fund of Funds Arrangements, Release Nos. 33–10871; IC–34045 (Oct. 7, 2020) (Adopting Release).

[285] We note that our staff has expressed its views of what constitutes a fund of funds for purposes of the custody rule. *See* Custody Rule FAQs, *supra* footnote 17, at Question VI.7.

[286] We note that our staff has expressed its views of what constitutes a fund of funds of funds for purposes of the custody rule. *See* Custody Rule FAQs, *supra* footnote 17, at Question VI.8B.

[287] See rule 206(4)–2(b)(4).

[288] *See, e.g.,* rule 206(4)–2(b)(4) under the Advisers Act; *see also* 2009 Adopting Release, *supra* footnote 11.

advisory client entity whose financial statements are able to be audited in accordance with the rule.[289]

This aspect of the proposed rule would also eliminate uncertainty about the entity types for which the audit provision is currently available and extend the investor protection benefits of an audit to a larger number of investors, such as pension plans, retirement plans, college saving plans (529 plans), and Achieving a Better Life Experience savings accounts (ABLE plans or 529 A accounts).[290] Because of uncertainty about the entity types eligible to use the audit provision, we believe that some investment advisers do not use the current rule's audit provision.

We believe that financial statement audits provide additional meaningful protections to investors as compared to a surprise examination by increasing the likelihood that fraudulent activity is uncovered, thereby providing deterrence against fraudulent conduct by advisers. In a financial statement audit, the accountant performs procedures beyond those procedures performed during a surprise examination. Similar to a surprise examination, a financial statement audit involves an accountant verifying the existence of an entity's assets. A financial statement audit, however, also typically involves an accountant addressing additional important matters that are not covered by a surprise examination, such as tests of valuations of entity investments, income, operating expenses, and, if applicable, incentive fees and allocations that accrue to the adviser. Thus, an audit includes the evaluation of amounts and disclosures within the financial statements that may be particularly significant to entity investors.

Moreover, we believe many entities other than pooled investment vehicles already undergo financial statement audits. These financial statement audits of entities may be similar in scope and offer similar investor protection benefits as an audit of a pooled investment vehicle. The proposed expansion of the availability of the audit provision, therefore, may reduce costs for these entities if they no longer must additionally undergo a surprise examination.

The account notice and custodial account statement delivery requirements are designed to help ensure the integrity of account statements and permit clients to identify any erroneous or unauthorized transactions or withdrawals by an adviser.[291] A financial statement audit regularly involves an accountant confirming bank account balances and securities holdings as of a point in time and includes the testing of transactions that have occurred throughout the year. We believe that the common types of audit evidence procedures performed by accountants during a financial statement audit—physical examination or inspection, confirmation, documentation, inquiry, recalculation, re-performance, observation, and analytical procedures—act as an important check to identify erroneous or unauthorized transactions or withdrawals by the adviser, obviating the need for the account notice and delivery requirements for entities that are not pooled investment vehicles.

We request comment on all aspects of the expanded availability of the audit provision, including the following items:

203. Should we expand the availability of the audit provision beyond limited partnerships, limited liability companies, or other types of pooled investment vehicle to entities as proposed? If not, explain why. If we expand the availability of the audit provision, in what circumstances would this likely be utilized? Should we impose any limits on the types of entities that can make use of the audit provision? If so, what limits, and why? It is our understanding that a separate account cannot be audited. Is our understanding correct? If not, are separate accounts currently being audited, and if so, for what purpose? To the extent separate accounts can be audited, should the audit provision be available for separate account clients in addition to entities?

204. Do commenters agree that expanding the scope of entities eligible for the audit provision, as proposed, is likely to result in a greater percentage of client audits?

205. Is the term ''entity'' the appropriate term to use to describe the audit provision client type, or is there another term we should use? For example, an adviser may manage a separate account for a corporate institutional client that undergoes a financial statement audit for reasons unrelated to the custody rule. Although the financial statements pertain to a much broader universe of transactions than just transactions in the account or the assets the adviser manages for that client, should the adviser be able to rely on this audit to comply with the proposed rule? Would the answer depend on whether the adviser manages a non-entity sleeve of the client corporation's assets or a subsidiary entity?

206. Should the proposed rule define the term ''entity''? If so, how? Would using the term ''entity'' reduce or eliminate any existing confusion regarding which entities may make use of the audit provision?

207. Do other entity client types currently undergo the type of audit, *i.e.,* a full scope audit that is required under the audit provision? If so, how do the audit procedures for these entity clients differ, if at all, from the audit procedures currently performed during audits of pooled investment vehicles? If the audit procedures for these entity clients differ, do they still offer substantially similar protections to investors as the audits currently performed of pooled investment vehicles? Why or why not?

208. We understand that certain entities may undergo audits that are limited in scope, *e.g.,* an ERISA section 103(a)(3)(C) audit. We understand that these limited scope audits restrict the testing of certain investment information where a qualified institution has certified to both the completeness and accuracy of the required information. These limited scope audits may be more cost-effective, but they also do not involve all of the procedures of a full scope audit. What audit procedures are performed during these limited scope engagements? Do these procedures offer substantially similar protection to investors as full scope audits? Why or why not? Should these limited scope audits be sufficient to satisfy the requirements of the audit exception? If so, why?

209. Given the independent public accountant's involvement to address the risks around the existence of investments and the risk of misappropriation, should the

[289] *See* rule 206(4)–2(b)(4). This provision does not depend upon a minimum number of investors in the entity. *See also* Custody Rule FAQs, *supra* footnote 17, at Question X.1, in which our staff expressed a similar view. Similar to the approach under the custody rule, under the proposed rule, if the investors or participants in the legal entity client that is being audited are also clients of the adviser, the adviser would have to evaluate separately whether it has the ability or authority to effect a change in beneficial ownership of that investor's or participant's investments and comply with the proposed rule as appropriate. The financial statement audit of the legal entity whose investors or participants have invested would not satisfy the adviser's obligations under the proposed rule with respect to the investors or participants. *See infra* footnote 307.

[290] The staff has previously provided its position to certain entities that requested clarity about their eligibility to comply with the current rule's exception for audited entities. *See, e.g., Investment Company Institute,* SEC Staff No-Action Letter (Sept. 5, 2012).

[291] *See generally* 2003 Adopting Release, *supra* footnote 2; *see also* discussion *supra* at section II.B and II.E.

safeguarding rule require full scope—rather than limited scope—audits as proposed? Or should the rule require full scope audits only in certain circumstances or with respect to certain entities? If so, what are those circumstances and why should the proposed rule require full scope audits in those circumstances? Would requiring full scope audits prohibit certain entities from being able to use the audit provision? If the rule allowed limited scope audits in some or all circumstances, should it impose any additional requirements on the investment adviser relying on that audit, the accountant performing that audit, or both?

c. PCAOB Inspection

As is the case with the current custody rule, the proposed rule would continue to require accountants performing audits to be registered with and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by the PCAOB in accordance with its rules. We believe that registration and periodic inspection of an independent public accountant's system of quality control by the PCAOB provides investors with some additional level of confidence in the quality of audit produced under the proposed rule. Under the PCAOB's current inspection program, we understand that the PCAOB selects audit engagements of audits performed involving U.S. public companies, other issuers, and broker-dealers, so private fund and certain other entity audit engagements would not be selected for review. Even if private fund and other entity audit engagements are not selected for review under the PCAOB's current inspection program, we believe that accounting firms registered with and subject to the PCAOB's inspection program would implement their quality control systems throughout the accounting firm related to their assurance engagements.

In light of our proposal to expand the availability of the audit provision, we understand that this requirement may limit the pool of accountants that are eligible to perform these services because only those accountants that currently conduct public company issuer audits are subject to regular inspection by the PCAOB. Many of an adviser's clients are already undergoing a financial statement audit; therefore, the increase in demand for these services may be limited.[292] Nonetheless, the resulting competition for these services as a result of our proposed expanded availability of the audit provision may result in a limited pool of accountants eligible to provide the auditing services, which may increase costs to investment advisers and investors.

We also understand that, as part of its interim inspection program, the PCAOB inspects accountants auditing brokers and dealers, and identifies and addresses with these firms any significant issues in those audits.[293] Similar to the inspection program for issuer audits, we believe that the interim inspection program for broker-dealers provides valuable oversight of these accountants, which may result in better quality audits. Although the PCAOB may not disclose which accounting firms have been inspected under the interim inspection program for broker-dealers, we believe that the PCAOB uses a varied approach for selecting a particular audit engagement for review focused on both risk-based selections and random selections.[294] Accordingly, we would also consider an accountant's compliance with the PCAOB's interim inspection program for auditors of brokers and dealers to satisfy the requirement for regular inspection by the PCAOB under the proposed audit provision until the effective date of a permanent program for the inspection of broker and dealer auditors that is approved by the Commission.[295]

An independent public accounting firm would not be considered to be ''subject to regular inspection,'' however, if it is included on the list of firms that is headquartered or has an office in a foreign jurisdiction that the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by one or more authorities in that jurisdiction in accordance with PCAOB Rule 6100.[296] We recognize that there may be a limited number of PCAOB-registered and inspected independent public accountants in certain foreign jurisdictions. However, we do not believe that advisers would have significant difficulty in finding an accountant that is eligible under the proposed rule in most jurisdictions because many PCAOB-registered independent public accountants who are subject to regular inspection currently have practices in various jurisdictions, which may ease concerns regarding offshore availability.

We request comment on the all aspects of the proposed requirement that accountants be registered with, and subject to inspection by, the PCAOB, including the following items:

210. Should the rule require accountants performing audits under the rule to be registered with the PCAOB as proposed? Should the rule require accountants to be subject to regular inspection by the PCAOB as proposed? Do accounting firms registered with and subject to regular inspection by the PCAOB implement their quality control systems throughout the accounting firm related to their assurance engagements? Why or why not?

211. If the rule did not include these requirements, should the rule impose any additional licensing, examination, or inspection requirements on such accountants? If so, describe these additional requirements and explain why they are necessary? For example, should the rule require accountants to have a CPA license in good standing?

212. The PCAOB has specific rules governing regular and special inspections under its inspection program.[297] We understand, however, that sometimes advisers may be unsure whether a registered public accounting firm is ''subject to regular inspection'' by the PCAOB. Rather than require the accountant to be ''subject to regular inspection,'' should we instead require the accountant to be a registered public accounting firm with either an issuer or broker dealer audit client (or play a substantial role in the audit of an issuer or broker dealer) as of the start of the engagement period and as of each calendar year end? If we were to take this approach, would it significantly diminish the number of accountants available to perform audits? How would this approach affect the cost of audits?

[292] For example, more than 90 percent of the total number of hedge funds and private equity funds currently undergo a financial statement audit.

[293] *See* PCAOB Adopts Interim Inspection Program for Broker-Dealer Audits and Broker and Dealer Funding Rules (June 14, 2011) (''interim inspection program''), *available at https://pcaobus.org/News/Releases/Pages/06142011_OpenBoardMeeting.aspx. See also* Dodd-Frank Act section 982.

[294] *See, e.g.,* Annual Report on the Interim Inspection Program Related to Audits of Brokers and Dealers, PCAOB Release No. 2022–04 (Aug. 19, 2022) at 7.

[295] We note that our staff took a similar position and has had several years to observe the impact on the availability of accountants to perform services and the quality of services produced by these accountants. *See* Robert Van Grover Esq., Seward & Kissel LLP, SEC Staff No-Action Letter (Dec. 11, 2019) (extending the no-action position taken in prior letters until the date that a PCAOB-adopted permanent program, having been approved by the Commission, takes effect).

[296] *See, e.g.,* Reports of Board Determinations Pursuant to Rule 6100, *available at https://pcaobus.org/oversight/international/board-determinations-holding-foreign-companies-accountable-act-hfcaa.*

[297] *See* PCAOB Rule 4000–4003, *available at https://pcaobus.org/about/rules-rulemaking/rules/section_4.*

Would this have any potential unintended consequences, including, for example, adversely affecting smaller public accounting firms compared to larger public accounting firms?

213. The PCAOB has explained that it will inspect at least five percent of the number of registered public accounting firms reporting that they have ''played a substantial role in the preparation or furnishing of an audit report with respect to an issuer without having issued an audit report with respect to an issuer in that reporting period.'' [298] Should we define ''subject to regular inspection'' for purposes of compliance with the safeguarding rule to exclude registered public accounting firms that ''played a substantial role in the preparation or furnishing of audit report with respect to an issuer without having issued an audit report with respect to an issuer in that reporting period''? If not, explain why not? If we defined ''subject to regular inspection'' in this way, would this significantly diminish the number of accountants available to perform audits? If so, how would this affect the cost of audits?

214. By extending the availability of the audit provision and continuing to require that the independent accountants performing audits be registered with and subject to regular inspection by the PCAOB, the proposed rule may narrow the pool of auditors who would be able to perform services under the proposed rule. Should the proposed rule instead require only PCAOB-registered public accounting firms to be used to perform certain services under the proposed rule? If so, which services and why?

215. Do commenters agree that the availability of accountants to perform services for purposes of the proposed rule is sufficient? If not, please describe how the proposed rule could provide greater availability.

216. Do commenters agree that advisers have reasonable access to public accountants that are registered with and subject to inspection by the PCAOB in the foreign jurisdictions in which they operate? If not, how should the proposed rule address this issue?

d. Accounting Standards for Financial Statements

As is the case with the current custody rule, the proposed rule would require audited financial statements to be prepared in accordance with the generally accepted accounting principles.[299] Entities that are organized outside of the United States, or that have a general partner or other manager with a principal place of business outside of the United States, may have their financial statements prepared in accordance with accounting standards other than U.S. GAAP.[300] We would consider these financial statements to meet the requirements of the proposed rule so long as they contain information substantially similar to financial statements prepared in accordance with U.S. GAAP, material differences with U.S. GAAP are reconciled, and the reconciliation, including supplementary U.S. GAAP disclosures, is distributed to U.S. investors as part of the audited financial statements. Requiring that financial statements comply with U.S. GAAP or standards substantially similar to U.S. GAAP along with a reconciliation to U.S. GAAP in the case of foreign entities would help assure that clients receive consistent and quality financial reporting on their assets from their adviser.

We believe that this approach balances the needs of users of the financial statements with the cost to prepare financial statements under separate accounting standards by allowing advisers the flexibility to provide clients with financial statements that are prepared in accordance with applicable local accounting standards. We also believe a reconciliation to U.S. GAAP is necessary for entity audits because U.S. GAAP has industry specific accounting principles for certain pooled vehicles, including private funds. For example, U.S. GAAP may require measurement of trades on trade date as opposed to settlement date, presentation of a schedule of investments, and certain financial highlights that may not be required under other accounting standards. Because these differences may be material, a reconciliation to U.S. GAAP would enhance investor protection.

We request comment on all aspects of the proposed requirements for preparing financial statements in accordance with generally accepted accounting principles, including the following items:

217. Should the rule continue to require accountants to prepare audited financial statements in accordance with generally accepted accounting principles as proposed? Should the rule include any additional requirements regarding the preparation of financial statements? If so, what requirements, and why? For example, should we, as proposed, consider financial statements of non-U.S. advisers and non-U.S. entities to meet the requirements of the rule provided that they contain information substantially similar to statements prepared in accordance with U.S. GAAP, material differences with U.S. GAAP are reconciled, and the reconciliation is distributed to U.S. clients along with the financial statements? If so, should we specify what ''substantially similar'' means? What standards should be viewed as ''substantially similar'' to U.S. GAAP, and why? Is the requirement to reconcile financial statements of entities organized under non-U.S. law or that have a general partner or other manager with a principal place of business outside the U.S. with U.S. GAAP necessary? Would this reconciliation requirement present any difficulties?

218. In light of our proposal to make the audit provision available to advisers to additional entities (*e.g.,* pension plans, retirement plans, 529 plans, and ABLE plans), would these additional entities be able to meet the proposed accounting standards? Would they present any challenges for such entities? Should we modify this aspect of the proposal to address these additional entities? If so, how?

219. It is our understanding that the financial statement presentation required under U.S. GAAP may be different for pooled investment vehicles, *e.g.,* private funds, compared to other entities, *e.g.,* 529 plans. Would these presentation differences have an impact on investor's ability to understand the financial statements?

e. Distribution of Audited Financial Statements

Under the custody rule, an adviser must annually distribute its audited financial statements to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year and promptly upon completion of the audit in the final year of liquidation.[301] The proposed audit provision would generally retain this approach, requiring an adviser to

[298] *See* PCAOB Rule 4003(h), *available at https://pcaobus.org/about/rules-rulemaking/rules/section_4.*

[299] *See* proposed rule 223–1(b)(4)(iii).

[300] This proposed provision is intended to codify our current approach. For example, we have previously allowed an adviser to a foreign pooled investment vehicle to have its financial statements prepared in accordance with International Accounting Standards or some other comprehensive body of accounting standards provided that the financial statements contain information that is substantially similar to financial statements prepared in accordance with U.S. GAAP and contains a footnote reconciling any material variations between the comprehensive body of accounting standards and U.S. GAAP. *See* 2003 Adopting Release *supra* footnote 2 at n.41.

[301] *See* rule 206(4)–2(b)(4)(i) *and* rule 206(4)–2(b)(4)(iii).

distribute an entity's audited financial statements to current investors within 120 days, but would extend the delivery deadline to 180 days in the case of a fund of funds or 260 days in the case of a fund of funds of funds of the entity's fiscal year end.[302] The audited financial statements would consist of the applicable financial statements (including any required reconciliation to U.S. GAAP, including supplementary U.S. GAAP disclosures), related schedules, accompanying footnotes, and the audit report. Based on our experience administering the custody rule, we believe that a 120-day time period is appropriate to allow the financial statements of an entity to be audited and to provide investors with timely information. We understand, however, that preparing audited financial statements for some arrangements, such as sub-adviser or outsourced Chief Investment Officer (OCIO) arrangements, may require reliance on third parties, which could cause an adviser to fail to meet the current 120-day timing requirements for distributing audited financial statements regardless of actions it takes to meet the requirements. We also recognize there may be times when an adviser reasonably believes that an entity's audited financial statements would be distributed within the 120-day timeframe but fails to have them distributed within that timeframe because of unforeseeable circumstances. For example, during the COVID–19 pandemic, some advisers were unable to distribute audited financial statements in the timeframes required under the custody rule due to logistical disruptions. Accordingly, the Commission would take the position that, if an adviser is unable to deliver audited financial statements in the timeframe required under the proposed safeguarding rule due to reasonably unforeseeable circumstances, this would not provide a basis for enforcement action so long as the adviser reasonably believed that the audited financial statements would be distributed by the applicable deadline.[303] We similarly believe that a 180-day time period (subject to this position and its reasonable belief standard) is appropriate in the context of a fund of funds and that a 260-day time period (subject to this position and its reasonable belief standard) is appropriate in the context of a fund of funds of funds because advisers to these types of pooled investment vehicles may face practical difficulties completing their audits before the completion of audits for the underlying funds in which they invest.[304]

Under the proposed audit provision, the audited financial statements (including any reconciliation to U.S. GAAP prepared for a foreign entity, as applicable) must be sent to all of the entity's investors.[305] Further, if an investor is a pooled investment vehicle that is in a control relationship with the adviser or the adviser's related persons, the sender must look through that pool (and any pools in a control relationship with the adviser or its related persons) in order to send the audited financial statements to investors in those pools.[306]

In addition, an adviser to a pooled investment vehicle client may utilize an SPV, organized as a limited liability company, trust, partnership, corporation or other similar vehicle, to facilitate investments for legal, tax, regulatory or other similar purposes. For example, the adviser's pooled investment vehicle client may invest a portion of its capital in an SPV, which in turn purchases a single investment for the pooled investment vehicle client (''single purpose vehicle''). Similarly, an adviser to multiple pooled investment vehicle clients may utilize an SPV to purchase a single investment for multiple pooled investment vehicle clients (''multi-fund single purpose vehicle''). In another variation, an adviser to one or more pooled investment vehicle clients may utilize an SPV to purchase multiple investments for one or more pooled investment vehicle clients (''multi-purpose vehicle''). Similar to under the custody rule,[307] an investment adviser could either treat an SPV as a separate client, in which case the adviser will have custody of the SPV's assets, or treat the SPV's assets as assets of the pooled investment vehicles of which it has custody indirectly under the safeguarding rule. If the adviser is relying on the audit provision and treats the SPV as a separate client, the safeguarding rule would require the adviser to comply separately with the safeguarding rule's audited financial statement distribution requirements like the custody rule.[308] Accordingly, the adviser would distribute the SPV's audited financial statements to the pooled investment vehicle's beneficial owners. If, however, the adviser is relying on the audit provision and treats the SPV's assets as the pooled investment vehicle's assets of which it has custody indirectly, the SPV's assets would be required to be considered within the scope of the pooled investment vehicle's financial statement audit.[309]

An adviser would have the choice of whether to treat the SPV as a separate client or treat the SPV's assets as the pooled investment vehicle's assets of which it has custody indirectly, regardless of whether the SPV is a single purpose vehicle, multi-fund single purpose vehicle, or a multi-purpose vehicle (as applicable), provided that the SPV's assets would be considered within the scope of the financial statement audit of the pooled investment vehicle client(s) and provided that the SPV has no owners other than the adviser, the adviser's related person(s) or the pooled investment vehicle clients that are controlled by the adviser or the adviser's related person(s). If, however, the adviser uses an SPV to purchase one or more investments for one or more pooled investment vehicle clients *and third parties that are not pooled investment vehicles controlled by the adviser or the adviser's related person(s),* the adviser may *not* treat the SPV's assets as assets of the pooled investment vehicle clients of which the adviser or the adviser's related person(s) has custody indirectly for purposes of the safeguarding rule. The adviser would, instead, be required to treat the SPV's assets as a separate client for purposes of the safeguarding rule because the SPV has owners other than the adviser, the adviser's related person(s) or pooled investment vehicles controlled by the adviser or the adviser's related person(s).[310]

We request comment on all aspects of the proposed rule's requirements for distributing audited financial statements, including the following items:

[302] *See* proposed rule 223–1(b)(4)(iv).

[303] *Compare* proposed rule 223–1(b)(4)(iv) *to* rule 206(4)–2(b)(4)(i). Under the proposed rule, we would still continue to require liquidation audited financial statements to be distributed ''promptly.''

[304] *See also* Custody Rule FAQs, *supra* footnote 17, at Question VI.8A and VI.8B, in which we note that our staff expressed a similar view.

[305] *See* proposed rule 223–1(b)(4)(iv).

[306] *See* proposed rule 223–1(c); *see supra* section II.B.3.b.ii.

[307] Advisers Act Rule 206(4)–2(c) states that sending an account statement under paragraph (a)(5) of the custody rule or distributing audited financial statements under paragraph (b)(4) of the custody rule shall not satisfy the requirements of the custody rule if such account statements or financial statements are sent solely to limited partners (or members or other beneficial owners) that themselves are limited partnerships (or limited liability companies, or another type of pooled investment vehicle) and are the adviser's related persons.

[308] *See* discussion *supra* at section II.B.3.b.ii.

[309] *See also id.*

[310] We note that our staff previously took a similar view. *See* 2014 IM Guidance *supra* footnote 17.

220. Should the safeguarding rule require audited financial statements of an entity to be distributed to all the entity's investors within 120 days (or 180 days in the case of a fund of funds or 260 days in the case of a fund of funds of funds) as proposed? Would a longer or shorter period be appropriate (*e.g.,* 180 days or 90 days)? Should the rule expressly allow the statements to be distributed beyond the prescribed period of 120 (or 180 or 260) days if a reasonably unforeseeable circumstance necessitates a longer period? If so, should such a longer period have an outer limit? If so, should other conditions apply such as requiring the adviser to retain documentation supporting the reasons for the delay? Should it require advisers to notify investors of the delay and, if so, what information should be included in the notice and by when should it be distributed?

221. If the adviser is unable to deliver audited financial statements in the timeframe required under the proposed safeguarding rule because of reasonably unforeseeable circumstances but the adviser reasonably believed that the audited financial statements would be distributed by the applicable deadline, the Commission would take the position that this would not provide a basis for enforcement action. Do commenters believe that this position should be incorporated into rule text? If so, why?

222. Instead of requiring distribution of the audited financial statement to investors, should we require the statement to be distributed or made available to investors upon request?

223. For entities, we understand that audited financial statements are posted to the entity's website, *e.g.,* a 529 plan's website, along with a written notification sent to accountholders of the availability of the financial statements. The entity also provides a hardcopy of the financial statements by mail within three business days upon an accountholder's request. Should we continue to allow this type of electronic delivery to meet the distribution requirement? Should we expand the availability of electronic delivery of audited financial statements? If so, how?

224. Do commenters agree that funds of funds or certain funds in master-feeder structures (including those advised by related persons) may not be able to prepare and distribute financial statements within the current rule's 120-day requirement? Subject to the qualification above that the Commission would take the position that an inability to deliver audited financial statements in the required timeframe under certain circumstances would not provide a basis for enforcement action, do commenters agree that distribution within 180 or 260 days of the fund's fiscal year end would be appropriate? With the proposed expansion of the audit exception to entities, are there any types of entities other than fund of funds that should be permitted additional time for distribution? If so, why and what should that limit be?

225. Where an investor is a pooled investment vehicle that is in a control relationship with the adviser or the adviser's related persons, should we require the sender to look through that pool (and any pools in a control relationship with the adviser or its related persons) to satisfy the distribution requirement? If not, why not?

226. We understand that some registered fund families have organized unregistered money market funds for investment exclusively by their registered investment companies, in compliance with rule 12d1–1 under the Investment Company Act. The financial statements of the unregistered money market funds are audited, but delivered to the registered investment companies, which may be related persons of the adviser. Should there be an exception to the distribution requirements of proposed rule 223–1(c) under these circumstances? [311] Are there other similar circumstances where an exception would be appropriate? Please explain.

f. Commission Notification

The proposed rule would require an adviser to enter into, or cause the entity to enter into, a written agreement with the independent public accountant performing the audit to notify the Commission (i) within one business day upon issuing an audit report to the entity that contains a modified opinion and (ii) within four business days of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed.[312] These proposed requirements are drawn from the current rule's Form ADV–E filing requirement for independent public accountants performing surprise examinations.[313] The accountant making such a notification would be required to provide its contact information and indicate its reason for sending the notification. The written agreement must require the independent public accountant to notify the Commission by electronic means directed to the Division of Examinations. Timely receipt of this information would enable our staff to evaluate the need for an examination of the adviser. We expect the Division of Examinations would establish a dedicated email address to receive these confidential transmissions and would make the address available on the Commission's website in an easily retrievable location.

Although there is a requirement on Form ADV for an adviser to a private fund to report to the Commission whether it received a qualified audit opinion and to provide, and update, its auditor's identifying information, there is not a similar obligation for an accountant to notify the Commission as there is for a surprise examination under the current rule.[314] Based on our experience in receiving notifications from accountants who perform surprise examinations under the custody rule, we believe that the timely receipt of this information—from an independent third party—would more readily enable our staff to identify advisers potentially engaged in harmful misconduct and who have other compliance issues. This would bolster the Commission's efforts at preventing fraudulent, deceptive, and manipulative activity and would aid oversight of investment advisers.

We request comment on all aspects these notification requirements, including the following items:

227. Should independent public accountants completing financial statement audits under the proposed rule be required to provide these proposed notifications? Would the requirement for an accountant to comply with the notification requirement change the approach that an accountant would take regarding audits that normally are performed for purposes of satisfying the custody rule? If so, how?

228. Are there any privacy concerns or contractual obligations that could prohibit or restrict an accountant from providing this information? If so, what?

229. The regulations in 17 CFR 240.17a–5 (rule 17a–5) require a broker or dealer to self-report to the Commission within one business day and to provide a copy to the accountant. The accountant must report to the Commission about any aspects of the broker's or dealer's report with which the accountant does not agree. If the

[311] We note that our staff has stated that it would not recommend enforcement action to the Commission under similar circumstances. *See* Custody Rule FAQs, *supra* footnote 17, at Question VI.10.

[312] *See* proposed rule 223–1(b)(4)(v).

[313] *See* rule 206(4)–2(a)(4).

[314] *See* rule 206(4)–2(a)(4) *compare to* rule 206(4)–2(b)(4); *see also* Form ADV Part 1A, Schedule D, section 7.B.1, Q.23.

broker or dealer fails to self-report, the accountant must report to the Commission to describe any material weaknesses or any instances of non-compliance that triggered the notification requirement. Should the audit provision under the proposed rule contain a notification requirement similar to rule 17a–5? Why or why not?

230. The regulations in 17 CFR 240.17a–5 (rule 17a–5) also require a broker-dealer, pursuant to a statement filed with the Commission, to allow access to the audit documentation associated with the reports of the independent public accountant and to allow the independent public accountant to discuss the findings associated with the reports with representatives of the Commission. Should the rule include a similar provision? Specifically, should the rule require that an investment adviser, pursuant to a written agreement between the adviser and the accountant, allow access to the audit or examination documentation associated with the reports of the independent public accountant, by representatives of the Commission, if requested in writing for purposes of an examination of the adviser? Should the rule require the investment adviser, pursuant to a written agreement between the adviser and the accountant, to require the independent public accountant to discuss with representatives of the Commission, if requested in writing for purposes of an examination of the adviser, the findings associated with the reports of the independent public accountant?

231. Should the accountant instead be required to file Form ADV–E in a similar manner as independent public accountants who complete surprise examinations? If so, what types of information should be included on Form ADV–E with respect to financial statement audits? Should a copy of the audit report or a copy of the audited financial statements be filed with the Commission? If so, would there be issues with making copies of these reports publicly available, particularly since the adviser typically is not a party to the audit engagement agreement between the audited entity and the independent public accountant?

232. Is one business day the appropriate timeframe for notification upon an accountant issuing a modified opinion? Should we use a different timeframe, such as promptly? Why or why not?

233. Is four business days the appropriate timeframe for notification after an accountant's resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed? Should we use a different timeframe? Why or why not?

234. Should the independent public accountants completing financial statement audits under the proposed rule be required to provide these proposed notifications of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed? Are there any instances of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed that should not be reported? If so, why? Should we also amend the instructions to Form ADV–E in a similar way?

2. Discretionary Authority

The proposed rule would contain an exception from the surprise examination requirement for client assets if the adviser's sole basis for having custody is discretionary authority with respect to those assets, provided this exception applies only for client assets that are maintained with a qualified custodian in accordance with the proposed rule and for accounts where the adviser's discretionary authority is limited to instructing its client's qualified custodian to transact in assets that settle exclusively on a DVP basis.[315] In DVP transactions, clients' custodians are generally under instructions to transfer assets out of a client's account only upon corresponding transfer of assets into the account.

When a custodian is under instructions to transfer assets out of a client's account only upon corresponding transfer of assets into the account, there is a reduced risk that the adviser could misappropriate the assets, and when the transaction settles on a DVP basis there is a reduced risk of theft of the asset because, on a non-DVP basis, the seller of an asset could deliver the asset but not receive payment or the buyer of an asset could make payment but not receive delivery of the asset.[316] We believe this exception will focus the requirement to obtain a surprise examination where the risk of misappropriation is greatest. As an example, if the custodian's instructions from the client authorize the adviser to wire cash from the client's account in exchange for an equivalent amount of XYZ stock that is to be received into the client's account, the adviser need not undergo a surprise examination. If, however, the custodian's instructions from the client authorize the adviser to wire cash from the client's account without receipt of a corresponding asset, the adviser would need to undergo a surprise examination.

We propose to limit this exception to instances where this is the adviser's *sole* basis for custody. Accordingly, if an adviser also has custody of the client's assets for additional reasons, such as via a power of attorney that confers one-way transfer authority, the adviser cannot rely on the exception. Conversely, if an adviser also has custody of the client's assets for reasons that are also subject to similar exceptions (*e.g.,* sole basis is fee deduction, sole basis is related person custody),[317] the adviser can rely on the exception. These exceptions from the surprise examination requirement are not mutually exclusive of one another notwithstanding our use of ''solely'' in each of them.[318]

We request comment on all aspects of the proposed exception for discretionary authority, including the following items.

235. Should we provide an exception from the requirement to obtain an independent verification of client assets if an adviser's sole basis for custody is having discretionary authority with respect to client assets that are maintained with a qualified custodian in accordance with the rule? Does providing such an exception from asset verification in these limited circumstances produce additional risks for client assets?

236. Are we correct in our assessment that this proposed exception would better balance the costs and protections of the proposed rule?

237. Should we limit the exception to situations in which the qualified custodian implements certain policies and procedures? If so, what should they include? For example, would a qualified custodian need to demonstrate that it has certain systems, confirmations, or authorizations in place to ensure that an adviser is unable to initiate any one-way transactions and that the adviser's authority is limited to only trading?

[315] Proposed rule 223–1(b)(8).

[316] We note that the staff has acknowledged that limiting the adviser's authority to transactions that settle via DVP at a qualified custodian is one way for an adviser to avoid inadvertent custody. The staff's statement noted that an adviser could draft a letter (or other form of document) addressed to the custodian that limits the adviser's authority to ''delivery versus payment,'' notwithstanding the wording of the custodial agreement, and have the client and custodian provide written consent to acknowledge the new arrangement. *See* 2017 IM Guidance, *supra* footnote 135.

[317] *See* Rule 206(4)–2(b)(3) and (6) and proposed rule 223–1(b)(6).

[318] *See* proposed rule 223–1(b)(9).

238. Should we limit the exception to situations in which the adviser implements certain policies and procedures with regard to discretionary authority? If so, what should those policies and procedures be? If we were to rely more heavily on the adviser's policies and procedures, should we require external testing or auditing of those policies and procedures or internal controls? For example, should we require an internal control report with similar control objectives to the internal control reports we require under the custody rule or what we would require under the safeguarding rule?

239. Do commenters agree with our assessment of the risks to client assets as a result of discretionary authority in qualified custodian accounts? Do commenters agree with our assumption that a one-way transfer of assets from an account at a qualified custodian is a riskier form of discretionary authority than DVP transactions? Are there circumstances in a discretionary trading environment at a qualified custodian where risks of misappropriation or theft in an account are not mitigated by DVP settlement or requiring a one-for-one exchange of assets? If so, please provide such examples.

240. If an adviser's authority over an account with a qualified custodian includes the ability to transfer assets free of payment to another account with the same account title, should such an account still be eligible for the limited exception to the surprise examination?

241. Should this exception apply ''solely'' when the basis for custody is discretionary authority? Should we allow use of the exception when the adviser also qualifies for another exception that is similarly premised on an adviser ''solely'' having custody for a specifically identified reason, such as when an adviser has custody of client assets ''solely'' as a consequence of its authority to make withdrawals from client accounts to pay its advisory fee, or ''solely'' because a related person has custody of them in connection with the adviser's advisory services? Notwithstanding the use of ''solely'' in certain exceptions from the surprise examination requirement, these limited exceptions are not mutually exclusive; should they be? [319]

3. Standing Letters of Authorization

The proposed rule also contains an exception from the surprise examination requirement for client assets if the adviser has custody of those assets solely because of a standing letter of authorization (''SLOA''). [320] The rule would define SLOA as an arrangement among the adviser, the client, and the client's qualified custodian in which the adviser is authorized, in writing, to direct the qualified custodian to transfer assets to a third-party recipient on a specified schedule or from time to time. In such an arrangement the client's qualified custodian could not be an adviser's related person. [321] Such an authorization must include the client's signature, the third party recipient's name, and either the third party's address or the third party's account number at a custodian to which the transfer should be directed. The authorization must also provide that the investment adviser has no ability or authority to designate or change any information about the recipient, including name, address, and account number. [322]

Clients increasingly grant their advisers limited powers to disburse assets from their accounts to one or more specifically designated third parties in a manner that limits the adviser's ability to redirect the assets. For example, a client may grant its adviser this authority pursuant to a one-time or standing letter of instruction or other similar asset transfer authorization arrangement that the client establishes with qualified custodians. In granting such authority the client may authorize the adviser to perform transfers or disbursements via automated clearing house (*i.e.,* ACH) transfers, wires, checks, or other methods. Such authorizations can be for one-time wires out of the account or standing authorization where an adviser is given ongoing authority by the client to execute certain asset movements into and out of a client's account.

The written instruction and authorization could be provided to the adviser on the same form the client delivers to its qualified custodian, or it could be provided separately, but it must be delivered to both parties. The required signature would ensure that the instructions and authorizations are verifiably from the client. We believe the types of financial institutions identified as meeting the proposed definition of qualified custodian are required by their primary functional regulator or otherwise to perform procedures to verify the instruction and authorization, through a signature review and, if determined to be necessary, based on the facts and circumstances, another method of verification. The required information could help ensure that the instructions to the qualified custodian provide relevant information about the recipient. These instructions could include a specified schedule for transfers, or they could include a more general instruction for the adviser to direct transfers to the recipient from time to time.

Where the arrangement is structured so that the adviser's role is limited to determining the timing and amounts when disbursing a client's assets, we believe that the adviser's role in effecting any change in beneficial ownership is circumscribed and ministerial, and there is little risk to clients of loss, misuse, misappropriation, or theft of its asset. [323] We also believe under such circumstances that a qualified custodian would be best positioned to ensure that the required authorizations and instructions are properly and verifiably issued by the client (*e.g.,* the client's signature is verifiable), provided the custodian is not a related person of the adviser to reduce the incentive and opportunity to collude in such an arrangement. [324] Under these circumstances, we believe that the proposed rule's independent verification requirement would not be meaningfully additive to protect a client's assets. [325]

[319] *See* rule 206(4)–2(b)(3) and (6); proposed rule 223–1(b)(3) and (6).

[320] Proposed rule 223–1(b)(7).

[321] The term ''related person'' would have the same meaning as in the current rule.

[322] Proposed rule 223–1(d)(12).

[323] We note that the staff has taken a similar position. *See* Investment Adviser Association, SEC Staff No-Action Letter (Feb. 21, 2017) (indicating the staff would not recommend enforcement action to the Commission if advisers exercise limited authority pursuant to a SLOA without undergoing an annual surprise examination, if the SLOA arrangement meets certain specified conditions).

[324] Each of the types of financial institutions identified in the proposed rule as meeting the definition of qualified custodian is subject to anti-money laundering and know your customer requirements that require the financial institution to verify signatures. *See, e.g.,* 12 CFR 21.21 (requiring every national bank and savings association to have a written, board approved program that is reasonably designed to assure and monitor compliance with the Bank Secrecy Act); FINRA Rule 3310 (setting forth the minimum standards for broker-dealer firm's written anti-money laundering compliance programs); FINRA Rule 2090 (requiring broker-dealers to use reasonable diligence, in regard to the opening and maintenance of customer accounts, to know (and retain) essential facts concerning its customers and concerning the authority of each person acting on behalf of such customers); *see also* Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual, *available at https://bsaaml.ffiec.gov/manual* database of BSA/AML policies and procedures.

[325] An adviser would be required to report to the Commission on Form ADV if it is relying on this exception. *See* proposed Form ADV amendment to Item 9 (Safeguarding). In addition, we are proposing corresponding amendments to the books and

Continued

Finally, as noted above, this exception is not mutually exclusive of similar limited exceptions within the proposed rule, notwithstanding our use of ''solely'' in each of them. It would not, however, be available if the adviser has custody for another reason outside of the ones that would qualify the adviser for an exception as a sole basis for custody. In our view, the approach outlined above clarifies that the initiation of SLOAs means that advisers have custody under the rule, but also recognizes the lower risks to client assets associated with these arrangements. We request comment on all aspects of the proposed rule's SLOA exception, including the following items.

242. Do commenters agree that an adviser should be exempt from the independent verification requirements if it has custody solely because of an SLOA where the client grants its adviser the limited power for disbursements to third parties specifically designated by the client and the adviser can comply with the conditions of the proposed exception? Are there other protections we should require? If so, what protections?

243. Should this exception be available when the client's assets are not maintained with a qualified custodian? Does a qualified custodian better protect client assets subject to limited powers of attorney (such as by performing signature verification procedures under anti-money laundering and know-your-customer requirements that require the financial institution to verify signatures)?

244. Should this exception be unavailable when the client's assets are at a related qualified custodian, as proposed? If not, what specific conditions would safeguard client assets from the risks of loss, theft, misuse, or misappropriation in these circumstances?

245. Would an adviser's authority be appropriately limited (and therefore circumscribed and ministerial) if the client's instructions include the name and either the address or the account number of the recipient to whom a transfer of investments should be directed? Should the instructions and authorization include different, or additional, information, and if so, what?

246. Are qualified custodians required to verify SLOAs, or other limited power of attorney, instructions under their governing regulations, such as a signature review or other method? If not, should we require the adviser to confirm or contract with the qualified custodian so that it takes these steps?

247. Would it be appropriate to permit another party, such as an introducing broker, to perform these steps for the qualified custodian? Is this sometimes necessary, such as in the context of signature verification, if the introducing broker has a relationship with the client while a clearing broker serves as qualified custodian? If yes, under what conditions? For instance, should the person performing the steps be regulated for this activity? Should the person be prohibited from performing these steps if it is a related person of the adviser?

248. Are qualified custodians required under their governing regulations to provide a transfer of funds notice to the client promptly after each transfer under a power of attorney and/or send the client, in writing, an initial notice confirming the instruction and an annual notice reconfirming the instruction? If not, should we require the qualified custodian take these steps as part of this proposed exception? Alternatively, should we require the adviser to include a provision requiring such notice in its written agreement with the qualified custodian?

249. Do commenters agree that, in order to rely on this proposed exception, the investment adviser must have no authority or ability to designate or change the identity of the third party, the address, or any other information about the third party contained in the client's instruction, as proposed? Are there other safeguards that an investment adviser should comply with in order to rely on this proposed exception?

250. Are clients that issue limited powers of attorney able to terminate or change the instruction to their qualified custodians? If not, should we require that the client have this ability as part of this proposed exception?

251. Are there some types of limited powers of attorney for which an adviser cannot satisfy the proposed conditions, where we should nevertheless permit an adviser to rely on this proposed exception? In those cases, is the adviser's role in effecting any change in beneficial ownership of a client's assets similarly circumscribed by the client and ministerial in nature? If so, what are they?

252. Could online bill pay be integrated into the proposed framework for the standing letters of authorization exception or another exception? Would there be the difficulties in crafting an exception for bill pay that offered similar protections to those we describe above?

253. Given the general irreversibility of crypto asset transactions in the event of erroneous or fraudulent transactions, should this proposed exception be unavailable for crypto assets?

H. Amendments to the Investment Adviser Recordkeeping Rule

We are proposing to amend rule 204–2 to set forth requirements for making and keeping books and records related to the requirements of the proposed custody rule. The proposed amendments to rule 204–2 are designed to work in concert with the proposed rule to help ensure that a complete custodial record with respect to client assets is maintained and preserved.

The proposed changes to the recordkeeping rule would help facilitate the Commission's inspection and enforcement capabilities, including assessing compliance with the requirements of the proposed rule. Reviewing client account activity and holdings is a routine part of most adviser examinations conducted by Commission staff. Currently, however, Commission staff experience challenges in requesting, receiving, and reconciling complete and accurate client-level information from some investment advisers due to a lack of recordkeeping and coordination between advisers and custodians. The proposed recordkeeping amendments are designed to help reduce these challenges by making it easier for examiners to obtain and review more complete and accurate advisory client account records. We believe having more complete records would facilitate client account reconciliation of all debits and credits to and from client accounts. This would benefit investors directly by virtue of enhanced detection and deterrence of possible misappropriation or fraud. More complete records also would better enable examiners to identify and detect potential investment adviser misappropriation or loss or misuse of client assets during their examinations, resulting in more effective investor protections.

The proposed amendments to rule 204–2 would require an investment adviser that has custody of client assets to make and keep true, accurate, and current records of required client notifications and independent public accountant engagements under proposed rule 223–1, as well as books and records related to specific types of client account information, custodian information, transaction and position information, and standing letters of

records rule. Proposed rule 204–2(b)(2) would require advisers to retain true, accurate, and current copies of, and records relating to, any SLOA issued by a client to the adviser. Proposed rule 204–2(b)(2)(vi).

authorization.[326] The proposed amendments would require a more detailed and broader scope of records of trade and transaction activity and position information for each client account than the existing requirements for such records.[327] The proposed amendments also would add new recordkeeping requirements that include: (i) retaining copies of required client notices; [328] (ii) creating and retaining records documenting client account identifying information, including copies of all account opening records and whether the adviser has discretionary authority; [329] (iii) creating and retaining records of custodian identifying information, including copies of required qualified custodian agreements, copies of all records received from the qualified custodian relating to client assets, a record of required reasonable assurances that the adviser obtains from the qualified custodian, and if applicable, a copy of the adviser's written reasonable determination that ownership of certain specified client assets cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control of such assets; [330] (iv) creating and retaining a record that indicates the basis of the adviser's custody of client assets; [331] (v) retaining copies of all account statements; [332] and (vi) retaining copies of any standing letters of authorization.[333] Lastly, the proposed amendments would add new recordkeeping requirements to address independent public accountant engagements.[334] We believe that all of these requirements would enhance the Commission's oversight of the safeguarding practices of advisers and their compliance with the rule, which would, in turn, promote investor protection.

1. Client Communications

The proposed amendments also would require an adviser to maintain a copy of all written notices to clients required under the proposed rule and any responses thereto.[335] Specifically, this would include notifications provided by the adviser to each client upon opening accounts at qualified custodians on the client's behalf, along with notices in writing of any subsequent changes in the qualified custodian's name, address, and account number, and the manner in which the client's assets are maintained.[336] Again, we believe these requirements will enable our staff to confirm that an adviser is complying with providing appropriate client communications requirements under proposed rule 223–1.

2. Client Accounts

Additionally, the proposed amendments would require an adviser to maintain six categories of records [337] with respect to each client account for which the adviser has custody of client assets: (1) client account identification; [338] (2) custodian identification; [339] (3) the basis for the adviser having custody of client assets in the account, and whether a related person holds the adviser's client assets; (4) any account statements received or sent by the adviser, including those delivered by the qualified custodian; (5) transaction and position information; and (6) standing letters of authorization.

Included among the proposed advisory account identification records an adviser would be required to maintain is a record indicating whether the adviser has discretionary authority with respect to any client assets in the account.[340] This requirement would inform whether the independent verification exception applies in the specific circumstance of the adviser having custody of client assets solely because the adviser has discretionary authority with respect to those assets.[341] This requirement also would subsume and replace the requirement in the current recordkeeping rule to make and keep a list or other record of all client accounts for which the adviser has any discretionary power.[342] The proposed advisory account identification records also would require the adviser to maintain a record indicating whether the adviser has authority to deduct advisory fees from the account.[343] This requirement would inform whether the independent verification exception applies in the specific circumstance of the adviser having custody of client assets solely as a consequence of the adviser's authority to make withdrawals from the account to pay its advisory fee, and the qualified custodian being an operationally independent related person.[344]

Included among the custodian identification information an adviser would be required to maintain are copies of each contract with a qualified custodian and copies of all records received from the qualified custodian thereunder relating to client assets, if applicable, and a record that indicates the basis for the reasonable assurances the adviser obtains from the qualified custodian under proposed rule 223–1(a)(1).[345] These aspects of the client account recordkeeping requirements generally are designed to specify that advisers must maintain such records

[326] Advisers would be required to maintain the proposed records for a period of not less than five years as required under the current books and recordkeeping rule. *See* rule 204–2(e)(1).

[327] *Compare* rules 204–2(b)(1) through (4) *with* proposed rule 204–2(b)(2)(v). Advisers would continue to be required to make and keep a record describing the basis upon which the adviser has determined that the presumption that any related person is not operationally independent has been overcome, as required under current rule 204–2(b)(5). This requirement would be renumbered in the proposed rule with an updated cross-reference to the definition of ''operationally independent'' in proposed rule 223–1(d)(7).

[328] Proposed rule 204–2(b)(1).

[329] Proposed rule 204–2(b)(2)(i). Given this proposed client account recordkeeping requirement, we would eliminate the current requirement under rule 204–2(a)(8) to keep a list or other record of all client accounts for which the investment adviser has any discretionary power.

[330] Proposed rule 204–2(b)(2)(ii).

[331] Proposed rule 204–2(b)(2)(iii).

[332] Proposed rule 204–2(b)(2)(iv).

[333] Proposed rule 204–2(b)(2)(vi).

[334] Proposed rule 204–2(b)(3). Given that the proposed independent public accountant recordkeeping requirements would include a requirement to retain copies of internal control reports under proposed rule 223–1, we would eliminate the current requirement under rule 204–2(a)(17)(iii) to keep a copy of any internal control report obtained or received pursuant to rule 206(4)-2(a)(6)(ii). *See* proposed rule 204–2(b)(3)(ii).

[335] *See* proposed rule 204–2(b)(1).

[336] *See* proposed rule 223–1(a)(2).

[337] *See generally* proposed rule 204–2(b)(2) for these six categories of records.

[338] For each client account, the adviser would maintain: the advisory account name; client contact information (including name, mailing address, phone number, email address); advisory account number; client type (as identified in Item 5.D. of Form ADV); or any other identifying information used by the investment adviser to identify the account. Further, the provision would require that the record identify the inception date for the advisory account, whether the investment adviser has discretionary authority with respect to any client assets in the account, whether the investment adviser has authority to deduct advisory fees from the account, and, if applicable, the termination date of the account, asset disposition upon termination, and the reason for the termination.

[339] For each client account, the adviser would maintain a record that identifies and matches, for each client of which the adviser has custody of client assets, the account name and account number, or any other identifying information, from any person or entity, including any qualified custodian, that maintains client assets to the corresponding advisory account record for each client required by rule 204–2(b)(2)(i). To the extent applicable, the record must contain a copy of the required written agreement with each qualified custodian under proposed rule 223–1(a)(2)(i), including any amendments thereto. The record must also reflect the basis for the reasonable assurances that the investment adviser obtains from the qualified custodian under proposed rule 223–1(a)(1)(ii).

[340] *See* proposed rule 204–2(b)(2)(i).

[341] *See* proposed rule 223–1(b)(8).

[342] *See* rule 204–(2)(a)(8).

[343] *See* proposed rule 204–2(b)(2)(i).

[344] *See* proposed rule 223–1(b)(3).

[345] *See* proposed rule 204–2(b)(2)(ii).

whenever client assets are maintained by a qualified custodian. These records also would be necessary for the adviser to help demonstrate its compliance with the requisite set of qualified custodian contractual provisions and reasonable assurances it must obtain from qualified custodians in proposed rule 223–1(a)(1). It would also help the adviser to identify and match the client custodial account to the corresponding advisory account record as discussed above. If applicable, the custodian identification information would require the adviser to maintain a copy of its written reasonable determination that ownership of certain specified client assets cannot be recorded and maintained in a manner in which a qualified custodian can maintain possession or control of such assets. This recordkeeping obligation would be required if the adviser wants to rely on the exception for privately offered securities and physical assets to be held at a qualified custodian. It also would help our examination staff to verify the reasonableness of the adviser's determination and enable both internal advisory personnel and our examination staff to readily identify the specified client assets that are at risk of loss or misappropriation.

The proposed recordkeeping rule would also require the adviser to document the basis for the adviser's custody of client assets, including whether a related person holds the adviser's client assets or has any authority to obtain possession of them in connection with the adviser's advisory services.[346] This information would be essential for internal advisory personnel and for our examination staff to be able to readily identify the client assets that are at risk of loss or misappropriation. It also would provide additional explanation in the client account record to complement the custodial information discussed above.

3. Account Activity

In addition to client account identification requirements, the proposed amendments include corollary books and records requirements relating to client account activity that address account statements, transaction and position information, and standing letters of authorization. In order to demonstrate compliance with the account statement aspects of the rule, the proposed amendments would require an investment adviser to maintain copies of any account statement delivered by the qualified custodian to the client and to the adviser under proposed rule. The adviser also would be required to maintain copies of any account statement it delivers to the client, including copies of any account statement it delivers to the client containing the required notification under proposed rule 223–1(a)(2).[347] If the client is a pooled investment vehicle, we would require that the record reflect the delivery of account statements, notices, or financial statements, as applicable, to all investors in such client pursuant to proposed rule 223–1(c).[348]

Regarding transaction and position information in client accounts, we are proposing several modifications that would clarify certain obligations of the current recordkeeping rule's requirements.[349] First, we are proposing modifications to the current recordkeeping rule's requirement that the adviser maintain records related to a client's position in each security.[350] The proposed amendments would replace the current rule's references to ''security'' or ''securities'' with ''asset'' or ''assets'' to align this requirement with the broader scope of proposed rule 223–1.

Second, we would modify the current recordkeeping requirement for advisers to make and keep records of debits and credits in client accounts, including all purchases, sales, receipts, and deliveries of securities for such accounts.[351] Specifically, we propose to require that in addition to trade activity, as required by rule 204–2, the records should reflect other *transaction* activity in client accounts, which we would interpret more broadly to include all debits and credits to or from the account, including deposits, transfers, and withdrawals as well as cash flows, corporate action activity, maturities, expirations, expenses, and income posted. The adviser's records also would be required to include the date and price or amount of any purchases, sales, receipts, deliveries, including any one-way delivery of assets, and free receipt and delivery of securities and certificate numbers, deposits, transfers, withdrawals, cash flows, corporate action activity, maturities, expirations, expenses, income posted to the account, and all other debits and credits. Although we are not prescribing the particular form in which the records must be kept, we would view as acceptable keeping the records on a trade blotter, customer account ledger, or accounting records maintained by the adviser. We believe that these modifications would help ensure that an adviser maintains sufficient information regarding client account activity when an adviser has custody of client assets, and would enhance the ability of our examination staff to verify the proper handling of client assets by the adviser and compliance with the proposed rule and other applicable provisions of the Federal securities laws.

We also would modify the current recordkeeping rule's requirement that advisers keep copies of confirmations of all transactions effected by or for the client in the client account.[352] The proposed amendments would expressly provide for trade confirmations that show the date and price of each trade as well as any instruction received by the adviser concerning transacting in the assets.[353] We believe these modifications are necessary because our staff has periodically received questions as to what is required under the current rule and, particularly, whether the current rule requires only that the adviser maintain a record of trade tickets rather than counterparty confirmations.

4. Independent Public Accountant Engagements

The proposed amendments also would require advisers to retain copies of documents relating to independent account engagements.[354] Specifically, these documents include: (1) all audited financial statements prepared under the safeguarding rule; [355] (2) a copy of each internal control report received by the investment adviser; [356] and (3) a copy of any written agreement between the independent public accountant and the adviser or the client, as applicable, required under proposed rule 223–1.

[346] *See* proposed rule 204–2(b)(2)(iii).

[347] *See* proposed rule 223–1(a)(2). If the adviser sends account statements to a client to which the adviser is required to provide the account opening notice under this section, the adviser must include in that notice and in any subsequent account statement it sends to such client, a statement urging the client to compare the account statements from the custodian with those from the adviser.

[348] *See supra* section II.B.3.b.ii, for discussion of proposed rule 223–1(c).

[349] *Compare* rules 204–2(b)(1) through (4) *with* proposed rule 204–2(b)(2)(v).

[350] *See* rule 204–2(b)(4).

[351] *Compare* rules 204–2(b)(1) and (2) *with* proposed rule 204–2(b)(2)(v)(A).

[352] *Compare* rule 204–2(b)(3) *with* proposed rule 204–2(b)(2)(v)(B).

[353] As under the current rule, advisers would be required to retain information about all orders placed (whether executed or not). *See* rule 204–2(a)(3).

[354] Proposed rule 204–2(b)(3).

[355] Proposed rule 204–2(b)(4).

[356] This requirement would subsume and replace the current recordkeeping requirement to retain a copy of any internal control report obtained or received under the current custody rule. *See* rule 204–2(a)(17)(iii).

With respect to all three aspects of the proposed amendments for independent public accountant engagements, we believe that maintaining these records would give our staff critical access to the findings of the independent public accountant(s) that perform procedures to verify the existence of client assets not maintained with a qualified custodian and/or the accuracy of an adviser's transactions in client assets using enhanced authority.

5. Standing Letters of Authorization

Finally, we propose to add a requirement for advisers to keep copies of, and records relating to, any standing letter of authorization issued by a client to the investment adviser.[357] These records generally should include the name and either the address or the account number of each recipient to whom a transfer of client assets may be directed, along with any instructions the adviser has provided to the client's qualified custodian to transfer client's assets to that recipient. We believe that this requirement would enhance the ability of our examinations staff to verify client-authorized transfers of assets to designated recipients. This requirement also would be critical for our examination staff and internal compliance personnel to demonstrate that the adviser is appropriately safeguarding a client's assets while relying on the proposed SLOA exception from the independent verification requirements in the proposed rule.[358]

We request comment on all aspects of the proposed books and recordkeeping amendments, including the following items.

254. Should we amend rule 204–2 as proposed? Are there any other records that an adviser should be required to maintain? If so, what are they, and why?

255. Are there alternatives to the proposed amendments to rule 204–2 that would minimize recordkeeping burdens and the associated costs, while promoting the goals of facilitating the inspection and enforcement capabilities of the Commission and its staff? If so, what are they, and why?

256. Should we require advisers to maintain the proposed records in electronic, text-searchable, machine-readable, and/or structured format?

257. Should we eliminate the requirement to maintain responses to any written client communications required under proposed rule 223–1? If so, why?

258. The proposed rule would require an adviser to make and keep records that identify client accounts for which the adviser has discretionary authority. As a result, we are proposing to eliminate the current rule's requirement to keep a list or other record of all client accounts for which the investment adviser has any discretionary power under 204–2(a)(8) as it is no longer necessary. Do commenters agree?

259. Is the proposed requirement sufficiently clear regarding account activity in a client's account? Should we require advisers to include additional information about transactions effected in a client account in their records? If so, please explain what additional information the rule should require and why it should be required. If the proposed requirement should require less information about account activity in a client account, please identify the information that should not be required and why.

260. Would advisers find the proposed modifications to the current recordkeeping rule's requirements regarding transaction and position information helpful for account reconciliation purposes?

261. The proposed rule would require an adviser to maintain the proposed records for the same period as required under the current books and recordkeeping rule (*i.e.,* 5 years). Should advisers be required to maintain these records for a shorter or longer period? If so, what time period, and why?

262. As proposed in amended rule 204–2, advisers that rely on the audited financial statements exception in the safeguarding rule for a pooled investment vehicle or any other entity would be required to maintain copies of such audited financial statements. Should we also require such advisers to maintain records verifying the delivery and distribution of such audited financial statements to investors in the entity (or their independent representatives)?

I. Changes to Form ADV

We are proposing to amend Part 1A, Schedule D, and the Instructions and Glossary of Form ADV.[359] The amendments are designed to help advisers identify when they may have custody of client assets, to provide the Commission with information related to advisers' practices to safeguard client assets, and to provide the Commission with additional data to improve our ability to identify compliance risks. Because Form ADV is publicly available, these amendments may also provide clients or investors additional protection because they will be better able to discern the reasons why a particular adviser has custody. Further, these amendments may offer ancillary market benefits to the extent that market participants are better able to analyze the Form ADV data to assess fraud risk. The proposed amendments would continue to collect much of the information currently reported by advisers in Item 9 of Form ADV Part 1A and the corresponding sections of Schedule D, along with new information that corresponds with certain aspects of the proposed rule.[360] These proposed revisions would also streamline the collection of this information by reorganizing Item 9 and refining certain reporting requirements to eliminate confusion and prevent inaccurate or incomplete reporting.[361]

Item 9 currently requires an adviser to report whether it or a related person has custody of any advisory client's cash or bank accounts or securities, along with certain additional information if an adviser reports having custody. Nonetheless, an adviser is not required to report having custody if it has custody solely because it deducts advisory fees or because a related person has custody but an adviser has overcome the presumption that it is not operationally independent. The adviser may, however, still be required to

[357] *See* proposed rule 204–2(b)(vi).

[358] Proposed rule 223–1(b)(7).

[359] This section discusses the Commission's proposed rule and form amendments that would affect advisers registered with the Commission. We understand that the state securities authorities intend to consider similar changes that affect advisers registered with the states, who are also required to complete Form ADV Part 1A as part of their state registrations. We will accept any comments and forward them to the North American Securities Administrators Association (''NASAA'') for consideration by the state securities authorities. We request that you clearly indicate in your comment letter which of your comments relate to these items.

[360] Because Form ADV, Part 1A—including the current Item 9—is submitted in a structured, XML-based data language specific to that Form, the information in the amended Item 9 would continue to be structured (*i.e.,* machine readable) as well. That is, the Commission is not proposing to change the structured data language used for Item 9.

[361] *See* proposed Form ADV, Part 1A, Item 9. The following definitions from the proposed rule would be added to Form ADV: Assets (for purposes of Item 9 and related sections of Schedule D), Operationally Independent (for purposes of Item 9 and related sections of Schedule D), Qualified Custodian, and Standing Letter of Authorization. Additionally, the definition of Discretionary Authority or Discretionary Basis would be expanded to include Discretionary Trading Authority. *See* proposed Form ADV, Part 1A, Glossary and Item 9.C, D, E, and F, which currently collect information about an adviser's methods of compliance with rule 206(4)–2, whether a related-party acts as a qualified custodian, whether the adviser was subject to a surprise examination, and the number of qualified custodians, respectively, would be deleted or revised in the proposed Item 9 to reflect the proposed changes to the rule and to collect similar information more effectively.

complete other sections of Item 9. In the Commission's experience, advisers often are confused by these requirements, because they may have custody under the rule but are instructed to report *not* having custody for purposes of completing Item 9.A.(1) of Form ADV. This can result in inaccurate or incomplete reporting, which in turn, could limit our staff's ability to effectively analyze this important Form ADV data. Further, not being required to report having custody on Form ADV when an adviser in fact has custody under the rule may result in adviser's erroneously believing that it is not subject to the custody rule. The proposed amendments to Form ADV are designed to eliminate this confusion, improve the information available to the Commission and the public about how advisers safeguard clients' assets, and promote greater compliance with the proposed safeguarding rule.

First, consistent with the proposed rule, we are proposing to capture information in Item 9 about an adviser's custody of its ''client assets'' including a client's funds, securities, and other positions held in a client's account. We are proposing to revise the introductory language, replace references to funds and securities in Item 9 with the term assets (as defined in the proposed rule), and add a new sub-item to allow advisers to indicate their reliance on certain exceptions in the proposed rule.[362] These revisions are designed to align Form ADV with the proposed rule.

Next, we are also proposing to revise Item 9.A.(1) to require advisers to indicate, in a single place, if they directly, or indirectly through a related person, have custody of client assets, including if custody is solely due to an adviser's ability to deduct fees from client accounts or because the adviser has discretionary authority.[363] Form ADV, Part 1A currently distinguishes reporting among advisers having direct custody, advisers subject to the current rule because a related person has custody, and advisers having custody of client funds or securities solely because of the ability to deduct advisory fees from client accounts. Further, as noted above, in certain circumstances advisers are currently instructed not to report having custody in Item 9.A.(1), despite having custody (*i.e.,* when the basis for custody is an adviser's ability to deduct advisory fees or through an operationally independent related person). While these distinctions are important for evaluating compliance risks, the current structure of Item 9 makes it difficult to easily analyze this data. For example, under the current structure of Item 9, we cannot easily identify the total number of clients or the total amount of assets over which an adviser has custody. The proposed revisions to Item 9.A.(1) are designed to increase the quality of the information reported on Form ADV by reducing confusion about how and where to report certain information and make it easier for the public and the Commission to understand and analyze.

Third, we are proposing to modify Item 9.A.(2) to preserve information currently reported by advisers in Item 9 about the amount of client assets and number of clients falling into each category of custody (*i.e.,* direct or indirect) and to require advisers to report similar information about client assets over which they have custody resulting from (1) having the ability to deduct advisory fees; (2) having discretionary trading authority; (3) serving as a general partner, managing member, trustee (or equivalent) for clients that are private funds; (4) serving as a general partner, managing member, trustee (or equivalent) for clients that are not private funds; (5) having a general power of attorney over client assets or check-writing authority; (6) having a standing letter of authorization; (7) having physical possession of client assets; (8) acting as a qualified custodian; (9) a related person with custody that is operationally independent; and (10) any other reason.[364] We believe this information would enhance the quality and utility of the data reported on the form, enhancing the Commission's ability to exercise oversight of the safeguarding practices of advisers. We believe this information may also be beneficial to clients or investors attempting to discern the reasons why a particular adviser has custody. Further, this updated format may help market participants to analyze Form ADV data on an aggregated basis to assess fraud risk more accurately.

Fourth, we are also proposing new Item 9.B. requiring an adviser to indicate whether it is relying on any of the exceptions from the proposed rule and, if so, to indicate on which exception(s) the adviser is relying. This information would be valuable for Commission staff to assess compliance with the proposed rule, and it may also be beneficial to clients or investors to assess which exception(s) the adviser is relying upon.

Fifth, we are proposing to require advisers to report whether client assets over which they or a related person have custody are maintained at a qualified custodian and the number of clients and approximate amount of client assets maintained with a qualified custodian.[365] Advisers also would be required to report certain identifying information about the qualified custodians maintaining client assets.[366] Item 9 currently collects only limited information from advisers about advisers and their related persons that act as qualified custodians under the rule.[367] Qualified custodians continue to serve a critical role in safeguarding client assets under the proposed rule. Given this important role, we are proposing to require advisers to report the following information for all qualified custodians maintaining client assets:

- Full legal name of the qualified custodian;
- Location of the qualified custodian's office responsible for the services provided;
- Contact information for an individual to receive regulatory inquiries;
- Type of entity;
- Legal Entity Identifier (if applicable);
- Number of clients and approximate amount of client assets (rounded to the nearest $1,000) maintained by the qualified custodian; and

[362] We would retain the instruction to exclude reporting information in Item 9 about advisory clients that are investment companies registered under the Investment Company Act as this provision in rule 223–1 is not proposed to be amended.

[363] We are also proposing to include new instructional language directing advisers to answer ''Yes'' to Item 9.A.(1) if they have the ability to deduct advisory fees directly from client accounts, reported discretionary RAUM in Item 5.F.(2).(a), or reported having discretionary trading authority in Item 8.C.(1).

[364] Proposed Form ADV, Part 1A, Item 9.A.(2). Advisers are currently required to report information with respect to funds and securities over which their related persons have custody, including the dollar amount and number of clients whose funds or securities are in the adviser's custody and whether any related person has custody of any clients' cash or bank accounts or securities and the relevant dollar amount and number of clients. *See* Form ADV, Part 1A Item 9.A.(2) through, Item 9.B. Based on its responses, an adviser is also required to report additional custody-related information in Schedule D of Form ADV, Part 1A.

[365] *See* proposed Form ADV, Part 1A, Item 9.C.(1)and proposed Form ADV, Part 1A, Schedule D, section 9.C.(1).

[366] Proposed Form ADV, Part 1A, Schedule D, section 9.C.(1).

[367] *See* Form ADV, Part 1A, Item 9.D.(2) and Form ADV, Part 1A, Schedule D, section 7.A. Advisers are currently required to report more detailed custodial information about their separately managed accounts and about the private funds they advise. *See* Form ADV, Part 1A, Schedule D, section 5.K.(3); Form ADV, Part 1A, Schedule D, section 7.B.(1)(25).

• Whether the qualified custodian is a related person, and if so, the identifying information for the independent public accountant engaged to prepare the proposed internal control report and verification required under the proposed safeguarding rule.[368]

Similarly, we are also proposing revisions to Item 9 that would require advisers to report information about accountants completing surprise examinations, financial statement audits, or verification of client assets under the proposed rule.[369] We believe requiring advisers to disclose more detailed information about the qualified custodians maintaining client assets and the accountants completing these engagements under the proposed rule would provide useful information to the public and facilitate the Commission's examination efforts.

Advisers currently are required to file an other-than-annual-amendment to Form ADV promptly if certain information provided in response to Item 9 becomes inaccurate in any way.[370] Information triggering this obligation includes whether the adviser or a related person has custody of client cash, bank accounts, or securities; [371] the methods by which the adviser complies with the custody rule; [372] and whether the adviser or a related person acts as a qualified custodian.[373] Given the importance of this information, we continue to believe that advisers should update this information to the extent it becomes inaccurate. Thus, we are proposing to retain the current requirement that advisers file an other-than-annual-amendment to Form ADV promptly if similar information we are proposing to collect on Form ADV becomes inaccurate.[374] More specifically, we are proposing to require an adviser to file promptly an other-than-annual amendment to Form ADV if any of an adviser's responses regarding the following becomes inaccurate in any way: (1) whether the adviser has custody of client assets either directly or because a related person has custody of client assets in connection with advisory services that the adviser provides to the client; (2) whether the adviser is relying on certain exceptions to the proposed rule; (3) whether client assets are maintained with a qualified custodian; (4) whether the adviser or a related person serves as a qualified custodian under the proposed rule; (5) whether client assets are not maintained by a qualified custodian; (6) whether the adviser is required to obtain a surprise examination by an independent public accountant under the proposed rule; or (7) whether the adviser is relying on the audit provision.[375] An adviser would be required to update the other information reported in Item 9 (*e.g.,* information about the number of clients and approximate amount of assets or certain information about qualified custodians) only on its annual updating amendment, which is the same frequency with which advisers update similar information on the current form.[376]

We request comment on all aspects of proposed revisions to Form ADV Part 1A, including the following items.

263. Would the proposed reorganization of Item 9 make it easier for advisers to complete Item 9 more accurately and eliminate the confusion created by the current structure or wording of Item 9? Are there other changes to Item 9 that would make the information reported on that Item more accurate or less confusing? Is additional guidance needed to clarify any of the requirements of the proposed revisions?

264. In proposed Item 9.A.(2), we ask advisers to identify various ways that they may have custody, directly or indirectly, broken out by the approximate amount of client assets and number of clients. Based on our experience, we understand that a client may have several different advisory accounts. Should we also ask for information at the advisory account level? Should we ask for information on an account level basis rather than a client level basis? Would this information be more meaningful? Why or why not?

265. In proposed Item 9.B.(2), we ask advisers about which exception(s) in rule 223–1(b) they are relying upon. Should we also ask for the approximate amount of assets and number of clients under each exception? Should we also ask for information at the advisory account level for each exception? Should we ask for information on an account level basis rather than a client level basis for each exception? Would this information be more meaningful? Why or why not?

266. Would advisers be able to provide the information we are proposing to collect about qualified custodians? Should we collect additional or different information from advisers about qualified custodians? If so, what types of information should advisers be required to report? Does the proposal seek to collect information about qualified custodians that would be unnecessary or overly burdensome for advisers to report? For example, do advisers keep records of the regulator for foreign financial institutions acting as qualified custodians? In particular, what information should not be collected and why? For instance, are there any privacy laws or other legal barriers that would prohibit or restrict an adviser from reporting this information about qualified custodians?

267. Should advisers be required to file promptly an other-than-annual-amendment to Form ADV when the information provided in response to certain parts of Item 9 becomes inaccurate? Should an adviser be required to update promptly only some of this information, as proposed, or, alternatively, all of this information when it becomes inaccurate? Are there different items on Form ADV that advisers should have to update promptly than those proposed?

268. Is there any additional information an adviser should be required to report regarding its practices to safeguard client assets? If so, what types of additional information should advisers be required to report on Form ADV?

269. Should advisers be required to report their holdings of physical assets on Form ADV?

270. Should advisers be required to report their holdings of privately offered securities that cannot be recorded and maintained with a qualified custodian on Form ADV?

271. Should advisers also be required to report information about the independent public accountant where the adviser cannot maintain assets with a qualified custodian?

272. Should advisers be required to disclose information on Form ADV regarding sub-custodial, securities depository, or other similar

[368] *See* proposed Form ADV, Part 1A, Schedule D, section 9.C.(1). This information is similar to the information advisers currently report regarding separately managed accounts and private fund custodians. *See* Form ADV, Part 1A, Schedule D, section 5.K.(3); Form ADV, Part 1A, Schedule D, section 7.B.(1)(25).

[369] *See* proposed Form ADV, Part 1A, Schedule D, section 9.C.(3). Advisers report similar information about the independent public accountants completing surprise examinations under the current rule in section 9.C of Form ADV Part 1A Schedule D.

[370] *See* Form ADV, General Instructions. Advisers, however, are not required to file an other-than-annual amendment to update information provided in response to Items 9.A.(2), 9.B.(2), 9.E, and 9.F even if that information becomes inaccurate—though advisers are required to update this information when filing their next annual updating amendment. *Id.*

[371] *See* Form ADV, Item 9.A.(1) and Item 9.B.(1).

[372] *See* Form ADV, Item 9.C.

[373] *See* Form ADV, Item 9.D.

[374] *See* proposed amendments to Form ADV General Instructions.

[375] *See generally* proposed Form ADV, Items 9.A.(1), 9.B.(1), 9.C., 9.D.(1), and 9.E.

[376] *See* proposed amendments to Form ADV, General Instructions.

arrangements about client assets? Do advisers often have this information?

273. Should advisers be required to disclose on Form ADV whether financial statements distributed to investors under the audit provision comply with U.S. GAAP or another comprehensive body of accounting standards?

274. Some of the information we are proposing be reported in section 9.C.(1) and 9.C.(3) of Schedule D is similar to the information adviser are required to report in section 7.B.(1) of Schedule D, particularly as it relates to whether reports provided by independent public accountants contain unqualified, qualified, or modified opinions. Should we amend these portions of section 7.B.(1) of Schedule D to conform with the proposed amendments to section 9.C.(2) and 9.C.(3)?

275. Where a filing adviser files Form ADV along with a relying adviser, it is our understanding that some filing advisers may include the amount of client funds and securities and total number of clients for which the filing adviser has custody in response to Item 9.A.(2) and for which the relying adviser has custody in response to Item 9.B.(2) of Form ADV.[377] Should we provide additional guidance in Form ADV about how we expect filing and relying advisers to complete Item 9? If so, please explain.

J. Existing Staff No-Action Letters and Other Staff Statements

Staff in the Division of Investment Management is reviewing certain of its no-action letters and other staff statements addressing the application of the custody rule to determine whether any such letters, statements, or portions thereof, should be withdrawn in connection with any adoption of this proposal. We list below the letters and other staff statements that are being reviewed as of the date of any adoption of the proposed rules or following a transition period after such adoption. If interested parties believe that additional letters or other staff statements, or portions thereof, should be withdrawn, they should identify the letter or statement, state why it is relevant to the proposed rule, and how it or any specific portion thereof should be treated and the reason therefor. To the extent that a letter listed relates both to the custody rule and another topic, the portion unrelated to the custody rule is not being reviewed in connection with the adoption of this proposal.

LETTERS TO BE REVIEWED

Name of staff statement	Date issued
All staff statements issued prior to the 2003 Commission Adopting Release	Various Dates.
American Bar Association (Question 1, Custody Rule Section, only)	December 8, 2005.
American Bar Association (Question D only)	August 10, 2006.
Deloitte & Touche LLP	August 28, 2006.
Investment Adviser Association	September 20, 2007.
Investment Company Institute	September 5, 2012.
Investment Adviser Association	April 25, 2016.
Investment Adviser Association	February 21, 2017.
Madison Capital Funding, Inc	December 20, 2018.
Robert Van Grover, Esq., Seward and Kissel LLP	December 11, 2019.
Privately Offered Securities Under the Investment Advisers Act Custody Rule, Investment Management Guidance Update (“IMGU”) 2013–04.	August 2013.
Private Funds and the Application of the Custody Rule to SPVs and Escrows, IMGU 2014–07	June 2014.
Inadvertent Custody, IMGU 2017–01	February 2017.
Staff Responses to Questions About the Custody Rule (all)	Issued on various dates since 2003.

K. Transition Period and Compliance Date

We are proposing a one-year transition period to provide time for advisers to come into compliance with the following if they are adopted: redesignation of rule 206(4)–2 as new rule 223–1, and corresponding amendments to rule 204–2 and Form ADV, as applicable. Accordingly, we propose that the compliance date of any adoption of this proposal would be one year following the rules' effective dates which would be sixty days after the date of publication of the final rules in the **Federal Register** for advisers with more than $1 billion in regulatory assets under management (''RAUM''). For advisers with up to $1 billion in RAUM, we propose that the compliance date of any adoption of this proposal would be 18 months following the rules' effective dates which would be sixty days after the date of publication of the final rules in the **Federal Register**. If adopted as proposed, approximately 10,454 advisers, which represents approximately 69% of all registered advisers and 2.5% of the total RAUM of all advisers, would be subject to the longer, 18 month transition period.[378] The chart below indicates the impact applying different RAUM threshold would have on the number of advisers subject to the proposed 18-month transition period.[379]

Threshold	Number of advisers under threshold	Percent of advisers under threshold	Total RAUM of advisers under threshold	Percent of total RAUM of advisers under threshold
$500 million	8,396	55.4	$1.7	1.3
1 billion	10,454	69.0	3.2	2.5
1.5 billion	11,448	75.5	4.4	3.4

[377] *See Form ADV and Investment Advisers Act Rules,* Advisers Act Rel. No. 4509 (Aug. 25, 2016) where the Commission amended Form ADV instructions, among other items, to allow umbrella registration for a filing adviser and relying advisers.

[378] As of June 2022, 15,062 investment advisers were registered with the Commission and reported a total of $128.96 trillion in RAUM, while 10,454 advisers reported having less than $1 billion in RAUM, while the aggregate RAUM reported by these advisers as of June 2022 was approximately $3.2 trillion.

[379] The data in the table is based upon data reported by advisers as of June 2022.

Threshold	Number of advisers under threshold	Percent of advisers under threshold	Total RAUM of advisers under threshold	Percent of total RAUM of advisers under threshold
2 billion	11,987	79.1	5.3	4.1
2.5 billion	12,378	81.6	6.2	4.8
3 billion	12,657	83.5	6.9	5.4
3.5 billion	12,859	84.8	7.6	5.9
4 billion	13,044	86.0	8.3	6.5
4.5 billion	13,215	87.2	9.0	7.0
5 billion	13,357	88.1	9.7	7.6
10 billion	13,994	92.3	14.1	11.0

Under this proposal, advisers could continue to rely on current rule 206(4)–2, rule 204–2, and Form ADV until the compliance date. We are proposing that once the rules become effective, advisers may voluntarily comply with them in advance of the compliance date. To promote regulatory consistency, however, we are proposing that any adviser that elects to rely, prior to the compliance date, on the effective rule 223–1 must also comply with, as applicable, the amended rule 204–2 and the amended Form ADV beginning at the same time.

We request comments on the proposed transition period:

276. Do commenters agree that a one-year transition period following each rule's effective date is appropriate for advisers with more than $1 billion in RAUM? Should the period be shorter or longer? For example, would six months be an appropriate amount of time? Alternatively would 18 months be necessary? Do commenters agree that an 18-month transition period following each rule's effective date is appropriate for advisers with up to $1 billion in RAUM? Should the period be shorter or longer? For example, would one year be an appropriate amount of time? Alternatively would 24 months be necessary? Should there be different compliance dates for different types of advisers, such as advisers to pooled investment vehicles or advisers to separate account clients? Should the $1 billion threshold for the different compliance groups be higher or lower?

277. Should the transition period be the same for proposed new rule 223–1 and amendments to rule 204–2 and Form ADV? Should we permit that once the rules become effective, advisers may voluntarily comply with them in advance of the compliance date, and require that any adviser that elects to rely on new rule 223–1 prior to the compliance date must also comply beginning at the same time with the amended rule 204–2 and amended Form ADV? Does this promote regulatory consistency, and if not, why not?

278. Should we also require that any adviser that elects to rely on rule 223–1 and amended rule 204–2 and amended Form ADV prior to the compliance date must also cease to rely on Commission and staff letters and other statements that would be withdrawn on the compliance date?

279. Should the transition period vary for different rule requirements? For example, would advisers need 18 months to comply with the proposed amendments to the qualified custodian provisions and three months to comply with the exception from the surprise examination for SLOAs? Please explain your answer and suggest transition period durations.

III. Economic Analysis

A. Introduction

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 202(c) of the Advisers Act provides that when the Commission is engaging in rulemaking under the Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors. The following analysis considers, in detail, the likely significant economic effects that may result from the proposed rule amendments, including the benefits and costs to investors and other market participants as well as the broader implications of the proposed rule amendments for efficiency, competition, and capital formation.

Where possible, the Commission quantifies the likely economic effects of its proposed amendments and rules. However, the Commission is unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges of costs. Additionally, in some cases, quantification would require numerous assumptions to forecast how investment advisers and other affected parties would respond to the proposed amendments, and how those responses would in turn affect the broader markets in which they operate. In addition, many factors determining the economic effects of the proposed amendments would vary significantly among investment advisers. Investment advisers vary in size and sophistication as well as the assets on which they provide advice. As a result, investment advisers' existing practices and the extent to which investment advisers qualify for exceptions from the rule varies, making it inherently difficult to quantify economic effects. Even if it were possible to calculate a range of potential quantitative estimates, that range would be so wide as to not be informative about the magnitude of the benefits or costs associated with the proposed rule. Many parts of the discussion below are, therefore, qualitative in nature. As described more fully below, the Commission is providing a qualitative assessment and, where practicable, a quantified estimate of the economic effects.

B. Broad Economic Considerations

Investors rely on the asset management industry for a wide variety of wealth management and financial planning functions. These services are critical for investors to plan for the future and diversify their investment risks. Investment advisers are a key part of this industry, as they provide investment advice to investors and clients about the value of, or about investing in, securities and other investment products.[380]

When performing services for investors and clients, an adviser may frequently have access to client assets, exposing them to the risk of loss, misuse, theft, or misappropriation. This gives rise to a principal-agent problem between investors and clients (the principals) on the one hand and their

[380] *See, e.g., https://www.investor.gov/introduction-investing/investing-basics/glossary/investment-adviser.*

investment advisers (the agents) on the other. This is because, while advisers face relevant competitive market forces and therefore have private reputational incentives to maintain some level of oversight and internal controls, as discussed below market failures can lead their chosen levels of oversight and control to be sub-optimally low. The current custody rule, which the Commission has amended over time, has been designed to deter such behavior and alleviate these market failures in part by relying on a third party, a qualified custodian, in safeguarding client assets. While requiring the use of a qualified custodians helps mitigate the principal-agent problem between investors, clients, and their advisers, the introduction of an additional agent—the custodian—introduces the potential for additional principal-agent conflicts.

Such principal-agent problems provide the economic rationale for revised Commission rules aimed at further mitigating the underlying market failures.[381] Specifically, in the absence of targeted regulation, principal-agent problems can result when investment advisers and custodians have different preferences and goals than clients. As a result, investment advisers and custodians might take actions that increase their well-being at the expense of imposing agency costs on investors and clients.[382] For example, a custodian may not have sufficient incentive to provide custodial account records to an independent public accountant on a timely basis, to the extent providing a timely response is burdensome to a custodian. This would make adviser compliance with the audit provision, surprise examination, or Form ADV–E filing provisions of the rule more difficult, which would ultimately be to the disadvantage of clients.

Market forces generally provide some incentive for principals and agents to mitigate principal-agent conflicts. Advisers that effectively mitigate conflicts, for example, by offering targeted private contract terms, may, all else being equal, gain a reputational advantage that will help them in retaining and attracting investors and clients. The assurance provided by such terms, however, would depend on both investors' perception of the costs of enforcing the terms, as well as the likelihood that disputes would be resolved in investors' favor.[383] A market failure may exist to the extent that more costly enforcement of the contract and more unpredictable favorable outcomes reduce the effectiveness of the contract in mitigating conflicts of interest between clients and investment advisers. Factors affecting the cost of enforcement in the context of investment advice may include: (1) the cost of verifying adviser conduct, (2) the extensiveness and complexity of services over which the terms apply, and (3) the ability of investors, who likely lack specialized knowledge, to understand how adviser conduct relates to the terms.[384]

When the incentives of advisers or custodians do not sufficiently align with investors' or clients' interests, and market failures prevent market participants from effectively resolving these conflicts of interest via private contracting, targeted regulatory requirements can help increase the level of investor protection. The investor protection benefits of such regulatory requirements will depend, however, on an adviser's ability and incentive to comply with the requirements. Encouraging or requiring independent oversight and verification of adviser conduct is one way to incentivize compliance.[385] For example, an adviser is less likely to engage in unauthorized trading in a client's account when the adviser knows that the client will be receiving an account statement detailing any trading activity. Similarly, an adviser is less likely to misappropriate client assets when it knows that an independent public accountant is required to verify client assets.[386]

There are three ways in which regulation facilitating clients' and third parties' oversight of advisers' conduct through verification of client assets can reduce potential harm to investors and clients. First, such regulation can increase the likelihood that any non-compliant behavior by advisers is detected. Second, it can increase the likelihood that any non-compliant behavior is detected sooner, potentially mitigating loss to clients. Third, and perhaps most importantly, facilitating verification of client assets would likely have a prophylactic effect, countering the incentive for non-compliant behavior by advisers. Indirectly, regulation that enhances verification of client assets also reduces potential harm to clients by facilitating detection of non-compliant behavior by the qualified custodians with whom the clients have custody agreements, potentially mitigating client losses and deterring non-compliant behavior by custodians. This ameliorates principal-agent problems between the client and the qualified custodian and facilitates advisers' exercise of fiduciary duty over client assets held by the qualified custodian.[387]

Finally, the ability to oversee investment advisers' (and custodians') conduct through verification of client assets depends on the quality of the third party's verification processes and the independence of the third party.[388] Generally, a higher quality verification process is one that has an increased likelihood of detecting misconduct.[389]

[381] As discussed above in section I, there have been market developments that suggest a need to better protect client assets by broadening the scope of the application of the rule and by improving its efficacy.

[382] *See, e.g.,* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J.Fin. Econ. 305 (1976).

[383] *See, e.g.,* Andrei Shleifer, ''*Efficient Regulation*'', (2010), *available at http://www.nber.org/papers/w15651* (''Shleifer paper''), for a general discussion of these points.

[384] *See* Shleifer paper for a general discussion of factors affecting the cost of enforcement of the terms and the predictability of favorable legal outcomes. Several factors may also affect an investor's assessment of a favorable legal outcome should the investor believe an adviser to have violated the contractual terms. First, while investors may believe an adviser has violated the terms, investors may be uncertain of their ability to verify such conduct. Second, given the potentially complex fact patterns of litigation related to the provision of investment advice, investors may believe that there is some chance that courts will simply ''get it wrong.'' Third, advisers may have access to substantially greater financial resources than investors. Investors may believe that the financial inequality between themselves and advisers makes a favorable legal outcome less likely. An investment adviser's fiduciary duty to their clients could mitigate the incentive for an adviser to provide fewer terms that protect investors. The ability of the adviser's fiduciary duty to mitigate the incentive for an adviser to provide fewer terms that protect investors will depend on factors affecting the cost of enforcing that duty. *See,* Frank H. Easterbrook & Daniel R. Fischel, ''The Economic Structure of Corporate Law,'' 1991, Harvard University Press.

[385] Even in the absence of such a regulatory requirement, an adviser could contractually offer independent oversight and verification of its conduct to its investors and clients. However, there may be practical impediments, such as the lack of specialized knowledge, which may lead investors to not seek out such terms. In addition, individual negotiation of contracts may be less cost effective than a market-wide regulatory solution.

[386] *See, e.g.,* Stephen G. Dimmock & William W. Gerken, ''*Predicting fraud by investment managers,*'' 105 J. Fin. Econ. 153 (Aug. 2011). This article finds that monitoring is a significant predictor of investment fraud. For example, large investors who have stronger incentive and greater ability to monitor are associated with fewer frauds. *Also see, e.g.,* Ben Charoenwong, Alan Kwan & Tarik Umar, ''*Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation?,*'' 109 Am. Econ. Rev., Am. Econ. Ass'n. 3681 (Oct. 2019). This article finds that registered investment advisers that are costlier for state regulators to supervise, or primarily serve less sophisticated investors, receive more complaints.

[387] For those custodians that are registered broker-dealers, it also facilitates compliance with their obligations under Exchange Act Rule 15c3–3.

[388] *See, e.g.,* Ross L. Watts & Jerold L. Zimmerman, ''*Positive Accounting Theory: A Ten Year Perspective,*'' 65 Acc. Rev. 131 (Jan. 1990).

[389] The use of PCAOB-registered independent public accountants is required for certain

Similarly, a more independent third party is one that is more likely to report misconduct or violations of regulatory requirements that it detects.[390] Regulation designed to enhance the quality of third-party verification processes and/or enhance the independence of third parties, then, generally enhances the ability of third parties to oversee investment advisers' conduct.

C. Baseline

The Commission assesses the economic effects of the proposed amendments relative to the baseline of existing requirements and practices of advisers.

1. Current Regulation

a. Custody

As discussed in greater detail in section II above, the regulatory framework regarding safeguarding of investment adviser client assets is set forth in rule 206(4)–2, which applies to any investment adviser registered or required to be registered with the Commission under section 203 of the Act that has custody of client funds or securities.[391] As defined by the current rule, ''custody'' means that the investment adviser, or its related persons, holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them.[392]

The current rule requires such advisers to maintain all funds and securities of which the adviser has custody with a ''qualified custodian'' in separate accounts under that client's name or in accounts containing only the funds and securities of such adviser's clients, under the adviser's name as agent or trustee, subject to certain exceptions.[393] Qualified custodians generally include banks and savings associations, broker-dealers, futures commission merchants, and certain FFIs [394]—all of which are financial institutions that are currently subject to regular government oversight and are subjected to periodic inspection and examination.[395]

The current rule generally requires an adviser with custody of client assets to obtain an annual surprise examination from an independent public accountant to verify client funds and securities independently.[396] With certain exceptions, the adviser must report on Form ADV whether it or its related person has custody of an advisory client's cash, bank accounts, and securities, and disclose the details of the custodial relationship (including, *inter alia,* dollar amounts, total number of clients, distribution of quarterly account statements, audits, annual surprise examinations, and internal control reports).[397]

In situations where the adviser or a related person acts as qualified custodian, the current rule requires advisers to obtain, or receive from its related person, an annual internal control report with respect to the adviser's or related person's custody controls, which includes an opinion from an independent public accountant that is registered with, and subject to regular inspection by, the PCAOB.[398] The required internal control report addresses the greater custodial risks associated with situations where an adviser, or its related person, acts as a qualified custodian.[399]

The current rule's requirements are, however, subject to certain exceptions. Specifically, the current rule provides an exception to the requirement to maintain securities with a qualified custodian for certain ''privately offered securities''.[400] The current rule also provides that advisers need not comply with the requirements of rule 206(4)–2 with respect to the accounts of registered investment companies,[401] and allows shares of mutual funds to be maintained with the fund's transfer agent in lieu of a qualified custodian.[402] In addition, an adviser that has custody solely because of its authority to deduct advisory fees, or because a related person has custody and such related person is operationally independent of the adviser, is not required to obtain an annual surprise examination.[403]

The current rule also requires that certain communications be made to clients. An investment adviser is required to provide its clients notice if the adviser establishes an account with a qualified custodian on a client's behalf.[404] Advisers must also have a

engagements under the current rule. In particular, a PCAOB-registered independent public accountant is required to perform surprise examinations and periodically inspect internal controls under the current rule when an adviser or its related person serves as a qualified custodian for client assets, and a PCAOB-registered independent public accountant must audit the financial statements of a pooled investment vehicle to be deemed to be in compliance with the surprise examination requirement. *See current* rule 206(4)–2(a)(6) and (b)(4). As the Commission noted in adopting these requirements in 2009, the Commission has greater confidence in the quality of audits conducted by an independent public accountant registered with, and subject to regular inspection by, the PCAOB. *See* 2009 Adopting Release, *supra* footnote 11, at 17.

[390] *See, e.g.,* Ross L. Watts & Jerold L. Zimmerman, ''*Agency Problems, Auditing and the Theory of the Firm: Some Evidence,*'' 26 J.L. Econ. 613 (1983).

[391] *See* rule 206(4)–2(a). Our exam program commits significant resources ensuring advisers are in compliance with the custody rule and verifying the existence of investor assets at custodians—a process called asset verification. In FY 2022, EXAMS verified over 2.1 million investor accounts, totaling over $2 trillion.

[392] Rule 206(4)–2(d)(2). The Commission stated in 2003, however, that because a one-for-one exchange of assets represents a limited risk of client loss, an adviser's authority to issue instructions to a broker-dealer or another custodian to effect or to settle trades does not constitute ''custody'' under the current rule. See 2003 Adopting Release at footnote 10. *See also* rule 206(4)–2(d)(7), defining ''related person'' as ''any person, directly or indirectly, controlling or controlled by [the investment adviser], and any person that is under common control with [the investment adviser].''

[393] *See* rule 206(4)–2(a)(1).

[394] *See* rule 206(4)–2(d)(6).

[395] *See supra* footnote 89.

[396] *See* rule 206(4)–2(a)(4). A 2013 Government Accountability Office (GAO) study, which examined 12 average-sized registered advisers, found that the cost of surprise examinations ranged from $3,500 to $31,000. The GAO noted that the costs of surprise examinations vary widely across advisers and are typically based on the amount of hours required to conduct the examinations, which is a function of a number of factors including the number of client accounts under custody. *See* Gov't Accountability Office, GAO–13–569, Investment Advisers: Requirements and Costs Associated with the Custody Rule (2013), *https://www.gao.gov/assets/gao-13-569.pdf.*

[397] 17 CFR 279.1; Form ADV, Part 1A, Item 9; *see also supra* notes 268–69, 271, 274–77.297, 303–309. An adviser must also include a notice in its brochure concerning its qualified custodian's account statement obligations, and a disclosure in its balance sheet of any financial conditions that are reasonably likely to impair the adviser's ability to meet contractual commitments to clients, when the adviser has discretionary authority or custody over client funds or securities. *See* Form ADV, Part 2A, Items 15, 18.

[398] *See* rule 206(4)–2(a)(6). The surprise examination must also be conducted by a PCAOB-registered and inspected independent public accountant. *See* Custody Rule Amendments Adopting Release, *supra* footnote 11 (stating that the internal control report should address control objectives and associated controls related to the areas of client account setup and maintenance, authorization and processing of client transactions, security maintenance and setup, processing of income and corporate action transactions, reconciliation of funds and security positions to depositories and other unaffiliated custodians, and client reporting).

[399] As noted in the Custody Rule Amendments Adopting Release, *supra* footnote 11, the surprise examination alone does not adequately address custodial risks associated with self-custody or related-person custody because the independent public accountant seeking to verify client assets would rely, at least in part, on custodial reports issued by the adviser or its related person. The internal control report can significantly strengthen the utility of the surprise examination when the adviser or its related person acts as qualified custodian for client assets because it provides a basis for the independent accountant performing the surprise examination to obtain additional comfort that the confirmations received from the custodian are reliable.

[400] See rule 206(4)–2(b)(2). As discussed in section II.C, we understand that demand for custodial services of privately offered may be thin.

[401] *See* rule 206(4)–2(b)(5).

[402] Rule 206(4)–2(b)(1).

[403] *See* rule 206(4)–2(b)(3), (6).

[404] *See* rule 206(4)–2(a)(2).

reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each of the adviser's applicable clients.[405] When an adviser has custody of funds and securities belonging to a client that is a pooled investment vehicle, these account statements must be sent to each limited partner, member, or other beneficial owner if the adviser or its related person is a general partner of a limited partnership, managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle.[406]

An adviser is not required to comply with the notice and account statement delivery requirements of the rule and shall be deemed to comply with the surprise examination requirement with respect to the account of a limited partnership or other pooled investment vehicle that is subject to annual audit, provided certain conditions are satisfied (the ''current audit provision'').[407] To rely on the current audit provision, the pool's financial statements must, among other things, be prepared in accordance with U.S. GAAP and distributed to all limited partners (or other beneficial owners) within 120 days of the end of the pool's fiscal year. The current audit provision also requires the auditor to be registered with and subject to inspection by the PCAOB.

b. Recordkeeping

Rule 204–2 applies to any investment adviser registered or required to be registered with the Commission under section 203 of the Act. This rule requires, among other things, that an adviser make and keep a list or other record of all client accounts for which the adviser has any discretionary power,[408] and copies of internal control reports obtained or received pursuant to current rule 206(4)–2.[409] Rule 204–2 also currently requires investment advisers subject to rule 206(4)–2 to make and keep records regarding all purchases, sales, receipts and deliveries of securities for such accounts and all other debits and credits to such accounts, separate ledgers for such accounts, copies of confirmations of all effected transactions, a record for each security in which any such client has a position, and a memorandum describing the basis upon which the adviser has determined that the presumption that any related person is not operationally independent has been overcome.[410]

c. Regulation of Qualified Custodians

Finally, other regulations affect entities' responsibilities as qualified custodians, namely, banks and savings associations, broker-dealers registered with the Commission, futures commission merchants registered with the CFTC, and FFIs. A broker-dealer acting in the capacity of a custodian is subject to Exchange Act Rule 15c3–3, under which customers' assets must be segregated from proprietary assets to permit prompt return in the event of the firm's liquidation in a proceeding under the Securities Investor Protection Act of 1970;[411] and, where applicable, to FINRA rule 2231, requiring broker-dealers' statements of assets to be sent to customers not less than quarterly. Futures commission merchants are subject to Commodities Exchange Act sections 4d(a)(2) and 4d(b) and regulations issued thereunder, which require segregation of client funds from the entities' funds, and impose related accounting and recordkeeping requirements.[412] Banks and savings associations are also subject to regulation with respect to their custodial services. For example, under applicable Treasury regulations, generally, a depository institution holding government securities for its customers must segregate the customer's securities from its own assets, free of any lien, charge, or claim of any third party granted or created by such custodian; and it may lend the securities to a third party only by written agreement with the customer and in full compliance with the appropriate regulatory agency.[413] Additionally, national banks and Federal savings associations are subject to OCC regulations when providing fiduciary custody services,[414] and the OCC has provided substantial guidance with respect to these firms' non-fiduciary custody services.[415] As a result, banks and savings associations have developed and deployed comprehensive custodial service agreements governing their relationships with their custodial customers. In addition, depository institutions are subject to the long-standing, efficient orderly resolution process deployed by the FDIC and non-depository member banks are subject to the efficient orderly resolution process by the OCC. Finally, as noted in part II.C.1, some FFIs are regulated in their local jurisdictions and subject to laws and regulations established by their national jurisdictions to combat money laundering and terrorism financing, consistent with standards and measures recommended by the FATF.

d. Accredited Investors

Aspects of the proposed rule address investments in privately offered securities such as investments in private companies, and offerings made by certain hedge funds, private equity funds, and venture capital funds.[416] Congress and the Commission have provided exemptions for these offerings based on various factors, including that the offerings are generally limited to individuals and entities (*e.g.,* accredited investors) that do not require the protection of registration.[417] Under Commission rules, qualifying as an accredited investor allows an investor to participate in investment opportunities that are generally not available to non-accredited investors, including certain investments in private companies and

[405] *See* rule 206(4)–2(a)(3).

[406] *See* rule 206(4)–2(a)(5).

[407] *See* rule 206(4)–2(b)(4).

[408] *See* rule 204–2(a)(8).

[409] *See* rule 204–2(a)(17)(iii).

[410] *See* rule 204–2(b).

[411] 17 CFR 240.15c3–3. Specifically, *see* Rule 15c3–3(b)(1) (requirement for a broker-dealer to promptly obtain and maintain the physical possession or control of all fully-paid securities and excess margin securities carried for the account of customers); (e)(1) (requiring every broker-dealer to maintain with a bank a ''Special Reserve Bank Account for the Exclusive Benefit of Customers'' and a ''Special Reserve Bank Account for Brokers and Dealers,'' separate from each other and from the broker-dealer's other bank accounts); and (f) (requiring written notification that the bank was informed that cash or securities are being held for the exclusive benefit of the broker-dealer's customers and account holders, separate from the broker-dealer's other accounts; and that the broker-dealer must have a written contract with the bank providing that the cash or securities will not be used as security for a loan to the broker-dealer by the bank, and will not be subject to any right, charge, security interest, lien, or claim in favor of the bank or any person claiming through the bank).

[412] 7 U.S.C. 6d(a)(2), 6d(6); 17 CFR 1.20–1.30, 1.32, 1.36.

[413] 17 CFR 450.4(a)(1), (a)(6).

[414] *See* 12 CFR 9.1 *et seq.* (rules governing fiduciary powers of national banks); 12 CFR 150.10 *et seq.* (rules governing fiduciary powers of Federal savings associations).

[415] *See generally* OCC Custody Handbook, *supra* note 237.

[416] The Securities Act of 1933 contains a number of exemptions from its registration requirements and authorizes the Commission to adopt additional exemptions.

[417] Historically, the Commission has stated that the accredited investor definition is ''intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or fend for themselves render the protections of the Securities Act's registration process unnecessary.'' See Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Release No. 33–6683 (Jan. 16, 1987) [52 FR 3015 (Jan. 30, 1987)]. See also *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 125 (1953) (taking the position that the availability of the section 4(a)(2) exemption ''should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering' '').

offerings by certain hedge funds, private equity funds, and venture capital funds.

e. Effect of State Law

The relationship between clients and qualified custodians is also governed by the common law of agency and contracts, and—to the extent adopted under state law—corresponding articles of the Uniform Commercial Code (UCC).[418] Thus under sections 8–504 and 8–509 of the UCC, unless otherwise agreed to, and unless duties are specified otherwise by statute, regulation, or rule, a custodian ''may not grant security interests in a financial asset it is obligated to maintain'' for the client and must exercise ''due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.'' [419]

2. Affected Parties and Industry Statistics

The proposed amendments would affect registered investment advisers, and those required to be registered, as well as current and prospective clients of investment advisers, qualified custodians, and independent public accountants.

a. Investment Advisers

As of June 2022 there were 15,062 investment advisers registered with the SEC. Registered investment advisers reported $128.96 trillion in RAUM with $117.57 trillion in 47.51 million accounts over which advisers have discretionary authority and $11.38 trillion in 14.55 million accounts over which advisers do not have discretionary authority.[420] The average RAUM among registered investment advisers was $8.56 billion and the median was $427.53 million.

b. Clients

Form ADV requires investment advisers to indicate the approximate number of advisory clients and the amount of total RAUM attributable to various client types.[421] Table 1 provides information on the number of client accounts, total RAUM, and the number of advisers by client type.

TABLE 1—INVESTMENT ADVISER CLIENTS

Client type	Number of clients (thousands)	Total RAUM (billions)	Registered investment advisers
Investment Companies	25	$43,838	1,603
Pooled investment vehicles—Other	95	34,584	5,763
High net worth individuals	6,917	11,832	8,989
Pension Plans	431	8,106	5,271
Insurance Companies	13	7,630	1,028
Non-high net worth individuals	43,824	7,093	8,286
State/Municipal Entities	27	4,285	1,299
Corporations	340	3,267	4,934
Foreign Institutions	2	2,209	363
Charities	121	1,613	5,134
Other Advisers	908	1,427	814
Banking Institutions	11	966	432
Business Development Companies	<1	211	98

Source: Form ADV, Items 5D.

c. Qualified Custodians

Qualified custodians include state and federally-chartered trusts, banks and savings associations, broker-dealers, FCMs, and certain FFIs.[422] The custody service industry has been characterized as dominated by a small number of large market share participants.[423] Several factors contribute to this: (i) economies of scale, because custodial services require a costly infrastructure capable of processing a large volume of transactions reliably; (ii) low margins, which makes it difficult for new entrants to compete against incumbents; and (iii) the importance of reputation/trust.[424] Large financial institutions headquartered in the U.S. dominate the global custody service industry.[425] In 2020, four large U.S. banks serviced around $114 trillion of global assets under in their custody.[426]

d. Independent Public Accountants

As discussed above, the current rule generally requires an adviser with custody of client assets to obtain an annual surprise examination from an independent public accountant.[427] As of June 2022, 13% of investment advisers obtain a surprise examination by an

[418] *See supra* footnotes 157, 159.

[419] U.C.C. 8–504(b), (c), 8–509(a) (Am. L. Inst. & Unif. L. Comm'n 2021).

[420] The term ''regulatory assets under management'' or ''RAUM'' refers to an adviser's assets under management as reported in response to Item 5.F. of Part 1A of Form ADV. See Form ADV: Instructions for Part 1A, instr. 5.b. (setting forth instructions for calculation of assets under management for regulatory purposes).

[421] If a client fits into more than one category, Form ADV requires an adviser to select one category that most accurately represents the client (to avoid double counting clients and assets).

[422] The FDIC reports that as of March 31, 2022, there were 4,194 FDIC-insured commercial banks and 602 FDIC-insured savings institutions. See *https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2022mar/industry.pdf.* We do not have data on the number of FDIC-insured commercial banks and FDIC-insured savings institutions providing custodial services. As of November 2022, there were 3,530 broker-dealers registered with the Commission. See *https://www.sec.gov/files/data/broker-dealers/company-information-about-active-broker-dealers/bd110122.txt.* The CFTC reports that as of September 30, 2022, there were 60 FCMs. See *https://www.cftc.gov/sites/default/files/2022-11/01%20-%20FCM%20webpage%20Update%20-%20September%202022.pdf.* Out of 3,498 broker-dealers registered with the Commission, 153 were classified as carrying broker-dealers based on FOCUS filings as of June 2022. Per EDGAR Form Custody: A ''Carrying broker-dealer'' is a broker-dealer that carries customer or broker or dealer accounts and receives or holds funds or securities for those customers. We do not have data on the number of qualifying FFIs.

[423] Deloitte, ''*The evolution of core financial service. Custodian & Depository Banks.*'' (2019), *available at https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/lu-the-evolution-of-a-core-financial-service.pdf. See* also Congressional Research Service, ''Digital Assets and SEC Regulation,'' January 30, 2020. According to this report, in 2020, four large banks service around $114 trillion of *global* assets under custody.

[424] Charles-Enguerrand Coste et al., *One size fits some: analyzing profitability, capital and liquidity constraints of custodian banks through the lens of the SREP methodology* (Eur. Cent. Bank Occasional Paper No. 256, 2021).

[425] *Id; see* also Congressional Research Service, ''*Digital Assets and SEC Regulations,*'' (Jan. 30, 2020.).

[426] Congressional Research Service, ''*Digital Assets and SEC Regulations,*'' (Jan. 30, 2020.).

[427] *See* rule 206(4)–2(a)(4).

independent public accountant.[428] Not all advisers with custody, however, are subject to an annual surprise examination. For example, as of June 2022, 4,933 investment advisers satisfied their custody rule obligations by complying with the current rule's audit provision.[429] Advisers reported that 86% of the accountants performing surprise examinations or conducting pooled investment vehicle financial statement audits are subject to regular inspection by the PCAOB.[430]

Advisers that are subject to an annual surprise examination also are required to obtain (or receive from the relevant related person) an internal control report if the adviser or a related person of the adviser serves as a qualified custodian for client assets. However, in the circumstance where an adviser is deemed to have custody solely because of a related person custodian and the related person custodian is operationally independent of the adviser, the adviser is not required to have an annual surprise examination but is subject to the internal control requirement.[431] As of June 2022, 98 investment advisers have a control report prepared by an independent public accountant without being subject to a surprise examination.[432]

3. Market Practice

a. Investment Advice

Academic studies have documented a number of benefits to retail investors from receiving investment advice, including, but not limited to: higher household savings rates, setting long-term goals and calculating retirement needs, more efficient portfolio diversification and asset allocation, increased confidence and peace of mind, facilitation of small investor participation, and improved tax efficiency.[433] Investment advisers can also help correct potential systematic errors that retail investors might make, including limited allocation of savings to equities, under-diversification, or investing too little in foreign assets.[434]

Investor demand for investment advice, however, may be affected by investor's assessment of the conflicts between themselves and investment advisers. For example, while investors may benefit from receiving investment advice, reports have indicated that the ability to trust the advice of a financial professional is an important factor in determining investors' demand for investment advice. In particular, one academic study has shown that trust in financial institutions is associated with the propensity to use financial advice.[435] Based on survey data analysis, this study found that financial trust is correlated with the likelihood of seeking financial advice. Using data from experiments, this study found that trust is an important predictor of who takes up advice, even after controlling for demographic characteristics and financial literacy.

b. Adviser Custody

As of June 2022, 8,536 advisers (56.67% of the total number of advisers) reported on Form ADV that they or their related persons, in aggregate, had custody of $45.56 trillion (35.33% of aggregate RAUM) of client assets.[436] [437] Advisers reported directly having custody of approximately $21.28 trillion, and $24.28 trillion resulted indirectly from custody through a related person. As of June 2022, 1,904 (12.64% of the total) advisers reported that an independent public accountant conducted an annual surprise examination of client assets.[438] 4,933 advisers reported that an independent

[428] Based on advisers' responses to Item 9.C.(2) of Part 1A of Form ADV. Comparable numbers for 2019, 2020, and 2021 were 13%, 13%, and 13%, respectively.

[429] Based on advisers' responses to Item 9.C.(3) of Part 1A of Form ADV. Comparable numbers for 2019, 2020, and 2021 were 4,460, 4,565, and 4,768, respectively.

[430] These percentages are based on advisers' responses to Item 9.C.(3) of Part 1A of Form ADV. Comparable percentages for 2019, 2020, and 2021 were 86%, 86%, and 86%, respectively.

[431] *See* rule 206(4)-2(a)(6) and (b)(6). In these circumstances, the adviser typically receives the internal control report from the related person custodian.

[432] Based on advisers' responses to Item 9.C.(3) and 9.C.(4) of Part 1A of Form ADV. Comparable numbers for 2019, 2020, and 2021 were 117, 112, and 105, respectively.

[433] *See, e.g.,* Mitchell Marsden, Catherine D. Zick, & Robert N. Mayer, *The Value of Seeking Financial Advice*, 32 J. Fam. & Econ. Issues 625 (2011); Jinhee Kim, Jasook Kwon & Elaine A. Anderson, *Factors Related to Retirement Confidence: Retirement Preparation and Workplace Financial Education*, 16 J. Fin. Counseling & Plan. 77 (2005); Michael S. Finke, Sandra J. Huston, & Danielle D. Winchester, *Financial Advice: Who Pays*, 22 J. Fin. Counseling & Plan. 18 (2011); Daniel Bergstresser, John M.R. Chalmers, & Peter Tufano, *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, 22 Rev. Fin. Stud. 4129 (2009); Ralph Bluethgen, Steffen Meyer & Andreas Hackethal, *High-Quality Financial Advice Wanted! (Working Paper, Feb. 2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102445;* Neal M. Stoughton, Youchang Wu & Josef Zechner, *Intermediated Investment Management, 66 J. Fin. 947* (2011). Marsden et al. (2011) documents benefits attributable to hiring a financial professional, such as better retirement account diversification and savings goals, but does not find that hiring a financial professional measurably increases the amount of overall wealth accumulation for those investors. *See, also,* Jeremy Burke & Angela A. Hung, *Do Financial Advisors Influence Savings Behavior?,* RAND Labor and Population Report Prepared for the Department of Labor (2015), *available at https://www.rand.org/pubs/research_reports/RR1289;* Terrance Martin & Michael Finke. ''*A Comparison of Retirement Strategies and Financial Planner Value.*'' 27 J. Fin. Plan. 46 (2014); Crystal R. Hudson L & Lance Palmer. ''*Low-Income Employees: The Relationship between Information from Formal Advisors and Financial Behaviors.*'' 23 Fin. Serv. Rev. (2014): 25; Marc M. Kramer, *Financial Literacy, Overconfidence and Financial Advice Seeking* (Working Paper, Dec. 19, 2014), *available at https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2015-Amsterdam/papers/EFMA2015_0067_fullpaper.pdf;* John R. Salter, Nathan Harness & Swarn Chatterjee. ''*Utilization of Financial Advisors by Affluent Retirees.*'' 19 Fin. Serv. Rev. 245 (2010), for additional studies on the causal relation between the use of a financial professional and wealth accumulation. Francis M. Kinniry et al., Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha, Vanguard Research (Sept. 2016), *available at https://advisors.vanguard.com/iwe/pdf/IARCQAA.pdf,* estimates the value to investors associated with obtaining financial advice of approximately 3% in net returns to investors, associated with suitable asset allocation, managing expense ratios, behavioral coaching, alleviating home bias, among others.

[434] *See, e.g.,* Luigi Guiso, Paolo Sapienza & Luigi Zingales, *People's Opium? Religion and Economic Attitudes*, 50 J. Monetary Econ. 225 (2003); Laurent E. Calvet, John Y. Campbell & Paolo Sodini, *Down or Out: Assessing the Welfare Costs of Household Investment Mistakes,* 115 J. Pol. Econ. 707 (2007); Brad M. Barber & Terrance Odean, ''*Trading is Hazardous to Your Wealth: The Common Stock Performance of Individual Investors*'', 55 J. Fin. 773 (2000); Karen K. Lewis, *Trying to Explain Home Bias in Equities and Consumption*, 37 J. Econ. Literature 571 (1999). Guiso et al., 2003; Calvet et al., 2007; Barber and Odean, 2000; Lewis, 1999. Possible explanations for these investor mistakes may arise from behavioral biases, such as cognitive errors, the cost of information acquisition, or the selection of the financial professional. For example, investors have been observed to hold too little of their wealth in foreign assets, which is often called ''home bias.''

[435] *See, e.g.,* Jeremy Burke & Angela A. Hung, *Trust and Financial Advice* (RAND Working Paper WR–1075, 2015).

[436] This analysis is based on advisers' responses to Items 9.A. and 9.B. of Part 1A of Form ADV. The instructions to Item 9.A. of Part 1A of Form ADV provide that an adviser that has custody solely because (i) it deducts advisory fees directly from client accounts, or (ii) an operationally independent related person has custody of client assets in connection with advisory services provided to clients, should answer ''No'' in response to Item 9.A.(1), which asks whether the adviser has custody of client assets, meaning the number of advisers with custody is likely larger.

[437] The total number of advisers reporting custody of client assets or custody by a related person, in response to Items 9.A. and 9.B. of Part 1A of Form ADV was 7,424 in 2019, 7,774 in 2020, and 8,180 in 2021. As a percent of the total number of registered advisers, the percent of advisers reporting custody of client assets or custody by a related person in response to Items 9.A. and 9.B. of Part 1A of Form ADV was 55.20% in 2019, 55.88% in 2020, and 55.95% in 2021. As a percent of aggregate RAUM, advisers reporting custody of client assets or custody by a related person in response to these Items of Form ADV, managed 33.92% in 2019, 33.80% in 2020, and 34.44% in 2021.

[438] Based on advisers' responses to Item 9.C.(3) of Part 1A of Form ADV, the total number of advisers reporting that an independent public accountant conducts an annual surprise examination of client assets was 800 (13.38%) in 2019, 1,834 (13.18%) in 2020, and 1,887 (12.91%) in 2021.

public accountant annually audits the pooled investment vehicle(s) the adviser manages and the audited financial statements are distributed to investors in the pools.[439] 1,405 (9.33% of the total) advisers reported having a qualified custodian send quarterly statements to investors in pooled investment vehicles.[440] As of June 2022, 98 (0.65%) registered advisers reported that they had an internal control report prepared by an independent public accountant but did not report that they were subject to a surprise examination.[441]

As of June 2022, approximately 0.5% of all registered investment advisers (6.51% of aggregate RAUM) acted as a qualified custodian for their clients. Approximately 0.6% of all registered investment advisers (23.67% of aggregate RAUM) had a related person acting as a qualified custodian.

c. Market Practice Baseline

In addition to rule 206(4)–2, the 2009 Accounting Guidance, no-action letters, interpretive letters, and other staff statements (some of which are enumerated in section II.K) shape investment advisers' custody rule compliance. For example, staff has issued 70 FAQs on a wide range of topics, including the contours of custody and how custody applies in the setting of pooled investment vehicles.[442]

Banks' practices as qualified custodians are also shaped by guidance, such as the Office of the Comptroller of the Currency's handbook on custody, which furnishes guidance to national banks and savings associations acting as custodians.[443] The OCC guidance provides that the custodian's management has the responsibility to assess its control environment and ensure an appropriate system of internal controls, including separation of duties, and accounting controls to monitor and measure transactional workflows and their accuracy.[444] The custodian's management should further ensure that custody account assets are kept separate from the custodian's own assets and maintained under joint control, and that securities under custody are not subject to lending transactions without a written agreement between the custodian and the client.[445]

d. Custody Market Trends

Competition among bank qualified custodians has been characterized as fierce, with shrinking profit margins, and the dominance of a handful of large entities.[446] One report noted that custodians need to adapt and expand their service offerings to accommodate new types of assets, such as crypto assets, and assets that are now held and transferred using new technological methods, such as central bank digital currencies (also known as CBDCs).[447]

The industry-reported market capitalization for crypto assets experienced a rapid growth from $1 billion in 2018 to $1 trillion in 2021.[448] One survey found that 16 percent of U.S. adults say they personally have invested in, traded, or otherwise used ''cryptocurrencies.'' [449] Institutional investors also invested in ''cryptocurrencies.'' [450] The Commission analyzed the extent to which investment advisers offer various kinds of services related to digital assets.[451] This analysis relied on Commission filings, advisers' websites, and mentions of an adviser's services from third-party online news sources.[452] The analysis was conducted as of June 2022 [453] and focuses on the 50 largest investment advisers [454] by RAUM. The Commission estimates that, of these 50 largest investment advisers, (i) 21 are offering or planning on offering some services related to digital assets,[455] (ii) 9 are giving or planning on giving investment advice related to digital assets,[456] (iii) 13 provide or are planning on providing custody of digital assets or custodial services of digital assets,[457] and (iv) 7 advise or are planning on advising a pooled investment vehicle (like a fund or commodity pool) that holds some digital assets.[458]

The market for crypto asset custodial services continues to develop. Our understanding is that one OCC-regulated national bank, four OCC-

[439] Based on advisers responses to Item 9.C.(2) of Form ADV. Comparable numbers for 2019, 2020, and 2021 were 4,460, 4,565, and 4,768, respectively.

In addition, based on advisers' responses to Items 9.A., 9.B., and 9.F., 8,165 registered advisers had custody solely because of their authority to deduct fees in 2020 as of June 2022.

[440] Based on advisers' responses to Item 9.C.(2) of Form ADV. Comparable numbers for 2019, 2020, and 2021 were 1,313 (9.76%), 1,328 (9.55%), and 1,348 (9.22%), respectively.

[441] These statistics are based on advisers' responses to Items 9.C.(3) and (4) of Part 1A of Form ADV. The comparable numbers for 2019, 2020, and 2021 were 117 (0.87%), 112 (0.81%), and 105 (0.72%), respectively.

[442] *See supra* note 17.

[443] Off. Of the Comptroller of the Currency, Comptroller's Handbook, Custody (2002), *available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/custody-services/index-custody-services.html.*

[444] Comptroller's Handbook, Custody at 6–7.

[445] *Id.* at 14, 30.

[446] *Id.* at 1. See also Deloitte, ''*The evolution of a core financial service. Custodian & Depository Banks.*'' *(2019) available at https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/lu-the-evolution-of-a-core-financial-service.pdf. See* also Congressional Research Service, ''Digital Assets and SEC Regulations,'' January (Jan. 30, 2020). According to this report, in 2020, four large banks service around $114 trillion of *global* assets under custody.

[447] *See, e.g.,* Deloitte, ''*The evolution of a core financial service. Custodian & Depository Banks.*'' (2019) *available at https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/lu-the-evolution-of-a-core-financial-service.pdf.*

[448] *See, e.g.,* Deloitte, ''*Market Manipulation in Digital Assets*'' (Mar. 2021), *available at https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Financial-Services/gx-design-market-manipulation-in-digital-assets-whitepaper-v2-1.pdf.*

[449] *See* ''46% of Americans who have invested in cryptocurrency say it's done worse than expected,''.'' Pew Research Center, Washington, DC (Aug. 23, 2022), *available at https://www.pewresearch.org/fact-tank/2022/08/23/46-of-americans-who-have-invested-in-cryptocurrency-say-its-done-worse-than-expected/.* Also, another study in 2019 estimated about 40 million Americans owned assets identified as cryptocurrencies. *See* Office of the Comptroller of the Currency, Interpretative Letter #1170, July 2020.

[450] *See* Office of the Comptroller of the Currency, Interpretative Letter #1170, July 2020.

[451] A search of Commission filings, advisers' websites, and mentions of an adviser's services from third-party only news services used the term ''digital assets'' because several of the sources did not explicitly state that they were strictly referring to crypto assets.

[452] Filings on Form ADV did not, in all cases, provide sufficient information to determine exactly the extent to which an adviser offers services related to digital assets. Therefore, this analysis relied on supplementary information obtained from advisers' websites, online news sources, and in two cases, other forms filed with the SEC. Both of these two cases involved funds that held digital assets. In the case of one adviser, the staff used information from Form D, in the case of the other the staff used information from Form S–1. Web pages whose terms and conditions required citation are: *https://investor.vanguard.com/*, *www.franklintempleton.com*, *www.mufg.jp*, *https://www.pimco.com/*, and *https://citywire.com/.*

[453] Commission analysis used advisers' most recent filings that were submitted during the period from July 2021 to June 2022. Supplemental data from websites was evaluated in October 2022.

[454] The Commission considered filers that represent the same firm to be a single adviser. In aggregate, these 50 investment advisers (i) reflect 49% of total RAUM (as reported in response to question 5F(2)(c)), (ii) manage 37% of all accounts (as reported in response to question 5F(2)(f)), (iii) hold 35% of client funds and securities in investment adviser firm's custody or in a related person's custody (as reported in response to questions 9A(2)(a) and 9B(2)(a)), and hold 32% of client funds and securities in investment adviser firm's custody (as reported in response to question 9A(2)(a) only).

[455] These investment advisers comprise 67% of RAUM and manage 66% of accounts of the largest 50 investment advisers.

[456] These investment advisers comprise 26% of RAUM and manage 41% of accounts of the largest 50 investment advisers.

[457] These investment advisers comprise 51% of RAUM and manage 43% of accounts of the largest 50 investment advisers. They further comprise 49% of client funds and securities in the largest fifty investment adviser firms' custody or in related persons' custody (as reported in response to questions 9A(2)(a) and 9B(2)(a)) and 48% of client funds and securities in the largest fifty investment adviser firms' custody (as reported in response to question 9A(2)(a) only).

[458] These investment advisers comprise 67% of RAUM and manage 66% of accounts of the largest 50 investment advisers.

regulated trusts, approximately 20 state-chartered trust companies and other state-chartered, limited purpose banking entities, and at least one FCM currently offer custodial services for crypto assets. We also understand that the provision of custodial services for crypto assets can arise in the context of the trading of crypto assets. As discussed above, many platforms that provide users with the ability to transact in crypto assets are not qualified custodians and require investors to pre-fund trades, a process in which investors transfer their crypto assets or fiat currency to such a platform prior to the execution of any trade.[459] Our understanding is that the majority of crypto asset trading occurs on platforms requiring pre-funding of trades, though crypto asset trading also occurs on so-called decentralized platforms that may not rely on pre-funding. We are aware that a limited number of SEC-registered crypto asset securities trade on Alternative Trading Systems (''ATSs'') that do not require pre-funding of trades.[460] ATSs that trade crypto asset securities follow a three-step process or four-step process [461] that does not involve the broker-dealer operator of the ATS providing custodial services for the crypto asset securities.[462] We understand, however, that ATSs do not offer trading of crypto asset non-securities.

We understand that certain advisers provide advisory services with respect to client funds and securities that would generally result in an adviser having ''custody'' within the meaning of the rule (*e.g.,* serving as the general partner for a private fund that holds crypto asset securities), and therefore are required to comply with the rule. Some of these advisers, however, may not maintain their client's crypto assets with a qualified custodian, instead attempting to safeguard their client's crypto assets themselves—a practice that is not compliant with the custody rule if those crypto assets are funds or securities and do not meet an exception from the qualified custodian requirement. Other advisers offering similar advisory services may take the position that crypto assets are not covered by the custody rule at all because they believe that crypto assets are neither funds nor securities.[463]

Assets other than publicly traded stocks and bonds have increased.[464] One investment services industry data provider forecasted that global assets under management across alternative asset classes would grow by 60 percent between the end of 2020 and the end of 2025.[465] For example, capital raised in the private equity market was less than $60 billion in 2010. About a decade later, in 2019, capital raised in the private equity market was more than $316 billion.[466] Also, investor interest in physical assets may have increased.[467] As discussed in section II.D, safeguarding alternative assets may involve unique procedures that differ across each specific asset type and that substantially differ from safeguarding practices with respect to more traditional asset classes (like equities and fixed income products). Additionally, physical assets potentially create more complex challenges with regard to transaction processing, monitoring, and reporting services.[468] The breadth and variety of alternative assets diminish an entity's ability to scale and automate its safekeeping services for efficiency and profitability and, therefore, entities providing safekeeping services may be reluctant to expend the resources necessary to accommodate such assets. As a result, custodians may outsource the safekeeping of alternative assets to entities that specialize in safekeeping certain asset classes.[469]

Staff has observed that custodians often include indemnification clauses in their custodial agreements with customers. Generally, the provisions indemnify custodial customers from losses arising out of or in connection with the custodian's execution or performance under the agreement to the extent the loss is caused by, among other things, the custodian's negligence, gross negligence, bad-faith, recklessness, or willful misconduct.[470] Staff has also observed that the contractual limitations on custodial liability vary between a gross negligence standard and a simple negligence standard. Also, we understand that some custodial agreements contain contractual language addressing when a lien or similar claim will attach to client assets. Finally, staff has observed a practice by custodians in which the custodian lists assets for which it does not accept custodial

[459] *See supra,* footnote 128 and accompanying text.

[460] ATSs that do not trade NMS stocks file with the Commission a Form ATS notice, which the Commission does not approve. In addition, all ATSs must file quarterly reports on Form ATS–R with the Commission. Form ATS–R requires, among other things, volume information for specified categories of securities, a list of all securities traded in the ATS during the quarter, and a list of all subscribers that were participants. To the extent that an ATS trades crypto asset securities, the ATS must disclose information regarding its crypto asset securities activities as required by Form ATS and Form ATS–R. Form ATS and Form ATS–R are deemed confidential when filed with the Commission. Based on information provided on these forms, a limited number of ATSs have noticed on Form ATS their intention to trade certain crypto asset securities and a subset of those ATSs have reported transactions in crypto asset securities on their Form ATS–R.

[461] For background on the models, the staff has noted as follows: A non-custodial ATS four-step model involves the following steps: Step 1—the buyer and seller send their respective orders to the ATS; Step 2—the ATS matches the orders; Step 3—the ATS notifies the buyer and seller of the matched trade; and Step 4—the buyer and seller settle the transaction bilaterally, either directly with each other or by instructing their respective custodians to settle the transaction on their behalf. In a non-custodial ATS three-step model involves the following steps: Step 1—the buyer and seller send their respective orders to the ATS, notify their respective custodians of their respective orders submitted to the ATS, and instruct their respective custodians to settle transactions in accordance with the terms of their orders when the ATS notifies the custodians of a match on the ATS; Step 2—the ATS matches the orders; and Step 3—the ATS notifies the buyer and seller and their respective custodians of the matched trade and the custodians carry out the conditional instructions. The custodians would then settle the trade on behalf of the buyer and seller based on the instructions received in Step 1. As with the four-step process, the broker-dealer operator does not guarantee or otherwise have responsibility for settling the trades and does not at any time exercise any level of control over the digital asset securities being sold or the cash being used to make the purchase (*e.g.,* the ATS does not place a temporary hold on the seller's wallet or on the buyer's cash to ensure the transaction is completed) other than by notifying the custodians for the buyer and seller, and the buyer and seller, of the match. *See finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.*

[462] Our understanding is that for existing ATSs, custodial services are typically provided by state-chartered trust companies and other state-chartered, limited purpose banking entities.

[463] This, however, is incorrect because most such assets are likely to be funds or crypto asset *securities* covered by the current rule. *See infra* footnote 29 and accompanying text.

[464] Financial Times, ''*Global shift into alternative assets gathers pace,*'' (July 16, 2017,), *available at https://www.ft.com/content/1167a4b8-6653-11e7-8526-7b38dcaef614.*

[465] *See, e.g.,* David Lowery & Preqin Blog, ''*Future of Alternative 2025: Preqin Forecasts Alternative AUM Growth of 9.8% though to 2025,*'' (Nov. 4, 2020), *available athttps://www.preqin.com/insights/research/blogs/preqin-forecasts-alternative-aum-growth-of-9-8-percent-through-to-2025.*

[466] *See, e.g.,* PitchBook, ''Data, Inc., *A PE fundraising record could await in 2021,*'', (Dec. 15, 2020), *available at https://pitchbook.com/newsletter/a-pe-fundraising-record-could-await-in-2021.*

[467] For example, the creation of art-market indices suggests that interest in physical assets, such as fine art, may have increased. Sotheby's, ''*The Sotheby's Mei Moses Indices,*'' *available at https://www.sothebys.com/en/the-sothebys-mei-moses-indices.*

[468] Deloitte, ''*The evolution of core financial service. Custodian & Depository Banks.*'' (2019) *available at https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/lu-the-evolution-of-a-core-financial-service.pdf.*

[469] *See, e.g.,* Colonnade, ''*Alternative Asset Custody Services, Positive Dynamics Power Growth,*'' Market Commentary—(Jan. 2015), *available at https://www.coladv.com/wp-content/uploads/Alt-Asset-Admin-Jan-2015-FINAL.pdf.*

[470] Custodial agreements are generally between an advisory client and a qualified custodian. We do not have data on custodial agreements that would allow us to characterize the relative frequency of various agreement provisions.

liability on a client's account statement on an accommodation basis only; the custodian does not attest to the holdings of, or transactions in, those investments or take steps to ensure that the investments are safeguarded appropriately. The custodian reports the holdings or transactions as reported to it by the adviser.

e. Compliance Trends

In 2013, the Commission staff issued a National Exam Program (''NEP'') Risk Alert stating that the NEP had observed widespread and varied non-compliance with elements of the custody rule.[471] In reviewing examinations that contained significant deficiencies, the NEP found that approximately one-third (over 140) included custody-related issues. The findings from the examinations resulted in remedial measures taken by advisers, including among other things, drafting, amending or enhancing their written compliance procedures, policies, or processes; changing their business practices; or devoting more resources or attention to the area of custody.

In 2017, the Commission staff issued a NEP Risk Alert reporting that deficiencies or weaknesses related to the custody rule were among the five most frequent compliance topics identified during examinations of investment advisers.[472] Typical examples of deficiencies or weaknesses with respect to the custody rule identified by the staff were: (1) advisers did not recognize that they may have custody due to online access to client accounts, (2) advisers with custody obtained surprise examinations that did not meet the requirements of the custody rule, and (3) advisers did not recognize that they may have custody as a result of certain authority over client accounts.

In 2021, the Division of Examinations issued a Risk Alert stating that in its experience, a number of activities related to digital asset securities presented specific risks to investors.[473] Included among the risks identified by the Division of Examinations were risks related to advisers' crypto asset custodial practices and their compliance with the custody rule. As discussed above, the custody rule was designed to help ensure advisers adequately safeguard client investments in their custody by requiring advisers to take steps to mitigate the risk that client investments will be lost, misused, stolen, misappropriated, or subject to the financial reverses, including insolvency, of an investment adviser.[474] Crypto assets are not exempt from these risks. Based on that experience, the Division of Examinations indicated that it would continue to review the risks and practices related to crypto asset custody and examine for compliance with the custody rule.[475]

D. Benefits and Costs of Proposed Rule and Form Amendments

1. Scope

The proposed rule would change the current rule's scope in two ways. First, it would expand the types of investments covered by the rule beyond a client's funds or securities to include other positions held in a client's account that are not funds or securities. Second, the proposed rule would make explicit that the current rule's defined term ''custody'' includes discretionary trading authority. The scope of the rule determines, in part, the costs and benefits of the regulatory program set forth by the other components of the proposed rule (the ''programmatic effects'').

a. Scope of Assets

The proposed rule's expanded scope would include all client assets for which an adviser has custody. The proposed rule would define ''assets'' as ''funds, securities, or other positions held in a client's account.'' [476] Assets under the rule also would include financial contracts held for investment purposes, collateral posted in connection with a swap contract on behalf of the client, and other assets that may not clearly be funds or securities covered by the current rule. ''Other positions held in the client's account'' covers current asset types and asset types that develop in the future regardless of their status as funds or securities. The addition of ''other positions held in the client's account'' would also include crypto assets when not otherwise covered by the rule's references to funds and securities.[477] Further, the proposed rule's use of the term ''assets'' would not exclude client investments that may appear in the liabilities column of a balance sheet or that may be represented as a financial obligation of the client including short positions, written options, or negative cash.

We believe that the proposed rule reduces the risk of loss of client assets by expanding the types of assets covered by the rule beyond ''funds and securities.'' Bringing more categories of assets into the scope of the rule's requirements will protect investors because the assets will be subject to custodial safeguards. Expanding the scope of the rule will also reduce uncertainty over the status of assets under advisement that must be held in the custody of a qualified custodian, thereby reducing the legal risk associated with advisory services and custodial arrangements for the assets. This may increase investment opportunities and the availability of advisory services for those assets. Looking forward, the proposed definition of assets is designed to remain evergreen, encompassing new investment types as they continue to evolve and to recognize that the protections of the rule should not depend on which type of assets the client entrusts to the adviser.

Expanding the scope of the custody rule to include client assets instead of only client funds and securities would also involve costs. We expect that this expansion in scope would cause advisers to incur compliance costs in connection with these newly covered investment positions. Accordingly, advisers with custody of such assets would incur additional costs to ensure their safeguarding practices with respect to such assets comply with the custody rule; for example, the costs associated with finding a qualified custodian that is able to take possession or control of these assets. Rather than incur such costs, advisers may continue providing advice with respect to clients' funds and securities, but stop providing advice with respect to clients' other assets within the scope of the expanded

[471] *See, e.g.,* SEC, ''*National Exam Program Risk Alert*'' (Mar. 4, 2013), *available at https://www.sec.gov/about/offices/ocie/custody-risk-alert.pdf.*

[472] *See, e.g.,* SEC, ''National Exam Program Risk Alert'' (Feb. 7, 2017), *available at https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdfhttps://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf.. https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf.*

[473] *See* Division of Examinations, ''Risk Alert: The Division of Examinations' Continued Focus on Digital Asset Securities'' (Feb. 26, 2021), *available at https://www.sec.gov/files/digital-assets-risk-alert.pdf.*

[474] *See* section I *infra.*

[475] Specifically the Division of Examinations stated that staff would review: (i) occurrences of unauthorized transactions, including theft of digital assets, (ii) controls around safekeeping of digital assets (*e.g.,* employee access to private keys and trading platform accounts), (iii) business continuity plans where key personnel have exclusive access to private keys, (iv) how the adviser evaluates harm due to the loss of private keys, (v) reliability of software used to interact with relevant digital asset networks, (vi) storage of digital assets on trading platform accounts and with third party custodians, and (vii) security procedures related to software and hardware wallets.

[476] Proposed rule 223–1(d)(1).

[477] *See* Part II.A, *supra.*

rule.[478] Investment advisers may accordingly eliminate the aspect of their services that gives them custody (they may decline the authority to hold or take possession of the other assets, including any discretionary authority to withdraw or transfer beneficial ownership of such assets). To the extent clients benefit from advice on such other assets—which may be merely ancillary to advice on funds and securities—investors would no longer receive these benefits.[479] Also, advisers would forego any fees associated with providing such services.

The expanded scope of assets subject to the proposed rule could create other costs. For example, as discussed above, the staff has observed a growing number of state-chartered trust companies and other state-chartered, limited purpose banking entities now offering custodial services for crypto assets. Also, the staff has observed an increase in the number of entities that provide platform users with the ability to transact in crypto assets. In connection with these services, these entities and/or their agents might safeguard the platform user's crypto asset(s) and also maintain the cryptographic key information necessary to access the crypto asset.

The expanded scope of assets subject to the proposed rule could create costs for those advisers (and their clients) with custody of crypto assets that are not funds or securities subject to the current custody rule. For example, to the extent advisers have custody of client crypto assets that are not funds or securities and those assets are maintained with state-chartered trust companies, other state-chartered, limited purpose banking entities, and entities providing platform users with the ability to transact in crypto assets who may choose not to make the changes necessary to satisfy all of the requirements to act as a qualified custodian under the proposed rule, the proposed rule would require such crypto assets to be removed from those entities. Removing assets from those entities could create costs for investors. For example, there would be costs associated with switching from one entity to another. As we noted in section II.C.3, the technical requirements for transacting and safeguarding crypto assets are likely to differ from those of traditional assets that include stocks, bonds, and options. The proposed rule could cause investors to remove their assets from an entity that has developed innovative safeguarding procedures for those assets, possibly putting those assets at a greater risk of loss. These costs would be mitigated, however, to the extent existing qualified custodians develop, or otherwise acquire, innovative safeguarding procedures for crypto assets, or are able to contract with specialized sub-custodians, as a result of the proposed rule.

If investors remove newly scoped-in assets from entities currently providing safeguarding services, those entities providing safeguarding services will experience a decline in fees because they would be providing custody for fewer assets. For example, if investors remove their crypto assets that are not funds or securities subject to the current rule from entities such as state-chartered trust companies, other state-chartered, limited-purpose banking entities, and entities providing platform users with the ability to transact in crypto assets, those entities could experience a decline in fees. The extent of the decline in fees would depend on investors' holdings of crypto assets that are not funds or securities subject to the current rule, the rates charged by those entities for safeguarding crypto assets, as well as the extent to which investors remove their crypto assets from those entities. We do not have data that would allow us to predict accurately investor holdings of crypto assets or the extent to which investors would remove crypto assets from those entities, or the resulting effect on profitability. A sufficiently large decline in profitability could lead such entities to reconsider their business models or exit the business altogether.

This aspect of the proposed rule could create additional costs as well. Independent public accountants would have to perform verification procedures over a larger universe of investments which could increase the cost of performing verification procedures. Absent an increase in the capacity of independent public accountants, the increased demand on the services of independent public accountants resulting from having to perform verification procedures over a larger universe of assets could result in increased costs for accountant services generally. To the extent independent public accountants reallocate resources away from other services to meet the increased demand for asset verification, other services provided by independent public accountants could become more costly. That said, as a result of requiring that all assets be held in the possession or control of a qualified custodian, performing verification procedures may be less labor-intensive and less costly than under the current rule.

b. Scope of Activity Subject to the Proposed Rule

The proposal would generally preserve the current rule's definition of ''custody''. The current definition of custody includes three categories that serve as examples of custody including certain arrangements when the adviser is authorized or permitted to instruct the client's custodian. The proposed rule would explicitly identify discretionary trading authority as an arrangement that triggers the rule. An adviser with this ability or authority can subject a client's assets to the risks of loss, misuse, misappropriation, theft, or financial reverses of the adviser. The proposed rule would also expand the scope of subject activity by explicitly identifying discretionary trading authority as an arrangement that triggers the rule.

The authority for discretionary trading presents the kinds of risks to client assets that the rule is designed to address. When advisers have this authority, they have the ability to sell or purchase assets for the client's account without first obtaining client consent. This creates an opportunity for an adviser to put those assets at risk of loss, misuse, misappropriation, theft, or financial reverses of the adviser. If an adviser has custody solely because the adviser has discretionary authority that is limited to instructing the custodian to transact in assets that settle on a DVP basis, the risk of loss is less pronounced, though not completely eliminated, when a client's custodian must participate in the transaction. In those cases, the custodian will observe, and record on a client's account statement, that assets are transferred out of a client's account only upon corresponding transfer of other assets of equal value into the account. Although the risk of loss is not reduced to zero in these situations, the client is at least on

[478] Analysis described in section III.C.3.d indicates that seven advisers either currently advise, or are planning to advise, a pooled investment vehicle (such as a private fund or commodity pool) that holds some crypto assets. To the extent these pooled investment vehicles hold crypto assets that may be outside of the current rule's scope (*i.e.,* they are neither funds nor securities), those assets would be within the scope of the proposed rule. To the extent that it becomes cost-prohibitive for advisers to find a qualified custodian, or otherwise comply with the proposed rule with respect to these newly covered crypto assets, we believe that advisers may choose to cease providing advisory services to pooled investment vehicles holding such assets, implying these pooled investment vehicles may no longer be offered to investors.

[479] To the extent competition in the market for those aspects of services that gives advisers custody is linked to the number of advisers offering such services, advisers choosing to eliminate the aspect of their services that gives them custody could result in a reduction in competition. A reduction in competition could result in higher fees for investors, lower quality services, or some combination of the two.

notice via the account statement from the custodian that a transaction has occurred. The proposed rule would thus benefit clients by extending the protections of the rule, namely the protections of the qualified custodian and the account statement reporting, to instances where an adviser has discretionary trading authority. The benefits will be mitigated to the extent that advisers comply with the rule today for reasons other than discretionary trading authority.

Advisers who currently do not need to comply with the rule for this type of authority will bear the costs of compliance with the rule. Those costs will be mitigated to the extent that advisers comply with the rule today for reasons other than discretionary trading authority. For example, if advisers also have a general power of attorney with respect to the same assets, such advisers already have custody of these assets under the current rule. For advisers that will be newly subject to the rule as a result of this change, the costs of compliance will be reduced if discretionary trading authority is their sole reason for having custody because they will not have to comply with the surprise examination requirement.[480]

Investment advisers with custody of client assets because of discretionary trading authority may continue to provide discretionary trading services to their clients, or, as discussed above, they may choose to no longer provide advice on assets which are not funds or securities and, accordingly, no longer exercise custody (including discretionary trading) for such other assets as a result of the compliance costs. If advisers choose to no longer offer discretionary trading services for assets other than funds or securities, to the extent clients benefit from those discretionary trading services, investors would bear a cost associated with the loss of those services or with finding an investment adviser that provides them.

2. Qualified Custodian Protections

As discussed in section II.B above, the proposed rule would require investment advisers to maintain client assets with a qualified custodian having ''possession or control'' of client assets pursuant to a written agreement between the qualified custodian and the investment adviser. The term ''possession or control'' would mean holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets, the qualified custodian's participation would effectuate the transaction involved in the change in beneficial ownership, and the qualified custodian's involvement is a condition precedent to the change in beneficial ownership. In the case of a qualified custodian that is the adviser, the proposed rule would require that the written agreement be between the adviser and the client.[481]

The proposed rule also would require the adviser to obtain reasonable assurances in writing from the custodian regarding certain vital protections for the safeguarding of client assets. If the qualified custodian is the adviser, the proposed rule would require that the reasonable assurances be part of the written agreement between the adviser and the client, described above.[482]

a. Definition of Qualified Custodian

Banks. The current rule includes in the definition of qualified custodian a bank as defined in section 202(a)(2) of the Advisers Act (15 U.S.C. 80b–2(a)(2)) or a savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811). The proposed rule would largely retain this definition of qualified custodian relating to banks and savings associations. However, in connection with the proposed rule's focus on setting certain minimum protections for client assets, the rule would require that a qualifying bank or savings association hold client assets in an account designed to protect such assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association in order to qualify as a qualified custodian. While applicable insolvency law and procedures vary depending on any particular bank's regulatory regime, we understand that assets held in these accounts are more likely to be returned to clients upon the insolvency of the qualified custodian because they may pass outside of a bank's insolvency, may be recoverable if wrongly transferred or converted, and are not treated as general assets of the bank.[483]

We believe that requiring banks and savings associations to hold client assets in an account designed to protect such assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association would benefit clients by providing client assets with enhanced protection from general creditors in the event of the qualified custodian's insolvency or failure and increasing the likelihood of return of client assets to advisory clients upon a qualified custodian's insolvency or failure. We acknowledge, however, that the benefit would be limited to the clients of those qualified custodians that would not be subject to the resolution processes deployed by the FDIC or by the OCC or have not developed and deployed comprehensive custodial service agreements governing their relationships with their custodial customers. For those custodians that would not be subject to the resolution processes deployed by the FDIC or by the OCC or have not developed and deployed comprehensive custodial service agreements governing their relationships with their custodial customers, we estimate that changing the terms of account agreements to comply with the proposed account requirement would require 1 hour from an assistant general counsel ($510/hour) and 5 hours from a paralegal ($199/hour), for a total estimated cost of $1,505 per agreement.

Foreign Financial Institutions. The proposed definition of qualified custodian would continue to include FFIs, but would require an FFI to satisfy certain additional conditions in order to serve as a qualified custodian for client investments. For an FFI to be a qualified custodian under the proposed rule, it would need to be:

- Incorporated or organized under the laws of a country or jurisdiction other than the United States, provided that the adviser and the Commission are able to enforce judgments, including civil monetary penalties, against the FFI;
- Regulated by a foreign country's government, an agency of a foreign country's government, or a foreign financial regulatory authority [484] as a banking institution, trust company, or other financial institution that customarily holds financial assets for its customers;
- Required by law to comply with anti-money laundering and related provisions similar to those of the Bank Secrecy Act [31 U.S.C. 5311, *et seq.*] and regulations thereunder;
- Holding financial assets for its customers in an account designed to protect such assets from creditors of the foreign financial institution in the event of the insolvency or failure of the foreign financial institution;

[480] Proposed rule 223–1(b)(9).

[481] Proposed rule 223–1(a)(1)(i).

[482] Proposed rule 223–1(a)(1)(ii).

[483] *See supra* footnote 96.

[484] Defined in section 202(a)(24) of the Advisers Act [15 U.S.C. 80b–2(a)(24)].

- Having the requisite financial strength to provide due care for client assets;
- Required by law to implement practices, procedures, and internal controls designed to ensure the exercise of due care with respect to the safekeeping of client assets; and
- Not operated for the purpose of evading the provisions of the proposed rule.[485]

As discussed in section II.B.1.b above, these proposed conditions are partly drawn from our experience with the conditions on the types of foreign financial entities that can act as ''eligible foreign custodians'' as defined in rule 17f–5 under the Investment Company Act.[486] Such conditions are designed to provide enhanced investor protections for advisory clients and their assets that we believe would help promote an FFI having generally similar protections as a U.S.-based qualified custodian.

Advisory clients often invest in securities traded on foreign exchanges and their advisers must, as a practical matter, maintain securities with financial institutions in foreign countries where the securities are traded. In order to facilitate these types of holdings, the current rule includes any FFI that customarily holds financial assets for its customers, as qualified custodian, provided that the FFI keeps the advisory clients' assets in customer accounts segregated from its proprietary assets. The proposed new conditions would require that an FFI have similar protections as a U.S.-based qualified custodian, thereby enhancing investor protections for advisory clients by reducing the risk of loss of their securities and other financial assets held outside the United States. For example, for an FFI to be a qualified custodian under the proposed rule it would need to be regulated by a foreign country's government, an agency of a foreign country's government, or a foreign financial regulatory authority as a banking institution, trust company, or other financial institution that customarily holds financial assets for its customers. An FFI also would have to be required by law to comply with AML requirements and related requirements comparable to those of the Bank Secrecy Act.[487] We believe the requirement to comply with AML and related provisions similar to those of the BSA and regulations thereunder would help increase the likelihood that the FFI would readily identify and investigate aberrant behavior in a client account, such as activity that might suggest misappropriation or some other type of loss to a client. An FFI also would have to hold financial assets for its customers in an account designed to protect such assets from creditors of the foreign financial institution in the event of the insolvency or failure of the foreign financial institution. We believe this requirement would help to promote investor protections that are more comparable, particularly in the event of an FFI insolvency or bankruptcy, to those we are proposing for assets held with U.S.-regulated bank or savings association qualified custodians.

FFIs that no longer meet the conditions to be a qualified custodian would either incur costs to become compliant, or incur costs in the form of lost custodial business, and potential loss of other banking business from the same clients. Clients of FFIs that incur costs to become compliant may experience higher fees. Clients whose assets were maintained with banks and savings associations that do not comply with the proposed requirements would incur one-time costs related to switching custodians or, if no financial institutions qualify as custodians in a country where securities are traded on a foreign exchange,[488] costs associated with divestiture, potentially at a loss. Advisers would incur costs associated with loss of client assets under management. The magnitude of these costs would depend on the number of client accounts and the quantity of assets affected.[489]

b. Possession or Control

Under the custody rule, advisers with custody of client funds and securities must maintain them with a qualified custodian, subject to certain exceptions.[490] The proposed rule would require that an investment adviser with custody of client assets maintain those assets with a qualified custodian that must maintain possession or control of those assets.[491] The term ''possession or control'' would mean holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets, the qualified custodian's participation would effectuate the transaction involved in the change in beneficial ownership, and the qualified custodian's involvement is a condition precedent to the change in beneficial ownership.[492]

The proposed requirement would benefit clients in several ways. First, a critical custodial function is to prevent loss or unauthorized transfers of ownership of client assets. It is our understanding that a custodian will only provide this safeguarding function and assume custodial liability for a custodial customer's loss if the custodian has possession or control of the asset that is lost. Second, because the qualified custodian would be required to participate in any change in beneficial ownership of a client asset, the qualified custodian's participation would effectuate the transaction involved in the change in beneficial ownership, and the qualified custodian's involvement is a condition precedent to the change in beneficial ownership, the proposed possession or control definition would provide assurance to the client that a regulated party who is hired for safekeeping services by the client to act for the client is involved in any change in beneficial ownership of the client's assets. Further, clients would be able to review their account statements to evaluate the legitimacy of any movement within their account, whether it is a trade, a payment, or a fee withdrawal. Finally, clients could take greater comfort that what is reported on their account statements is an accurate attestation of holdings and transactions because anything held by a qualified custodian would be required to be in its possession or control.

The proposed definition is designed to be consistent with the laws, rules, or regulations administered by the qualified custodian's functional regulator for purposes of its custodial activities. As detailed in section II.C.2 above, this would include Exchange Act requirements for broker-dealers, regulatory requirements for national banks, Commodity Exchange Act requirements for FCMs, as well as the broad range of regulatory requirements for FFIs. Given the proposed definition's consistency with the laws, rules, or regulations administered by a qualified custodian's functional regulator, we believe the additional cost of the proposed definition of ''possession or control'' on qualified custodians would be minimal.

[485] Proposed rule 223–1(d)(10)(iv).

[486] Furthermore, the proposed rule would replace and strengthen the segregation requirement applicable to FFIs in the current custody rule, and it is designed to complement the proposed segregation requirements of the safeguarding rule.

[487] Proposed rule 223–1(d)(10)(iv)(C); *see also* pt. II.B.1.

[488] This could occur if, for example, if the country does not have a regulatory framework equivalent to the Bank Secrecy Act requirements for reporting transactions to financial intelligence authorities.

[489] We do not have data on the number of client accounts and the quantity of assets affected.

[490] *See* rule 206(4)–2(a)(1).

[491] *See* proposed rule 223–1(a)(1)(i).

[492] *See* proposed rule 223–1(d)(8).

It is our understanding that custodians have been unwilling or unable to take possession or control of certain investments, such as a variety of privately issued securities. Advisers sometimes request that custodians report these securities as an ''accommodation'' on a custodial account statement so that the client is aware of their existence. We acknowledge, however, that to the extent account statements provided by a qualified custodian on an accommodation basis offer a client the ability to review all of its investments in a single consolidated account statement, and potentially alert a client or an auditor to the existence of an investment, the proposed rule's elimination of the custodian's ability to provide account statements on an accommodation basis could impose a cost on investors. Clients would bear costs to collect information from multiple sources rather than relying on a single consolidated account statement.[493] If a client requests such assets be included on its account statement, the account statement may identify the assets, but only if the account statement clearly indicates that the custodian does not have possession or control of the assets.[494]

c. Reasonable Assurances

We understand that under existing market practices, advisers are rarely parties to the custodial agreement, which is generally between an advisory client and a qualified custodian. The proposed rule would require an adviser to obtain reasonable assurances in writing from qualified custodians regarding certain vital protections for the safeguarding of client assets and that the adviser maintain an ongoing reasonable belief that the custodian is complying with the client protections for which the adviser obtains reasonable assurances.

i. Benefits

Due Care. The proposed rule would require that the adviser obtain reasonable assurances from the qualified custodian that the qualified custodian will exercise due care in accordance with reasonable commercial standards in discharging its duty as custodian and will implement appropriate measures to safeguard client assets from theft, misuse, misappropriation, or other similar types of loss.[495] We recognize that the appropriateness of the measures required to safeguard assets varies depending on the asset.[496] We believe such appropriate measures would, in turn, mitigate the risk to client assets from theft, misuse, misappropriation, or other similar types of loss.

Indemnification. The proposed rule would require the adviser to obtain reasonable assurances from the qualified custodian that the qualified custodian will indemnify the client (and will have insurance arrangements in place that will adequately protect the client) against the risk of loss in the event of the qualified custodian's own negligence, recklessness, or willful misconduct.[497] Our staff has observed that custodians often include indemnification clauses in their custodial agreements with customers. Staff has also observed that the contractual limitations on custodial liability vary widely in the marketplace, in some instances reducing a qualified custodian's liability to such an extent as to not provide an appropriate level of investor protection. By requiring advisers to obtain reasonable assurances from the qualified custodian that the qualified custodian will indemnify the client against the risk of loss in the event of the qualified custodian's own negligence, recklessness, or willful misconduct, the proposed rule seeks to create a minimum floor of custodial protection for investors in the event of custodial misconduct (*i.e.,* simple negligence). For those investors whose qualified custodians indemnify the client against the risk of loss in the event of the qualified custodian's gross negligence, the proposed requirement that an adviser obtain reasonable assurances from the qualified custodian that the qualified custodian will indemnify the client against the risk of loss in the event of the qualified custodian's own negligence, recklessness, or willful misconduct would likely operate as a substantial expansion in the protections provided by qualified custodians to advisory clients by preventing these custodians from disclaiming liability for misconduct that does not rise to the level of gross negligence.

Sub-custodian or Other Similar Arrangements. The proposed rule would require the adviser to obtain reasonable assurances from the qualified custodian that the existence of any sub-custodial, securities depository, or other similar arrangements with regard to the client's assets will not excuse its obligations to the client.[498]

As discussed in section II.B.3.a.3 outsourcing has become increasingly common in the custodial space, whether outsourcing of back-office functions or the core function of safeguarding a custodial customer's assets. Additionally, we understand that the delegation of safeguarding to sub-custodians can result in opaque structures; for example, involving several FFI sub-custodians in different countries. This proposed requirement would enhance investor protections by reducing the ability of a qualified custodian to avoid responsibility for the other important safeguarding obligations it has to the advisory client by delegating custodial responsibility to a sub-custodian, securities depository, or other similar arrangements. To the extent advisory clients are aware of risks resulting from a qualified custodian delegating its safeguarding obligations to a sub-custodian, we believe that this requirement would give advisory clients greater confidence that their assets maintained with a qualified custodian would not lose protections as a result of such a delegation.

Segregation of Client Assets. The proposed rule would require the adviser to obtain reasonable assurances from the qualified custodian that the qualified custodian will clearly identify the client's assets as such, hold them in a custodial account, and segregate them from the qualified custodian's proprietary assets.[499] The proposed requirement would benefit investors by helping to ensure that client assets are at all times readily identifiable as client property and remain available to the client even if the qualified custodian becomes financially insolvent. We believe this proposed requirement would also benefit clients by helping to protect client assets from claims by a qualified custodian's third-party creditors looking to secure or satisfy an obligation of the qualified custodian. We believe that the proposed requirement would also benefit clients by helping to identify clearly client assets as belonging to the appropriate client and, in the context of an FFI in a region facing political risk, we believe these actions would help to preserve the client's interests in the event of a government taking.

No Liens Unless Authorized in Writing. The proposed rule would

[493] It is possible that the requirement could lead to reduced costs for custodians. Our understanding, however, is that the custodian merely reports the holdings or transactions as reported to it by the adviser—the custodian does not attest to the holdings of or transactions in those investments or take steps to ensure that the investments are safeguarded appropriately. As a result, we would expect cost savings for custodians to be minimal.

[494] *See supra* note 185.

[495] Proposed rule 223–1(a)(1)(ii)(A).

[496] *See* discussion in section II.B.3.a.i and *supra* footnote 154.

[497] Proposed rule 223–1(a)(1)(ii)(B).

[498] Proposed rule 223–1(a)(1)(ii)(C).

[499] Proposed rule 223–1(a)(1)(ii)(D).

require the adviser to obtain reasonable assurances from the qualified custodian that the qualified custodian will not subject client assets to any right, charge, security interest, lien or claim in favor of the qualified custodian or its related persons or creditors, except to the extent agreed to or authorized in writing by the client.[500] This requirement would benefit clients by discouraging qualified custodians from using client assets in a manner not authorized by the client, reducing the risk of loss of client assets. The requirement would also help reduce the risk of the loss of client assets to claims by the qualified custodian, or a third party looking to secure or satisfy an obligation of the qualified custodian, including in cases of the qualified custodian's insolvency or bankruptcy. The magnitude of the benefits will depend on the extent to which such arrangements may already be common. As discussed in section II.B.3.a.v, we believe that many qualified custodians maintain their custodial customer assets free of liens and similar claims, other than those agreed to or authorized in writing by the client. Further, we understand that some custodial agreements contain contractual language addressing when a lien or similar claim will attach to client assets.

ii. Costs

Obtaining Reasonable Assurances. The proposed rule would require an adviser to obtain reasonable assurances in writing from a qualified custodian regarding certain client protections. As discussed above, one way that advisers are likely to satisfy this requirement is by seeking confirmation from a qualified custodian that the custodial agreement with the advisory client contains contractual language reflecting the reasonable assurances required by the rule. The reasonable assurances requirement could also require conforming changes in custody agreements between clients and qualified custodians. The cost of obtaining reasonable assurances and conforming changes in custody agreements include costs attributable to attorneys and compliance professionals, both prior to and at the inception of the relationship between a client and a qualified custodian as well as over the life of the relationship. We describe the nature of these costs in detail below. For purposes of the Paperwork Reduction Act, we estimate that qualified custodians and advisers will incur aggregate initial costs of $27,469,680 associated with advisers obtaining reasonable assurances from qualified custodians.[501] The requirements that an adviser obtain reasonable assurances from qualified custodians also will require due diligence and periodic monitoring by the adviser. For purposes of the Paperwork Reduction Act, we estimate that qualified custodians and advisers will incur aggregate ongoing annual costs of $5,493,936 associated with advisers obtaining reasonable assurances from qualified custodians.[502]

Due Care. The proposed due care requirement is the same as the standard that generally applies to custodians under Article 8 of the Uniform Commercial Code.[503] As a result, we believe the proposed standard of care is not uncommon in the custodial market, and that financial institutions acting as qualified custodians are familiar with it. We believe, however, that the standard of care is not universal in the custodial market. As discussed above, this requirement may result in certain qualified custodians incurring costs to change the terms of their custodial agreements with advisory clients to incorporate this standard.[504]

Indemnification. As discussed above, staff has observed that the contractual limitations on custodial liability vary widely in the marketplace. The proposed rule seeks to create a minimum floor of custodial protection for investors in the event of custodial misconduct. First, the proposed simple negligence requirement could impose operational costs on those custodians holding advisory client assets subject to a gross negligence standard. The operational costs would include the costs of adapting existing systems and processes to meet the more stringent simple negligence standard. Second, the insurance requirement of the proposed indemnification requirement would likely create a substantial increase in the cost of liability insurance for custodians that currently do not insure against loss resulting from simple negligence. We note, however, that operational costs and costs of liability insurance would be mitigated to the extent custodians who currently hold client assets subject to a gross negligence standard already have systems, processes and liability insurance that are consistent with a simple negligence standard.

Sub-custodian or Other Similar Arrangements. As discussed above, staff has observed custodial agreements addressing the use of sub-custodians that seek to contractually limit the custodian's liability for acts or omissions of the sub-custodian in a variety of ways, including expressly limiting the contractual liability of the custodian for acts of the sub-custodian, as well as limiting the affirmative steps the custodian may be required to take in connection with any loss of client assets as a result of the sub-custodian's willful default or insolvency. The proposed reasonable assurances requirement could impose operational costs on those custodians who make use of sub-custodial, securities depository, or other similar arrangements and who would seek to disclaim responsibility in circumstances where a loss or other failure to satisfy its obligations to the client can be attributed to a sub-custodian or other third party selected by the qualified custodian. The operational costs would include the costs of adapting existing systems and processes to meet the proposed requirement. We note, however, that the costs would be mitigated to the extent custodians who make use of sub-custodial, securities depository, or other similar arrangements already have systems and processes in place that are consistent with the proposed requirement.

Segregation of Client Assets. We understand that custodial agreements between advisory clients and qualified custodians may currently contain a contractual provision requiring segregation of client assets from the custodian's assets. In addition, we understand that many qualified custodians are currently required by their functional regulator to segregate assets. The proposed segregation requirements are drawn from rule 15c3–3 of the Exchange Act. To the extent existing regulatory requirements for qualified custodians are the same or similar to the requirements of 15c3–3, the costs of adapting existing systems may be mitigated for broker-dealers who act as qualified custodians. For example, rule 15c3–3 of the Exchange Act requires broker-dealers to safeguard their customer assets and keep customer assets separate from the firm's assets. Given their existing regulatory requirements, we believe custodian broker-dealers already have systems to segregate customer assets from their own and, as a result, the cost of the proposed requirement for broker-dealer qualified custodians largely would be mitigated. Other regulatory regimes have adopted similar requirements. For example, under the Commodity Exchange Act, futures commission merchants are required to segregate customer assets from their own

[500] *See* proposed rule 223–1(a)(1)(ii)(E).

[501] *See infra* footnote 620.

[502] *See infra* footnote 622.

[504] *See infra* footnote 619.

assets.[505] Because futures commission merchants already have systems to segregate customer assets from their own, we believe their cost of meeting the segregation requirement of the proposed rule would also largely be mitigated for futures commission merchants.

We believe, however, that not all financial institutions that serve as qualified custodians are required to segregate and identify their client assets, particularly FFIs. In addition, for those qualified custodians that are required to segregate and identify their client assets, the extent of those activities varies.[506] To the extent certain custodians currently do not segregate client assets, the reasonable assurances requirement in the proposed rule would result in qualified custodians adapting existing systems and processes to meet the proposed requirement.

No Liens Unless Authorized in Writing. The rule would not prohibit liens and the other claims addressed in the proposed rule, but would require that the adviser obtain reasonable assurances from the qualified custodian that the client has authorized in writing any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors. The proposed reasonable assurances requirement could impose operational costs on those custodians who make use of liens and the other claims addressed in the proposed rule. The operational costs would include the costs of adapting existing systems and processes to ensure that qualified custodians get written client authorization. The proposed requirement may also result in qualified custodians adding a conforming provision to custodial agreements for those clients that authorize such claims. Doing so would result in an additional burden for those qualified custodians. We believe that many qualified custodians maintain their custodial customer assets free of liens and similar claims, other than those agreed to or authorized in writing by the client. Further, we understand that some custodial agreements contain contractual language addressing when a lien or similar claim will attach to client assets. Operational costs and the cost of adding conforming provisions for those clients that authorize such claims would be mitigated to the extent qualified custodians already have such systems and provisions in place.

d. Written Agreement

The proposed rule would require advisers to enter into a written agreement with a qualified custodian based upon a reasonable belief that certain contractual provisions have been implemented. Further, during the term of the written agreement and related advisory relationship, advisers generally should have a reasonable belief that the qualified custodian is complying with the contractual obligations of the agreement and continuing to provide the protections to client assets for which the adviser obtained reasonable assurances from the qualified custodian.

We discuss the benefits and costs of the proposed written agreement requirement below. The magnitude of both the benefits and costs of the proposed written agreement requirement would depend on the extent to which advisers currently are party to custodial agreements, and advisers' actions to ensure that the elements of the written agreements are effective and being met.[507]

i. Benefits

Under the proposed rule, one provision would require the qualified custodian to provide promptly, upon request, records relating to clients' assets held in the account at the qualified custodian to the Commission or to an independent public accountant engaged for purposes of complying with the rule. Another provision would specify the adviser's agreed-upon level of authority to effect transactions in the account. A third provision would require the qualified custodian to deliver account statements to clients and to the adviser, whereas currently, advisers must only have a reasonable basis for believing that clients are receiving these account statements upon due inquiry. The fourth provision would require the qualified custodian to obtain a written internal control report that includes an opinion of an independent public accountant regarding the adequacy of the qualified custodian's controls.

Record Sharing. The proposed rule would require that the written agreement with the qualified custodian include a provision requiring the qualified custodian to provide, promptly, upon request, records relating to client assets to the Commission or an independent public accountant engaged for purposes of compliance with the rule.[508] We understand, currently, that accountants often struggle to obtain—or to obtain timely—information from qualified custodians when performing surprise examinations under the current rule unless the advisory client requests that the qualified custodian share the information. We believe that accountants likely struggle to obtain information from qualified custodians because the qualified custodian has no contractual agreement with the adviser or the accountant that has been hired by the adviser. We believe that the proposed contractual requirement would mitigate these record access challenges because the qualified custodian would be in direct contractual privity with the adviser and would have a contractual obligation to provide the records required by the rule—potentially reducing the costs attributable to completing a surprise examination under the rule.

Account Statements. The proposed rule would require that the written agreement provide that the qualified custodian will send account statements (unless the client is an entity whose investors will receive audited financial statements as part of the financial statement audit process pursuant to the proposed rule), at least quarterly, to the client and the investment adviser, identifying the amount of each client asset in the custodial account at the end of the period as well as all transactions in the account during that period.[509] We believe that the delivery of quarterly account statements to the adviser, which is a new requirement, would allow the adviser to more easily perform account statement reconciliations. We believe that qualified custodians' delivery of account statements directly to advisory clients enhances investor protections by facilitating clients' ability to verify adviser conduct as well as client assets. We also continue to believe that qualified custodians' delivery of account statements directly to advisory clients—without the involvement of the adviser—helps provide clients with confidence that any erroneous or unauthorized transactions by an adviser would be reflected in the account statement and, as a result,

[505] *See* discussion in section III.C.1.

[506] *See, e.g.,* 12 U.S.C. 92(c) and 12 U.S.C. 1464(n)(2) (requiring national banks and Federal savings associations to segregate all assets held in any fiduciary capacity from their general assets and to keep a separate set of books and records showing all transactions in these accounts); section 4d(a)(2) of the Commodity Exchange Act (requiring FCMs to segregate from their own assets all money, securities and other property deposited by futures customers to margin, secure, or guarantee futures contracts and options on futures contracts traded on designated contract markets).

[507] While we understand that advisers are rarely parties to the custodial agreement, which is generally between an advisory client and its qualified custodian, we lack quantitative data to confirm this understanding.

[508] Proposed rule 223–1(a)(1)(i)(A).

[509] Proposed rules 223–1(a)(1)(i)(B), 223–1(b)(4).

would deter advisers from fraudulent activities.[510]

The proposed rule would also require a provision prohibiting the account statement from identifying assets for which the qualified custodian lacks possession or control, unless requested by the client and the qualified custodian clearly indicates that the custodian does not have possession or control over such assets. We believe the proposed requirement would enhance investor protections by enhancing the integrity and utility of the account statements, thereby reducing the risk investors are misled or become confused about those assets for which the custodian is responsible in the event of a loss.

Internal Control Report. The proposed rule would require that the written agreement with the qualified custodian provide that the qualified custodian, at least annually, will obtain, and provide to the investment adviser a written internal control report that includes an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, are suitably designed, and are operating effectively to meet control objectives relating to custodial services (including the safeguarding of the client assets held by that qualified custodian during the year). The objectives and scope of the proposed internal control report are substantially the same as those of the internal control report required under the current rule, but would expand the requirement to all qualified custodians as opposed to the current rule, which only requires the internal control report when the adviser or its related person acts as a qualified custodian.

In circumstances where the qualified custodian is not the adviser or its related person, we believe the proposed requirement would help enhance investor protections by ensuring that the qualified custodian's controls with respect to its safeguarding practices are routinely evaluated in a timely manner by an independent third party. Also, in those circumstances where qualified custodians currently obtain internal control reports, the scope of those reports likely covers the financial institutions' safeguarding activities for ''funds and securities'' rather than all ''assets,'' as defined in the proposed amendments. We believe the proposed requirement would help enhance investor protection by expanding the scope of internal control reports to cover safeguarding actives for ''assets'' rather than ''funds and securities.'' We believe the requirement that auditors must be independent in fact and in appearance contributes to investor protection and investor confidence in connection with the relationship between an auditor and the qualified custodian. Unlike the current rule that only requires an internal control report when the adviser or its related person acts as a qualified custodian, the proposed rule would mitigate risks to client assets regardless of the affiliation of the qualified custodian.

Under circumstances where the proposed rule requires the engagement of a PCAOB-registered and inspected public accountant, we anticipate that the proposed rule will have client protection benefits. As the Commission noted in adopting the current custody rule, the Commission has greater confidence in the quality of the processes followed by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.[511] [512] We believe that registration and the periodic inspection of an independent public accountant's system of quality control by the PCAOB would provide clients with confidence in the quality of the reports produced under the proposed rule.

Adviser's Level of Authority. The proposed rule would require that the adviser's written agreement with the qualified custodian specify the investment adviser's agreed-upon level of authority to effect transactions in the custodial account as well as any applicable terms or limitations.[513] As discussed in section II.B.3.b.iv above, our understanding is that custodial agreements between advisory clients and qualified custodians often contain provisions that give investment advisers authority over their clients' custodial accounts that may be broader than what the adviser and client have agreed to in their advisory agreements. For example, an adviser may not have authority under its advisory agreement with a client to instruct the client's custodian to disburse client assets, or the advisory agreement may not be entirely clear on the level of authority granted to the adviser. If, however, the client's agreement with its qualified custodian grants the adviser broad authority over the client's account, the qualified custodian will accept and act upon instructions from the adviser to disburse or transfer assets, for example, without verifying or confirming those instructions with the advisory client), even though the adviser's agreement with its client does not give the adviser the authority to do so.[514] This puts client assets at risk by giving the adviser access to client assets that the adviser may not otherwise be authorized to access. The proposed requirement that the contract between the adviser and the qualified custodian specify the adviser's agreed upon level of authority would mitigate these concerns and empower advisers to tailor custodial arrangements to better reflect client intentions and to be consistent with the adviser's contractual obligations to its clients.

ii. Costs

The proposed written agreement requirements would impose costs on advisers and qualified custodians related to negotiating, drafting, and implementing the written agreements.

(a) Negotiating, Drafting, and Forming a Reasonable Belief the Agreement Provisions Have Been Implemented

We understand that advisers are rarely parties to the custodial agreements. Those advisers who are not a party to a custodial agreement and those qualified custodians with whom

[510] Rule 206(4)–2(a)(3) requires the adviser to have reasonable belief upon due inquiry that the qualified custodian delivers quarterly account statements to the client.

[511] *See* Custody Rule Amendments Adopting Release, *supra* footnote 11, at 17.

[512] For example, in response to our 2009 proposed Custody Rule amendments requiring the use of PCAOB-registered independent public accountants for annual surprise examinations in certain circumstances, many commenters agreed with our belief that PCAOB registration and inspection provided an important quality check on the independent accountants providing those examinations. *See* comment letter of Investment Adviser Association (July 24, 2009); comment letter of The National Association of Active Investment Managers (July 27, 2009); comment letter of Timothy P. Turner (July 27, 2009); comment letter of American Bar Association (Committee on Federal Regulation of Securities) (July 28, 2009); comment letter of Curian Capital LLC, Financial Wealth Management, Inc., LPL Financial Corporation, and SEI Investments Company (July 28, 2009); comment letter of Ernst & Young (July 28, 2009); comment letter of Financial Planning Association (July 28, 2009); comment letter of Coalition of Private Investment Companies (July 31, 2009); comment letter of North American Securities Administrators Association, Inc. (Aug. 5, 2009). Academic research suggests that PCAOB registration and inspection is associated with higher quality engagements. *See, e.g.,* Mark L. DeFond & Clive S. Lennox, *Do PCAOB Inspections Improve the Quality of Internal Control Audits?* (Sept. 2015), *available at https://pcaobus.org//News/Events/Documents/10222015_CEA/PCAOB-Inspections-Internal-Control-Audits-DeFond_Lennox.pdf.* DeFond and Lennox (2015) posit that auditors are motivated to receive clean inspection reports from the PCAOB because adverse inspection outcomes are detrimental to the auditors' compensation (Johnson, Lindsay, Marsha Keune & Jennifer Winchel, Auditors' Perceptions of the PCAOB Process (2015) working paper, University of Virginia). They also note that the PCAOB has broad powers within its jurisdiction to sanction individual auditors and firms that provide substandard audits, which provides further incentive for auditors to perform high quality audits.

[513] Proposed rule 223–1(a)(1)(i)(D).

[514] *See supra* note 202.

they would be contracting would have to bear costs to negotiate and draft the written agreement required by the proposed rule, and the adviser would be required to form a reasonable belief that the agreement provisions have been implemented by the qualified custodian. This would include costs attributable to attorneys and compliance professionals, both prior to and at the inception of the written agreement, and over the life of the written agreement. For purposes of the Paperwork Reduction Act, we estimate that investment advisers and qualified custodians would incur aggregate initial costs of $41,218,464 to prepare these written agreements,[515] and that aggregate annual costs associated with modifying these agreements would be $3,503,599.[516] Advisers may also incur costs associated with developing and maintaining a reasonable belief that the contractual provisions have been implemented. These costs would largely depend upon how each adviser satisfies and evidences compliance with this requirement, making them difficult to quantify. However, the proposed revisions to the recordkeeping rule would require an adviser to maintain records that would likely be useful in demonstrating an adviser's reasonable belief that a qualified custodian has implemented the proposed contractual provisions. As a result, we estimate any additional costs incurred by an adviser to develop and maintain a reasonable belief that the proposed contractual provisions have been implemented would be marginal.[517]

(b) Required Provisions

The proposed rule would require a written agreement between advisers and qualified custodians that incorporates certain elements. We believe the cost of including elements likely varies, depending on the nature of each required element. Including certain elements may involve minimal cost, while including other elements may involve more substantial costs.

We understand that qualified custodians often do not provide independent public accountants access to custodial account records in light of privacy concerns for their customers. The requirement that the written agreement with the qualified custodian include a provision requiring the qualified custodian to promptly, upon request, provide records relating to client assets to the Commission or an independent public accountant for purposes of compliance with the rule could impose additional costs on custodians. We believe these costs would largely be mitigated because we believe that providing custodial account records is consistent with the longstanding custodial practice of providing account statements to clients.[518] For purposes of the Paperwork Reduction Act, we estimate that qualified custodians would incur aggregate annual costs of $19,462,024 associated with this record provision requirement.[519]

The proposed rule would require that the written agreement with the qualified custodian provide that the qualified custodian will send account statements (unless the client is an entity whose investors will receive audited financial statements as part of the financial statement audit process pursuant to the audit provision of the proposed rule), at least quarterly, to the client and the investment adviser, identifying the amount of each client asset in the custodial account at the end of the period as well as all transactions in the account during that period. Because qualified custodians generally already send quarterly account statements to clients, we expect the additional costs associated with also sending such statements to advisers to be small. For purposes of the Paperwork Reduction Act, we estimate that qualified custodians would incur aggregate costs of $4,869,322.50 associated with this requirement.[520]

The proposed rule would also require a provision prohibiting the account statements from identifying assets for which the qualified custodian lacks possession or control, unless requested by the client and the qualified custodian clearly indicates that the custodian does not have possession or control over such assets. As discussed in section III.D.2.b, that provision could impose a cost on clients to the extent account statements provided by a qualified custodian on an accommodation basis offer a client the ability to review all of its investments in a single consolidated account statement and potentially alert a client or an auditor to the existence of an investment. This provision would also impose costs on qualified custodians associated with accommodating customization requests from clients. For purposes of the Paperwork Reduction Act, we estimate that qualified custodians will incur aggregate annual costs of $324,621.50 associated with these customized requests.[521]

Internal Control Report. The objectives of the proposed internal control report are substantially the same as those of the internal control report required under the current rule.[522] The internal control report includes an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, are suitably designed, and are operating effectively to meet control objectives relating to custodial services. For those qualified custodians that currently obtain internal control reports, the scope of those reports likely do not cover the financial institutions' safeguarding activities that this proposed requirement, which would expand the scope of the rule to include all ''assets'' instead of ''funds and securities,'' is designed to cover, thus potentially creating new costs for those firms whose report scope would need to be modified. Any such new cost would be mitigated, however, to the extent newly included assets would share existing controls or implicate controls similar to those for funds and securities. We understand, however, that not all qualified custodians may currently obtain internal control reports—or may not be obtaining internal control reports that meet the requirements of the proposed rule. While we believe those financial institutions will be able to obtain a report that satisfies the requirements of the proposed rule, doing so could pose a substantial financial burden and time commitment. As discussed above, we are not requiring that a specific type of internal control report be provided under the proposed rule as long as the required objectives are addressed. For example, a report on the description of controls placed in operation and tests of operation effectiveness, commonly

[515] *See infra* footnote 593.

[516] *See infra* footnote 595.

[517] For example, under the revised recordkeeping rule, and adviser would be required to maintain copies of the client account statements it receives from a qualified custodian. These records could form the basis of an adviser's reasonable belief that a qualified custodian has implemented the proposed contractual requirement to deliver account statements. *See* Proposed rule 204–2(b)(iv). The costs associated with proposed amendments to the recordkeeping rule are discussed in more detail below. *See* section 3.D.7, *infra.*

[518] Current rule 206(4)–2(a)(3). Qualified custodians use custodial account records to produce client account statements.

[519] *See infra* footnote 601, which estimates the annual burden associated with records provision to independent public accountants as being 18,422 hours. Using a blended rate of $394 per hour (*see infra* footnote 605) produces an estimated annual burden of (18,422 * $394) = $7,258,268 associated with records provision to independent public accountants. *See infra* footnote 605, which estimates the annual burden associated with records provision to the Commission as being $12,203,756, producing a total annual burden associated with records provision of ($7,258,268 + $12,203,756) = $19,462,024.

[520] *See infra* note 609.

[521] *See infra* note 613.

[522] Rule 206(4)–2(a)(4)(ii).

referred to as a ''SOC 1 Type 2 Report,'' generally should be sufficient to satisfy the requirements of the proposed internal control report requirement. For purposes of the Paperwork Reduction Act, we estimate that an average internal control report would cost approximately $750,000 per year and that qualified custodians will incur aggregate annual costs of $35,962,500 associated with obtaining internal control reports.[523]

Adviser's Level of Authority. As discussed above, our understanding is that custodial agreements between advisory clients and qualified custodians often give advisers authority over custodial accounts that is broader than what the adviser and client agreed to in the advisory agreement. Our staff has observed that qualified custodians have been reluctant to modify or customize the level of authority of investment advisers with respect to customer accounts. We believe that qualified custodians have been reluctant to modify or customize advisers' level of authority because doing so would increase qualified custodians' need to monitor customer accounts, and to accept liability, for unauthorized transactions by an adviser and its personnel. The proposed requirement could create operational costs for qualified custodians including the costs of adapting existing systems and processes to modify or customize the level of authority of investment advisers with respect to customer accounts. Also, qualified custodians might incur costs to incorporate new provisions into their contracts with advisers as well as amend any inconsistent provisions in their existing contracts. As a result, we believe the proposed requirement that the written agreement contain a provision addressing the adviser's authority, including authority of the client and adviser to reduce that authority, may be costly for qualified custodians.

3. Certain Assets That Are Unable To Be Maintained With a Qualified Custodian

As discussed in section II.C above, we believe the bulk of advisory client assets can be maintained by qualified custodians. Some assets by their very nature or size may not easily be subject to misuse or misappropriation, and that may reduce the need for the safeguarding protections offered by a qualified custodian, but it is also our understanding that qualified custodians often refuse to custody such assets for both advisers and their clients. In addition, as discussed above, certain privately offered securities may not be able to be maintained by a qualified custodian because, in our understanding, demand for these services is low and thus there may not be a ready market.

In circumstances where the protections of a qualified custodian are unavailable for certain physical assets and privately offered securities, the proposed rule would provide an exception to the requirement to maintain client assets with a qualified custodian, but would also require additional protections to help ensure that these assets are properly safeguarded. In this section, we discuss the costs and benefits of each of the proposed rule's safeguarding requirements for assets that are unable to be maintained by a qualified custodian.

a. Definition of Privately Offered Security

The proposed rule's definition of privately offered securities would retain the elements from the custody rule's description that require the securities to be acquired from the issuer in a transaction or chain of transactions not involving any public offering and transferable only with prior consent of the issuer or holders of other outstanding securities of the issuer.[524] Like the custody rule, the safeguarding rule would also require the securities to be uncertificated and would require ownership to be recorded only on the books of the issuer or its transfer agent in the name of the client. However, the safeguarding rule would also require that the securities be capable of only being recorded on the non-public books of the issuer or its transfer agent in the name of the client as it appears in the records the adviser is required to keep under rule 204–2.

To the extent crypto asset securities may qualify as privately offered securities under the current rule's privately offered securities exception, advisers with custody of such assets may not be maintaining them with a qualified custodian in reliance upon the exception. However, as discussed above, we believe crypto asset securities issued on public, permissionless blockchains would not satisfy the definition of privately offered securities.[525] As a result, advisers with custody of such crypto asset securities generally would be required to maintain those assets with a qualified custodian and their clients would benefit from the enhanced protections qualified custodians provide.[526] To the extent that crypto asset securities exist or develop that are able to meet the conditions of the privately offered securities exception, the costs and benefits discussed below with respect to the safeguarding of privately offered securities would apply to such assets.

a. Adviser's Reasonable Determination

In order to be eligible for the exception, the rule would require an adviser to reasonably determine, and document in writing, that ownership cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control of such assets. Such a determination necessarily depends on the facts and circumstances at issue. Moreover, these determinations would necessarily evolve over time as assets and the custodial industry change.

An adviser's reasonable determination of whether a qualified custodian is able to maintain possession or control of a particular asset would generally involve an analysis of the asset and the available custodial market. An adviser's reasonable determination generally would not require the identification of every conceivable qualified custodian and an evaluation of its custodial services. Fundamentally, to determine whether an asset can or cannot be maintained by a qualified custodian under the proposed rule, an adviser generally should obtain a reasonable understanding of the marketplace of custody services available for each client asset for which it has custody.

The proposed rule's reasonable determination requirement would benefit investors by limiting the scope of assets eligible for the exception and helping to ensure that any privately offered security or physical asset for which a qualified custodian is available is held by such custodian, maximizing the set of assets for which investors receive the enhanced protections associated with maintaining possession or control by a qualified custodian. The magnitude of this benefit would depend on the extent to which advisers currently would not otherwise maintain assets they have control of with a qualified custodian despite the availability of custodial services for such assets. For example, if the costs associated with maintaining an asset with a qualified custodian exceeded the costs of safeguarding the asset

[523] *See infra* footnote 617.

[524] *See supra* note 223.

[525] *See supra* note 227 and surrounding discussion.

[526] *See* section III.D.2 for a discussion of the benefits and costs for assets that do not qualify for the privately offered security exception and are not physical assets.

internally, an adviser with custody of the asset might choose to safeguard the asset internally absent this requirement. Alternatively, in cases where custodial services are available at prices that are competitive with the costs of internally safeguarding an asset, advisers may have chosen to maintain assets in their custody with a qualified custodian regardless of this requirement.

Advisers would incur costs associated with the proposed rule's reasonable determination requirement. For example, while the rule does not prescribe exactly how advisers should comply with the requirement, many advisers may choose to develop policies and procedures that establish the frequency with which the market for custodial services is reviewed, the manner in which the availability of custodial services for an asset should be assessed, and the manner in which an ultimate determination is made. The development and implementation of such policies and procedures, including the documentation of each reasonable determination, would cause advisers to incur costs that may be passed on to their clients in the form of higher fees. The proposed rule does provide advisers with flexibility in determining the frequency with which they make the required reasonable determinations, which should allow advisers to tailor these policies and procedures to the types of asset they hold on behalf of clients and control the associated costs.

In addition, in cases where custodial services become available for an asset but are highly costly, the reasonable determination requirement would force advisers to incur such high custodial costs, which may be passed on to their clients, whereas they otherwise may have chosen to forgo custodial services in such cases. The costs an adviser incurs as a result of the requirement would vary depending on factors such as the types of assets the adviser has custody of and the heterogeneity in these asset types. For example, an adviser that has custody of client assets that are relatively homogenous may only have to monitor a single market for custodial services, whereas an adviser with custody of many different types of assets would likely incur higher costs in monitoring and determining whether custodial services are available in multiple markets. We lack precise information on the degree of homogeneity versus heterogeneity in the assets held by advisers, as well as the eventual costs advisers would pay to custody assets under the proposed rule, so we cannot quantify the costs associated with this requirement.

b. Adviser Reasonably Safeguards Client Assets That Are Unable To Be Maintained With a Qualified Custodian

To rely on the exception, the adviser would be required to reasonably safeguard physical assets and privately offered securities that cannot be maintained with a qualified custodian. The proposed rule would not require that advisers implement any particular measures to safeguard physical assets or privately offered securities not maintained with a qualified custodian. Instead, the proposed rule would take a more principles-based approach. If an adviser has custody of a physical asset or privately offered security that it has determined cannot be maintained with a qualified custodian, the adviser may decide to safeguard that asset itself, designing and implementing safeguarding policies and procedures accordingly. An adviser must act consistently with its fiduciary role in safeguarding any particular asset. For example, the adviser might ''reasonably safeguard'' an asset by looking to reasonable commercial standards for safeguarding that asset from theft, misuse, misappropriation, or other similar type of loss. Under the rule, however, an adviser would have the flexibility to determine the specific safeguarding measures it puts in place, which may differ from asset to asset. If an adviser does not ''self-custody'' physical assets or privately offered securities that it has determined cannot be maintained with a qualified custodian, and instead maintains those assets with a third party that is in the business of safeguarding those assets, the adviser might implement policies and procedures reasonably designed to ensure that the entity directly maintaining the client's assets has implemented appropriate measures to safeguard them.

Advisers are already obligated to safeguard client assets as part of their fiduciary duty. However, to the extent that the proposed rule would lead advisers to develop practices that more effectively safeguard assets that are not maintained by a qualified custodian, the proposed rule would benefit investors by reducing the risk that their assets are subject to loss, theft, misuse, or misappropriation by an adviser. Even to the extent advisers already effectively safeguard client assets that are not maintained by a qualified custodian, the proposed rule may still benefit investors by establishing a minimum safeguarding standard which they can expect will be applied to those assets, increasing investors' confidence in the market for advisory services.

The proposed rule would not require advisers to implement any particular measures to safeguard physical assets or privately offered securities not maintained with a qualified custodian. This principles-based approach would give advisers the flexibility to safeguard client assets in a way consistent with the nature of the assets and each adviser's individual facts and circumstances. If advisers choose to safeguard client assets themselves, then, to the extent they do not already safeguard client assets in accordance with the proposed requirement, advisers would bear any costs associated with developing and implementing effective safeguarding practices. For example, some advisers may incur costs designing and implementing safeguarding policies and procedures.

If physical assets or privately offered securities are maintained with a third party, advisers might comply with the proposed rule's safeguarding requirement by implementing policies and procedures reasonably designed to ensure that the third party maintaining the client's physical assets has implemented appropriate measures to safeguard them. Such policies and procedures might include robust due diligence and ongoing oversight procedures designed to ensure the adviser has assessed and evaluated the measures put in place by the third party. To the extent advisers do not already employ practices that can ensure that client assets maintained with a third party are safeguarded consistently with the proposed rule, advisers will incur costs in developing and implementing such practices in order to comply with the rule.

c. Notification and Prompt Independent Public Accountant Verification

The exception to the requirement to maintain assets with a qualified custodian would also require an adviser to enter into a written agreement with an independent public accountant. The proposed rule would require the adviser to notify the independent public accountant of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day. The proposed rule would require the written agreement to require the independent public accountant to verify the purchase, sale, or other transfer promptly upon receiving the required transfer notice. We believe the involvement of independent public accountants in the review and verification of client assets of which advisers have custody is an important safeguarding tool. The timing of the requirement would build a record for

the accountant to review in connection with an annual surprise examination or financial statement audit. The written agreement would also require the independent public accountant to notify the Commission by electronic means directed to the Division of Examinations within one business day upon finding any material discrepancies during the course of performing its procedures.

The notification and verification requirement would benefit investors by reducing the risk that a loss, theft, misuse, or misappropriation of their assets goes undetected for a significant amount of time, which might allow investors or the Commission to mitigate losses associated with such events in a timely manner. Even in cases where an adviser fails to notify the independent public accountant of a transaction because it involves loss, theft, misuse, or misappropriation, the absence of such notifications relative to what has been observed in the past may serve as a warning sign that is useful in identifying potential losses during annual audits or surprise examinations by the independent public accountant.

Advisers would incur costs associated with the proposed rule's notification and verification requirement. While an adviser would likely incur some initial costs associated with designing and implementing any policies and procedures necessary to notify the independent public accountant that a transaction of client assets has occurred, the ongoing costs of notifying the independent public accountant are likely to be small relative to the more involved transaction costs associated with a change of ownership for privately offered securities or physical assets. For purposes of the Paperwork Reduction Act, we estimate that advisers would incur aggregate ongoing annual costs of $48,013 associated with notifying independent public accountants of transactions.[527] Advisers will also incur one-time costs associated with negotiating, drafting, and implementing the written agreement with their designated independent public accountant. Advisers may be able to mitigate these one-time costs if they already have written agreements associated with an annual surprise exam or audit by the same independent public accountant. In addition, advisers may incur minimal costs associated with the occasional modification of these agreements. For purposes of the Paperwork Reduction Act, we estimate that investment advisers would incur aggregate initial costs of $2,443,194 to prepare these written agreements,[528] and that aggregate annual costs associated with modifying these agreements would be $977,514.[529]

Finally, the adviser will have to pay the independent public accountant for its services, the costs of which may be passed onto investors. Verification costs would likely vary across advisers depending on factors such as the type of client assets they have custody of as well as the volume of transactions in which they engage. For example, a transaction involving a real estate asset that requires the independent public accountant to verify titles or deeds in person is likely to be costlier to verify than a transaction that can be verified electronically or via telephone. Similarly, an adviser that engages in a high volume of annual transactions would incur higher costs associated with transaction verification, which may ultimately be borne by the advisers' clients. For purposes of the Paperwork Reduction Act, we estimate that advisers would incur aggregate ongoing annual costs of $21,000,000 associated with the verification of transactions by independent public accountants.[530]

d. Surprise Examination or Audit

Like the existing custody rule, the proposed safeguarding rule would require advisers relying on the exception to undergo an annual surprise examination or rely on the audit provision. In a change from the custody rule, however, the proposed rule would require each privately offered security or physical asset not maintained with a qualified custodian to be verified, rather than only requiring that a sampling of assets be verified during a surprise exam or that only assets meeting the materiality threshold be verified during an audit.

The proposed requirement that each asset be verified in annual surprise examinations or audits would benefit investors by reducing the risk that the loss or theft of client assets is not detected when those assets are either not included in a surprise examination's sample or do not meet the materiality threshold when advisers rely on the audit provision. For clients of advisers that do not rely on the audit provision, the magnitude of this benefit depends on the extent to which the sampling techniques used in conducting a surprise examination are likely to omit assets that have been subject to loss or theft. To the extent that the sampling techniques currently used in surprise examinations are effective at capturing instances of asset loss or theft, or that the sampling techniques are already a sufficient deterrent to adviser misconduct that might result in loss or theft, the benefit of this requirement will be more limited with respect to surprise examinations.

For clients of advisers that rely on the audit provision, the magnitude of this benefit depends on the extent to which loss or theft tend to occur in client assets that do not meet the materiality threshold. While the existing custody rule might not deter adviser misconduct in assets below the materiality threshold, the proposed safeguarding rule would act as more of a deterrent against such misconduct because those assets would be subject to regular verification for advisers that rely on the audit provision.

Advisers would incur additional costs as a result of the requirement that, to rely on the exception, each client asset be verified in a surprise examination or annual audit, and these costs may be passed on to their clients. These costs will vary with the type of asset subject to verification and the number of assets held by an adviser. For example, verifying a privately offered security held by an adviser on behalf of its client might require an independent public accountant to contact the issuer of the security or its agent to verify the existence of the asset, or to review documents such as private placement memoranda and the issuer's Regulation D filings. For physical assets, an independent public accountant may be required to review deeds or other land recordation materials (*e.g.,* for real estate assets) or to review other documents, such as warehouse receipts, that confirm the existence of a physical commodity. For both physical assets and privately offered securities, incremental verification costs could be high in cases where the number of assets held by an adviser is large relative to the number of assets typically verified in surprise examinations or audits under the current custody rule. If the supply of qualified independent public accountants is scarce relative to any increased demand for their services as a result of this requirement, the overall cost of their services would also increase, at least temporarily until those higher prices attract new entrants into the public accounting market. For purposes of the Paperwork Reduction Act, we estimate that advisers would incur aggregate ongoing annual costs of $322,956,000 associated with the

[527] *See infra* note 648.

[528] *See infra* note 642.

[529] *See infra* note 644.

[530] *See infra* note 649.

verification of transactions by independent public accountants.[531]

4. Segregation of Investments

In addition to requiring advisers to attain reasonable assurance of segregation of client assets from a qualified custodian's assets, the proposed rule also would require advisers to segregate client assets from the adviser's assets and its related person's assets in circumstances where the adviser has custody. Specifically, the proposed rule would require that client assets of which an adviser has custody:

(1) Be titled or registered in the client's name or otherwise held for the benefit of that client;

(2) Not be commingled with the adviser's assets or the adviser's related persons' assets; and

(3) Not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the adviser, its related persons, or its creditors, except to the extent agreed to or authorized in writing by the client.[532]

The proposed requirement that a client's assets be titled or registered in the client's name would help ensure that the client's assets are clearly identified as belonging to the appropriate client. The proposed rule would also permit advisers to identify the assets ''for the benefit of'' a particular client where assets may not be ''titled or registered'' in the client's name. Permitting advisers to identify assets ''for the benefit of'' a particular client benefits investors by recognizing that advisory clients can title or register their investments in various ways.

The proposed rule would also require that client assets not be commingled with the adviser's assets or those of its related persons. The proposed requirement would help ensure that client assets are isolated and more readily identifiable as client property. We believe isolating client assets and making them more readily identifiable as client property would help protect client assets from claims by a third party looking to secure or satisfy an obligation of the adviser, including in cases of insolvency or bankruptcy of the adviser, or its related persons.

The proposed rule would also require client assets to remain free from any right, charge, security interest, lien, or claim of any kind in favor of the adviser, its related persons, or its creditors. These requirements would protect client assets by limiting the ability of an adviser, or its related persons, to use client assets for their own purposes or in a manner not authorized by the client. We recognize that some advisers regularly service assets in a manner where such assets are reasonably identifiable from other clients' assets and not subject to increased risk of loss from adviser misuse or in the case of adviser insolvency, thereby mitigating the potential benefits of the proposed requirement. Also, we recognize that, depending on the types of assets, products, or strategies in which they invest, some clients may authorize these types of arrangements. We do not intend this condition to limit or prohibit clients' ability to authorize such arrangements.

We recognize that not all advisers service assets in a manner where such asserts are reasonably identifiable from the other clients' assets and not subject to increased risk of loss from adviser misuse or in the case of adviser insolvency. In addition, for those advisers that segregate and identify their client assets, the extent of those activities varies. To the extent certain advisers currently do not segregate client assets, the segregation requirement in the proposed rule would result in advisers adapting existing systems and processes to meet the proposed requirement.

5. Investment Adviser Delivery of Notice to Clients

The proposed rule, like the custody rule, would require an investment adviser to notify its client in writing promptly upon opening an account with a qualified custodian on the client's behalf. The proposed rule, however, would require that the notice must include the custodial account number in addition to the currently required qualified custodian's name and address.[533] The proposed rule would also continue to allow the notice to be delivered to the client's independent representative. If the client is a pooled investment vehicle, the notice must be sent to all of the investors in the pool, provided that, if an investor is a pooled investment vehicle that is in a control relationship with the adviser or the adviser's related persons, the sender must look through that pool (and any pools in a control relationship with the adviser or its related persons) in order to send the notice to investors in those pools.[534]

The addition of the custodial account number would benefit clients by allowing them to more easily identify the custodial account. The client would be able to compare the custodial account number on subsequent account statements received from the qualified custodian to the custodial account number on the notice received from their investment adviser. Also, if the client is a pooled investment vehicle, the look-through requirement on senders promotes meaningful delivery of this important information.

We understand that custodial account numbers are readily available to qualified custodians and that the cost of including the custodial account number in the notice to clients would be minimal. For purposes of the Paperwork Reduction Act, we estimate that advisers would incur aggregate initial costs of $4,720,044 associated with ensuring that custodial account numbers are included in notices to clients.[535]

6. Exceptions From the Surprise Examination

The proposed rule would create new exceptions to the surprise examination requirement in certain limited circumstances where advisers may have custody. We believe that in these circumstances, the subject activities or arrangements have built-in adequate preventative safeguards or simply pose less risk to client assets.

a. Entities Subject to an Audit

We believe that audits provide substantial protections to private funds and their investors both because audits test assertions associated with the investment portfolio (*e.g.,* completeness, existence, rights and obligations, valuation, presentation) and because they provide a check against adviser misrepresentations of performance, fees, and other information about the fund. Because of that belief, the proposed rule's audit provision would allow audits to serve as a substitute mechanism of compliance with certain aspects of the proposed rule. Elements of the proposed rule's audit provision are largely unchanged from the audit provision of the current rule.[536] Differences include: expanded availability from ''pooled investment vehicle'' clients to ''entities,'' extending the current rule's specific deadlines for distribution of audited financial statements to 180 days in the case of fund of funds or 260 days of a fund of funds of the entity's fiscal year end, and a requirement for there to be a written agreement between the adviser or the client and the auditor requiring the auditor to notify the Commission

[531] *See infra* note 655.

[532] Proposed rule 223–1(a)(3).

[533] Proposed rule 223–1(a)(2).

[534] *See* proposed rule 223–1(c).

[535] *See infra* note 624.

[536] *See supra* note 282.

upon the auditor's termination or issuance of a modified opinion.[537]

i. The Expanded Availability of Audit Provision

While the current rule's audit provision is only available to an adviser to clients that are limited partnerships, limited liability companies, and other types of pooled investment vehicles, the proposed audit provision would also be available to an adviser for any other client ''entity'' whose financial statements can be audited in accordance with the rule.[538]

As discussed in section II.G.1.b, this aspect of the proposed rule would extend the investor protection benefits of an audit to a larger number of investors, such as pension plans, retirement plans, college saving plans (529 plans), and Achieving a Better Life Experience savings accounts (ABLE plans or 529 A accounts). Investment advisers do not use the current rule's audit provision for clients that are not pooled investment vehicles, a consequence that may increase compliance burdens for advisers and result in additional costs.

Also, we believe that financial statement audits provide additional meaningful protections to investors by increasing the likelihood that fraudulent activity is uncovered, thereby providing deterrence against fraudulent conduct by advisers. In a financial statement audit, the accountant performs procedures beyond those procedures performed during a surprise examination. For example, a financial statement audit typically involves tests of valuations of entity investments, income, operating expenses, and, if applicable, incentive fees and allocations that accrue to the adviser. Additionally, a financial statement audit regularly involves an accountant confirming bank account balances and securities holdings as of a point in time, and a financial statement audit frequently includes the testing of transactions that have occurred throughout the year. These common types of audit evidence procedures performed by accountants during a financial statement audit—physical examination or inspection, confirmation, documentation, inquiry, recalculation, re-performance, observation, and analytical procedures—act as an important check on the adviser obviating the need for the account notice and delivery requirements for pooled investment vehicles and other entities.

Based on our experience, we estimate that the party (or parties) that bears the audit expense would pay an average audit fee of $60,000 per fund. We estimate that individual fund audit fees would tend to vary over an estimated range from $15,000 to $300,000, and that some fund audit fees would be higher or lower than this range. We noted that the price of a private fund audit depends on many factors, such as whether it is a liquid fund or an illiquid fund, the number of its holdings, availability of a PCAOB-registered and -inspected auditor, economies of scale, and the location and size of the auditor. We believe that the cost of audit for client entities whose financial statements can be audited would be of a similar magnitude.[539] [540]

ii. Distribution of Audited Financial Statements

The proposed audit provision would require an adviser to distribute an entity's audited financial statements to current investors within 120 days (or 180 days in the case of a fund of funds or 260 days in the case of a fund of funds of funds) of the entity's fiscal year end, instead of the 120-day period required currently.[541] As discussed in section II.G.1.e above, we understand that reliance on third parties could cause an adviser to fail to meet the 120-day timing requirements regardless of an adviser's actions. We also recognize there may be times when an adviser reasonably believes that an entity's audited financial statements would be distributed within the required timeframe but fails to have them distributed in time under certain unforeseeable circumstances.

By extending the timeframe in which advisers of certain types of pooled investment vehicles (*i.e.,* funds of funds and funds of funds of funds) must distribute an entity's audited financial statements,[542] the proposed rule may reduce any uncertainty advisers to such pooled investment vehicles face under the current rule. Because we understand existing market practices with respect to these pooled investment vehicles already follow similar timeframes, we believe the costs of the proposed changes to the audit provision with respect to the distribution of audited financial statements would be minimal.

For purposes of the Paperwork Reduction Act, we estimate that investment advisers would incur an aggregate annual burden of $1,242,150 associated with delivering audited financial statements to their clients.[543]

iii. Commission Notification

The proposed rule would require an adviser to enter into, or cause the entity to enter into, a written agreement with the independent public accountant performing the audit to notify the Commission (i) within one business day upon issuing an audit report to the entity that contains a modified opinion and (ii) within four business days of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed.[544] The written agreement must require the independent public accountant to notify the Commission by electronic means directed to the Division of Examinations. Although there is a requirement on Form ADV for an adviser to a private fund to report to the Commission whether it received a qualified audit opinion and to provide and update its auditor's identifying information, there is not a similar current obligation for an accountant to notify the Commission under the current rule.

The proposed requirement to notify the Commission (i) within one business day upon issuing an audit report to the entity that contains a modified opinion and (ii) within four business days of resignation or dismissal from, or other termination of, the engagement, or upon

[537] *See supra* note 283.

[538] *Compare* rule 206(4)–2(b)(4); proposed rule 223–1(b)(4).

[539] Although we believe that the procedures performed by the accountant during the course of an audit provide meaningful protections to clients beyond those of a surprise examination, certain protections provided by surprise examinations would no longer be provided. The loss of those protections could create a cost for investors, but we believe the requirements under the proposed rule mitigate those potential costs. For example, although the annual audit is not required to be performed at a time of the accountant's choosing (as is a surprise examination), we believe other elements of the audit incorporate an element of uncertainty similar to the surprise element of the surprise examination, with corresponding benefits to investors. Specifically, in the course of an annual audit, the auditor will select transactions to test during the period that the adviser will not be able to anticipate.

[540] Under the proposed rule, only those accountants that are subject to regular inspection by the PCAOB are eligible to perform these services which limits eligible accountants to those that currently conduct public company issuer and broker-dealer audits. The expansion of the availability of audit provision could result in an increase in demand for audit services provided by PCAOB-inspected accountants. Absent an offsetting increase in the supply of such services, the cost of audit services for client entities could increase. If PCAOB-inspected accountants reallocate resources from other market segments, thereby decreasing the supply of PCAOB-inspected accountant capacity in those other market segments, the cost of audit services, more generally, could increase.

[541] *See* proposed rule 223–1(b)(4)(iv).

[542] *See supra* note 304.

[543] *See infra* note 660.

[544] *See* proposed rule 223–1(b)(4)(v).

removing itself or being removed from consideration for being reappointed would enable the Commission to receive more timely, complete, and independent information in these circumstances and to evaluate the need for an examination of the adviser. Based on our experience in receiving notifications from accountants who perform surprise examinations under the custody rule, we believe that the timely receipt of this information—from an independent third party—would more readily enable our staff to identify advisers potentially engaged in harmful misconduct and who have other compliance issues. This would bolster the Commission's efforts at preventing fraudulent, deceptive, and manipulative activity and would aid oversight of investment advisers. This could lead to a higher rate of detection of activities that lead to the loss of client assets and a greater potential for mitigation of such losses. Anticipating this, advisers would have stronger incentives to avoid such harmful activities.

The proposed written agreement requirement could impose costs on advisers and accountants related to negotiating, drafting, and implementing the written agreements. Based on staff experience, however, we understand that written agreements are commonplace and reflect industry practice when a person retains the services of a professional, such as an accountant, and they are typically prepared by the independent public accountant in advance. Also, the proposed requirements are drawn from the current rule's Form ADV–E filing requirement for independent public accountants performing surprise examinations and, as a result, should not be burdensome for accountants to include in their written agreements.[545] As a result, we do not believe that the proposed requirement would significantly increase the costs attributable to the proposed requirement. For purposes of the Paperwork Reduction Act, we estimate that investment advisers would incur an initial aggregate burden of 48,735 hours and an ongoing annual burden of 35,869 hours associated with the written agreement.[546]

b. Discretionary Trading Authority

The proposed rule would contain an exception from the surprise examination requirement of client assets if the adviser's sole basis for having custody is discretionary authority with respect to those assets, provided this exception applies only for client assets that are maintained with a qualified custodian and for accounts where the adviser's discretionary authority is limited to instructing its client's qualified custodian to transact in assets that settle exclusively on a delivery versus payment basis.[547] The proposed rule would limit this exception to instances where this is the adviser's *sole* basis for custody. Also, if an adviser also has custody of the client's assets for reasons that are also subject to similar exceptions (*e.g.,* sole basis is fee deduction, sole basis is related person custody),[548] the adviser can rely on the exception.

We understand that certain investors may prefer to give their adviser discretionary trading authority. In delivery versus payment transactions, clients' custodians are generally under instructions to transfer assets out of a client's account only upon corresponding transfer of assets into the account. When a custodian is under instructions to transfer assets out of a client's account only upon corresponding transfer of assets into the account, there is a reduced risk that the adviser could misappropriate the assets, and when the transaction settles on a DVP basis there is a reduced risk of theft of the asset because, on a non-DVP basis, the seller of an asset could deliver but not receive payment or that the buyer of an asset could make payment but not receive delivery of the asset. The proposed exception would reduce the cost of discretionary trading authority in these instances by not requiring the adviser to comply with the surprise examination requirement of the proposed rule in those circumstances where the discretionary trading authority arrangement minimizes the risk that an investment adviser could withdraw or misappropriate assets in its clients' accounts. We believe this exception will mitigate the creation of new burdens for many advisers, particularly smaller advisers, as a result of the expanded scope of the definition of custody in the proposed rule and will focus the requirement to obtain a surprise examination where the risk of misappropriation is greatest. To the extent advisers pass along cost savings to clients, clients could realize a benefit in the form of reduced fees.

c. Standing Letters of Authorization

The proposed rule would provide an exception from the surprise examination requirement for an investment adviser that has custody of client assets solely because of a standing letter of authorization.[549]

We understand that certain investors may prefer to grant their adviser authority to disburse assets from the client's account to one or more specifically designated third parties in a manner that limits the adviser's ability to redirect the assets, via standing letter of instruction or other similar asset transfer authorization arrangement. The proposed exception would reduce the cost of granting an adviser such authority by not requiring the adviser to comply with the surprise examination requirement of the proposed rule. To the extent advisers pass along cost savings to clients, clients could realize a benefit in the form of reduced fees.

As discussed in section II.G.3 above, where an arrangement is structured so that the adviser's role is limited to determining when to disburse a client's assets, we believe that the adviser's role in effecting any change in beneficial ownership is circumscribed and ministerial, and there is little risk to clients of loss, misuse, misappropriation, or theft of its asset. We also believe under such circumstances that a qualified custodian would be best positioned to ensure that the required authorizations and instructions are properly and verifiably issued by the client (*e.g.,* the client's signature is verifiable). As a result, we believe the cost of the exception to clients would be minimal.

The proposed required information could benefit qualified custodians by helping ensure that the instructions to the qualified custodian provide relevant information about the recipient. The proposed rule's requirement could also impose operational costs on qualified custodians. As described in section II.G.3, we believe the types of financial institutions identified as meeting the proposed definition of qualified custodian are required by their primary functional regulator or otherwise to perform procedures to verify the instruction and authorization, through a signature review and, if determined to be necessary, based on the facts and circumstances, another method of verification. To the extent existing regulatory requirements for qualified custodians are the same or similar to the proposed rule's requirements, the costs of adapting existing systems may be mitigated.

[545] Form ADV–E Instructions, pt. 3.ii, *https://www.sec.gov/files/formadv-e.pdf.*

[546] *See infra* notes 662 and 664.

[547] Proposed rule 223–1(b)(8).

[548] *See* Rule 206(4)–2(b)(3) and (6) and proposed rule 223–1(b)(3) and (6).

[549] Proposed rule 223–1(b)(7).

7. Amendments to the Investment Adviser Recordkeeping Rule

The proposed amendments to rule 204–2 would require an investment adviser that has custody of client assets to make and keep true, accurate, and current records of required client notifications and independent public accountant engagements under proposed rule 223–1, as well as books and records related to specific types of client account information, custodian information, transaction and position information, and standing letters of authorization.[550] The proposed amendments would require a more detailed and broader scope of records of trade and transaction activity and position information for each client account than the existing requirements for such records.[551] The proposed amendments also would add new recordkeeping requirements that include: (i) retaining copies of required client notices; [552] (ii) creating and retaining records documenting client account identifying information, including whether the adviser has discretionary authority; [553] (iii) creating and retaining records of custodian identifying information, including copies of required qualified custodian agreements, and a record of required reasonable assurances that the adviser obtains from the qualified custodian; [554] (iv) creating and retaining a record that indicates the basis of the adviser's custody of client assets; [555] (v) retaining copies of all account statements; [556] and (vi) retaining copies of any standing letters of authorization.[557] Lastly, the proposed amendments would add new recordkeeping requirements to address independent public accountant engagements.[558]

The proposed recordkeeping requirements are designed to work in concert with the proposed rule to help ensure that a complete custodial record with respect to client assets is maintained and preserved. The proposed changes to the recordkeeping rule would benefit clients by helping to facilitate the Commission's inspection and enforcement capabilities, including assessing compliance with the requirements of the proposed rule. In particular, the proposed recordkeeping requirement would benefit investors by providing more complete records that would facilitate client account reconciliation of all debits and credits to and from client accounts. More complete records also would better enable examiners to identify and detect potential investment adviser misappropriation or loss or misuse of client assets during their examinations, resulting in more effective investor protections. More generally, the recordkeeping requirements would enhance the transparency of custody of client assets and enhance the Commission's oversight capabilities. Enhancing the Commission's oversight capabilities could benefit clients and investors through reduced risks of loss and greater regulatory transparency and resulting effectiveness of the Commission's client and investor protection efforts.

The proposed recordkeeping requirements would impose costs on advisers related to creating and maintaining the required records. These costs include those that can be attributed to compliance professionals who would review and familiarize themselves with requirements as specified in the proposed rule. In particular, advisers would be required to make and retain a list of covered functions and contributing factors, document their due diligence efforts, retain any written agreements with service providers, and document periodic monitoring of retained service providers. For purposes of the Paperwork Reduction Act, we estimate that advisers would incur aggregate annual costs of $41,352,853 as a result of the proposed amendments to rule 204–2.[559]

8. Changes to Form ADV

We are proposing to amend Part 1A, Schedule D, and the Instructions and Glossary of Form ADV.[560] The amendments are designed to categorize information about advisers' practices to safeguard client assets, to provide the Commission with information related to these practices, and to provide the Commission with additional data to improve our ability to identify compliance risks. The Commission is not, however, proposing to change the structured data language used for Part 1A. Specifically, given that Form ADV Part 1A currently is submitted in a structured (*i.e.,* machine-readable), XML-based data language specific to that Form, the information in amended new Item 9 would continue to be structured in the same manner.

The amendments will provide the Commission with information related to these practices, and also provide the Commission with additional data to improve our ability to identify compliance risks. Also, public reporting of these custodial practices could allow clients or third parties to assess potential risks (*e.g.,* concentration of investments with a small number of custodians) associated with the market for custodial services, generally. For example, these amendments may also provide clients or investors additional protection because they will be better able to discern the reasons why a particular adviser has custody. Further, these amendments may offer ancillary market benefits to the extent that market participants are better able to analyze the Form ADV data to assess fraud risk. These proposed revisions would also streamline the collection of this information by reorganizing Item 9 and refining certain reporting requirements to eliminate confusion and prevent inaccurate or incomplete reporting.[561]

Reporting this additional information would impose additional costs on investment advisers, but we believe that such costs would not be significant since we understand that much of the information we propose requesting on Form ADV would be readily available to or easily accessible by advisers.[562]

E. Efficiency, Competition, and Capital Formation

Efficiency. As discussed above, the proposed rule should benefit clients and investors by mitigating risks associated with the custody of client assets, thereby enhancing client and investor protections. The enhancement to client and investor protections could, in turn, lead to current clients being willing to invest a greater portion of their resources with registered advisers or for more clients and investors to seek the advice of registered advisers. Investment advisers provide investment advice to investors and clients about the value of, or about investing in, securities and other investment products. To the extent investors benefit from such advice, we could expect an improvement in the efficiency of client investment.

It is possible, however, that the proposed rule could have the opposite

[550] Advisers would be required to maintain the proposed records for a period of not less than five years as required under the current books and recordkeeping rule. *See* rule 204–2(e)(1).

[551] *Compare* rule 204–2(b)(1)-(4) *with* proposed rule 204–2(b)(2)(v).

[552] Proposed rule 204–2(b)(1).

[553] Proposed rule 204–2(b)(2)(i).

[554] Proposed rule 204–2(b)(2)(ii).

[555] Proposed rule 204–2(b)(2)(iii).

[556] Proposed rule 204–2(b)(2)(iv).

[557] Proposed rule 204–2(b)(2)(vi).

[558] Proposed rule 204–2(b)(3).

[559] *See infra* footnote 674.

[560] *See supra* note 359.

[561] *See* proposed Form ADV, Part 1A, Item 9.

[562] *See infra* Table 10 for the revised From ADV PRA burden that includes incremental changes due to the proposed amendments as well as adjustments due to wage inflation and changes in the number of advisers.

effect on efficiency. The costs of the proposed rule would be borne by advisers, their clients, and qualified custodians. It is possible that the costs borne by advisers may be large enough to cause some advisers to stop providing investment advice for certain assets.[563] If advisers were to stop providing investment advice for certain assets, clients could experience a decrease in the quality of advisers' services. Alternatively, if advisers do try to push the costs, or some component thereof, to clients, it is possible that costs will be large enough to cause some clients to seek alternatives to registered advisers. To the extent clients would benefit from the advice provided by registered investment advisers, the decreased use of advisory services could result in a decline in the efficiency of client investment including lower realized returns.

The proposed amendments would result in a substantive increase in the information about custodial practices available to the Commission. That increased information could, for example, aid Commission staff in examinations, increase the likelihood that non-compliant behavior by custodians or advisers is detected, and increase the likelihood that non-compliant behavior is detected sooner. That increased information should also allow the Commission to develop a better understanding custodial practices, generally. As a result, we would expect an enhancement in regulatory efficiency.

Competition. The proposed rule would enhance protections associated with the custody of client assets. These enhancements to client and investor protection, as well as the additional information available to current and potential clients, could lead to an increased demand for advisory services. That increase in demand for advisory services could, in turn, lead to increased competition among advisers to meet the increased demand. Alternatively, the increased demand for advisory services could lead to an increase in the number of advisers in the marketplace, also leading to an increase in competition among advisers. An increase in competition could, presumably, manifest itself in terms of better service, better pricing, or some combination of the two, for clients.

As discussed above, however, it is possible that the proposed rule could have the opposite effect on competition. As noted above, the costs of the proposed rule would be borne by advisers, clients, and qualified custodians. It is possible that the costs borne by advisers may be large enough to cause some advisers to stop providing advice with respect to certain assets. To the extent the proposed rule would create new fixed costs of providing advisory services, those fixed costs would disproportionately impact small or newly emerging advisers. As a result, those fixed costs could discourage entry of new advisers or cause certain advisers to exit the market. Rather than exiting the market, there could be consolidation among advisers that could result in fewer options, and potentially higher costs, for investors. If advisers were to stop providing advice with respect to certain assets, competition among advisers with respect to providing advice for those assets could decline. Further, if advisers do try to push the costs, or some component thereof, to clients, it is possible that costs will be large enough to cause some clients to seek alternatives to the advice of registered advisers. The decreased demand for advisory services could result in a decline in the number of registered advisers and a decrease in competition among registered advisers.

Also, we understand that the requirements of the proposed rule may result in additional costs for qualified custodians, particularly the requirements of a written agreement and reasonable assurances between the qualified custodian and the investment adviser incorporating certain minimum investor protection elements for advisory clients. To the extent qualified custodians are unable to pass these costs along to advisers and their clients, an increase in compliance costs could cause some qualified custodians to exit the market. A decrease in the number of qualified custodians could, in turn, lead to reduced competition, increased custodial fees, or both.

Capital Formation. As noted above, the proposed amendments enhance investor protections by mitigating risks associated with custody of client assets. Additionally, the proposed rule would result in more information about custodial practices being available to the public. Those enhancements to client and investor protection as well as the additional information available to potential current clients and potential investors could lead to greater investor confidence which could result in current investors being willing to invest more and potential investors being more willing to invest for the first time. To the extent that the proposed rule leads to greater investment, we could expect greater demand for securities, which could, in turn, promote capital formation.

F. Reasonable Alternatives

In this section, reasonable alternatives to the proposed elements of rule 223–1 are discussed.

1. Scope of Assets

The proposed rule would define ''assets'' as ''funds, securities, or other positions held in a client's account.'' While, like the current rule, the proposed rule would apply to a client's cash and cash equivalents as well as a client's securities, it also would generally apply to other positions held in a client's account that are not funds or securities. The Commission alternatively could define the scope of other positions more narrowly, perhaps by identifying specific types of other positions subject to the proposed rule's safeguarding requirements.

As discussed above, however, we observe a continuing evolution of the types of investments held in advisory accounts. If the proposed rule were to identify specific types of assets as subject to the safeguarding requirements of the rule, clients may not benefit from the safeguarding requirements of the rule if they invest in new asset types introduced in the future that fall outside the rule's scope. We therefore believe a broad definition of other positions strikes the correct balance in terms of investor protections and the cost of complying with the proposed rule.

2. Elimination of Privately Offered Securities Exception

The proposed rule would modify the current rule's exception to the requirement to maintain client funds and securities with a qualified custodian with respect to certain privately offered securities.[564] As discussed above, we believe qualified custodians serve as key gatekeepers to mitigate loss of client assets. The Commission alternatively could seek to enhance investor protections by eliminating the exception—thus requiring advisers with custody of privately offered securities to either maintain these assets with a qualified custodian or eliminate having custody—or retain the current exception without the proposed modifications.

[563] If there are fixed costs associated with the proposed regulations, then smaller advisers will generally tend to bear a greater cost, relative to adviser size, than larger advisers. If there are material fixed costs associated with the proposed rule, then we would expect the possible negative effect on competition to be greater for smaller advisers because the proposed regulations will tend to increase their costs more (relative to adviser size) than for larger advisers.

[564] Proposed rule 223–1(b)(2).

The choice between retaining the current exception, the exception modified as proposed, or eliminating the exception entirely necessarily involves tradeoffs. Eliminating the exception and requiring privately offered securities be maintained with a qualified custodian would increase the likelihood that a loss would be prevented or that non-compliant behavior is detected earlier, potentially mitigating loss to clients. Also, to the extent the likelihood of timely detection deters non-compliant behavior, requiring privately offered securities to be maintained with a qualified custodian could have an important prophylactic effect.

While we believe that requiring a qualified custodian to be involved in any transfer of ownership of privately offered securities would best mitigate the risk of loss of client assets, the current costs associated with this approach would be substantial while a custodial market is still relatively undeveloped. Although we believe that this market would be more robust if the custody rule's exception for uncertificated privately offered securities were eliminated and demand for custodian services would increase, it is possible that this market would not develop as we may expect or would develop in a way that the costs of maintaining privately offered securities with qualified custodians would not be justified by the benefits of doing so. At the same time, we believe retaining the current exception without modification leaves client assets at risk. In our view, the proposed modifications strike the correct balance in terms of investor protections and the cost of complying with the proposed rule.

3. Distribution of Requirements Across Reasonable Assurances and Written Agreement

The proposed rule would require an adviser to obtain certain reasonable assurances regarding the protections clients receive from the qualified custodians maintaining their assets. The proposed rule would also require a written agreement between advisers and qualified custodians specifying different provisions related to the relationship among an adviser, its client, and a qualified custodian. Both the proposed reasonable assurances and written agreement requirements expand and formalize the minimum standard protections to advisory clients' assets. The Commission alternatively could specify a different composition of client protections realized via reasonable assurances and written agreements. For example, the Commission could require fewer protections be realized via written agreements and more be realized via a reasonable assurances requirement. Or, the Commission could require more protections be realized via written agreements and fewer protections be realized via a reasonable assurances requirement.

Under the proposal, the written agreement covers matters that directly affect the adviser's own legal compliance (*i.e.,* requiring the custodian to promptly provide records to the Commission or to an independent public accountant when required for compliance; requiring the qualified custodian to deliver account statements to the adviser as well as to the client; requiring the qualified custodian to assure the adequacy of its internal controls) and that concern the adviser's authority to effect transactions with funds in the client's account held by the custodian. In contrast, the reasonable assurances requirements cover matters which—while within the scope of the adviser's fiduciary duty—principally concern the qualified custodian's direct obligations to the client (*i.e.,* the qualified custodian's standard of due care to the client, the custodian's measures to safeguard the client's assets, the custodian's indemnification of the client against loss, the custodian's obligations to the client when making sub-custodial arrangements, and the custodian's responsibility to identify and segregate the client's assets and to protect the client from liens or third-party claims).

Committing more of these requirements to a written agreement would have the benefit of establishing a uniform, predictable set of requirements for all custodial arrangements and giving the adviser—as well as the client—a contractual enforcement mechanism. The existence of a written agreement might be a greater deterrent to misconduct than a reasonable assurances requirement, and the agreement might provide useful terms of reference for examinations. But committing more of the requirements to a written agreement could result in significant contracting costs, potential loss of flexibility in qualified custodians' business practices, a significant disruption in current practices, and increased litigation costs. In contrast, committing more of these requirements to reasonable assurances would have the benefit of reducing contracting costs, but with the added cost associated with advisers exercising due diligence and periodic monitoring of qualified custodians to obtain reasonable assurances, without the benefit of an agreement to establish basic expectations on matters directly affecting client advisory services. Moreover, qualified custodians may have concerns about implementing certain protections in the absence of contractual privity between themselves and investment advisers. For example, qualified custodians may have privacy concerns for their clients in the absence of an agreement with the adviser governing provision of records to an independent public accountant. Weighing these factors, we believe that the composition of client protections realized via reasonable assurances and written agreements in the proposal strikes the correct balance in terms of investor protections and the cost of complying with the proposed rule.

3. Additional Accounting and Client Notification Requirements for Privately Offered Securities and Physical Assets That Are Not Maintained With a Qualified Custodian

The proposed rule would require an investment adviser to implement certain safeguards for clients' privately offered securities and physical assets that cannot be maintained with a qualified custodian. The safeguards are designed to improve protection of these assets and to create transparency for an investor as to holdings of and transactions in these assets, thereby increasing the likelihood that a loss will be detected sooner, and misconduct will be deterred. These include requirements for the adviser to reasonably determine that ownership cannot be recorded and maintained in a manner in which a qualified custodian can maintain possession or control of such assets;[565] for the adviser to reasonably safeguard the assets from loss, theft, misuse, misappropriation, or the adviser's financial reverses, including insolvency;[566] for the adviser to enter into a written agreement for an independent public accountant (''IPA'') to verify any purchase, sale, or other transfer of beneficial ownership of such assets promptly upon receiving notice from the adviser, and for the IPA to notify the Commission within one business day upon finding any material discrepancies during the course of performing its procedures;[567] for the adviser to notify the IPA of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day;[568] and for verification of the existence and ownership of such assets during an

[565] Proposed rule 223–1(b)(2)(i).

[566] Proposed rule 223–1(b)(2)(ii).

[567] Proposed rule 223–1(b)(2)(iii).

[568] Proposed rule 223–1(b)(2)(iv).

annual surprise examination or a financial statement audit.[569]

We considered whether these safeguards should be supplemented or replaced with additional accounting and client notification requirements, including periodic examinations of the assets; prompt delivery to the client of a written notice that the assets are not kept by a qualified custodian, with an explanation of how the client can verify the existence and ownership of those holdings; a summary of a client's transactions involving assets that are not maintained with a qualified custodian, to be issued on a quarterly or other periodic basis; or for the adviser to obtain an internal control report for assets not maintained with a qualified custodian.[570] We also considered requiring the independent public accountant engaged to perform the proposed transaction verifications to be PCAOB-registered. We believe the proposed safeguards are sufficient, and the costs of additional safeguards to advisers and clients alike may not be justified.

As previously noted, we lack precise information on the degree of homogeneity versus heterogeneity of assets held by advisers that cannot be maintained by a qualified custodian, and more prescriptive accounting and notification requirements could be more costly when the assets are more varied and unique,[571] when the custodian must rely on a third-party service provider to safeguard and inventory physical assets, or when the client engages in high-volume transactions.[572] Moreover, the benefits of these additional safeguards would be limited where the assets are of such a nature that loss or misappropriation is readily detectable.[573]

4. Additional Safeguards When Clients Assets Are Not Maintained With a Qualified Custodian

As discussed above, we recognize that not all client assets for which an adviser may have custody can currently be maintained with qualified custodians.[574] We considered proposing several alternative additional protections designed to help protect client investments when they are not maintained at a qualified custodian. One such alternative we considered would have required advisers to implement at least one financial responsibility safeguard. Specifically, we considered requiring advisers having custody of client assets that they determined could not be maintained with a qualified custodian to either (i) maintain an insurance policy covering losses to the investment adviser or its clients resulting from the loss, misuse, theft, or misappropriation of investments not maintained at a qualified custodian; or (ii) maintain a reserve bank account containing a specified amount of cash or certain qualified securities that could be used only to compensate clients for violations of the proposed rule.[575]

While this approach is similar to the types of fidelity bonds that broker-dealers, investment companies, ERISA fiduciaries, and some state-registered investment advisers are required to maintain,[576] we considered requiring advisers to maintain insurance coverage that would have been more comprehensive than a typical fidelity bond in order to address the risks the proposed rule is designed to mitigate. For example, we considered requiring an adviser to maintain an insurance policy covering losses to the investment adviser or its clients resulting from the loss, misuse, theft, or misappropriation of investments not maintained at a qualified custodian due to the adviser's negligence, recklessness, or intentional misconduct.

However, we recognize there could be legal and logistical challenges in implementing such a requirement. For example, fidelity bond policies generally only protect policyholders from direct losses suffered from a covered event (*e.g.,* theft of the insured's property by an employee), not third parties such as an adviser's clients, and even to the extent fidelity policies are written to specifically cover third-party property, there is disagreement as to whether the money a policyholder uses to compensate a third party qualifies as a loss covered under these policies.[577] Also, it could be difficult for an adviser to maintain appropriate coverage efficiently and effectively as they buy and sell various investments on behalf of their clients or as those investments increase and decrease in value. Finally, while this approach may provide some means for recovery if an adviser's clients are harmed, requiring this type of insurance coverage would likely require advisers to pay significant premiums, which they would likely pass along to clients through increased fees.

We similarly considered requiring an adviser to maintain a specified level of reserves based on the value of client investments not maintained by a qualified custodian or for which an adviser has an enhanced ability or

[569] Proposed rule 223–1(b)(2)(v).

[570] *See* part II.D.5, Requests for Comment.

[571] *See* part III.D.3.b.

[572] *See generally* parts III.D.3.c, III.D.3.d.

[573] For example, unique, high-value, non-fungible assets, such as developed real estate.

[574] *See* section II.D, *supra.*

[575] In the past—though in different contexts—the Commission and Congress have considered various financial responsibility requirements for advisers, including requiring advisers to maintain insurance (in the form of fidelity bonds) or satisfy minimum capital requirements. The Commission most recently sought comment on these concepts in 2018 in conjunction with its proposed interpretation regarding the standard of conduct for investment advisers. *See* Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Release No. IA–4889, at 4 n.8 (Apr. 18, 2018) [83 FR 21203 (May 9, 2018)]. Comments received in response to this request were still under evaluation at the time the Commission adopted its final interpretation regarding the standard of conduct for investment advisers. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, *supra* footnote 57. Previously, in 2003, the Commission requested comment on whether to require a fidelity bonding requirement for advisers as a way to increase private sector oversight of the compliance by funds and advisers with the Federal securities laws. *See* Compliance Programs of Investment Companies and Investment Advisers, Release Nos. IC–25925 and IA–2107 (Feb. 5, 2003) [68 FR 7037 (Feb. 11, 2003)]. The Commission decided not to adopt a fidelity bonding requirement at that time, but noted that it regarded such a requirement as a viable option should the Commission wish to further strengthen compliance programs of funds and advisers. *See* Compliance Programs of Investment Companies and Investment Advisers, Release Nos. IC–26299 and IA–2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)]. Also, in 1973, a Commission advisory committee recommended that Congress authorize the Commission to adopt minimum financial responsibility requirements for investment advisers, including minimum capital requirements. *See* Report of the Advisory Committee on Investment Management Services for Individual Investors, Small Account Investment Management Services, Fed. Sec. L. Rep. (CCH) No. 465, Pt. III, 64–66 (Jan. 1973). Three years later, in 1976, the Senate Committee on Banking, Housing and Urban Affairs considered a bill that, among other things, would have authorized the Commission to adopt rules requiring investment advisers with discretionary authority over client assets, or that advise registered investment companies, to meet financial responsibility standards. S. Rep. No. 94–910, 94th Cong. 2d Sess. (May 20, 1976) (reporting favorably S. 2849). S.2849 was never enacted, however. The issue of adviser financial responsibility was also considered by Congress in 1992, with both the Senate and House of Representatives passing bills that would have given the Commission the explicit authority to require investment advisers with custody of client assets to obtain fidelity bonds. S.226, 102d Cong., 2d Sess. (Aug. 12, 1992) and H.R. 5726, 102d Cong. Ed (Sept. 23, 1992). Differences in these two bills were never reconciled and thus neither became law.

[576] *See, e.g.,* FINRA Rule 4360 (broker-dealers); 17 CFR 270.17g–1 (investment companies); 29 CFR 2580.412–1 (ERISA fiduciaries). Many state-registered investment advisers are required to maintain fidelity bonds. *See, e.g.,* Ala. Code 1975 section 8–6–3; Ark. Admin. Code 214.00.1–303.2; Ga. Code Ann., section 10–5–40; *see also* NASAA Bonding Requirements for Investment Advisers Model Rule, *available at https://www.nasaa.org/wp-content/uploads/2011/07/IA-Model-Rule-Bonding.pdf.*

[577] *See* Adam D. Cornett & Andrew S. Kent, *Who Can Recover Under a Fidelity Policy?,* XX Fid. L.J. 139, 139–41, 177–180 (2014) (citing *Retail Ventures, Inc.* v. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 691 F3d 821, 828–32 (6th Cir. 2012)).

authority to effect a change in beneficial ownership. Requiring an adviser to have sufficient liquid assets to cover these types of client investments would have provided a source of recovery when those client investments are lost, misused, stolen, or misappropriated due to the adviser's failure to adequately safeguard them. This approach would have resembled the capitalization requirements of other financial firms.[578] However, because the value of these client investments would vary based on market fluctuations as well as client transactions, designing a reserve requirement that would ensure that an adviser maintained adequate reserves to allow for full recovery at all times could be operationally challenging and costly. Further requiring advisers to maintain reserves sufficient to provide for full—or even meaningful—client recovery, may be prohibitively costly because advisers would need to set aside significant amounts of capital, potentially acting as a barrier to entry for new advisory firms or causing existing advisers to leave the market.

Another alternative we considered would have required an adviser to undergo an enhanced independent verification of assets not kept with a qualified custodian or when an adviser has one-way transfer authority over a client's account, irrespective of whether those assets are maintained with a qualified custodian. For assets not kept with a qualified custodian, the surprise examination would have been required to verify 100% of a client's assets, and it would have required the independent public accountant to verify the disposition of assets from one examination to the next. We have opted, instead, to propose limiting the assets an adviser is not required to maintain assets with a qualified custodian to shares of mutual funds, and certain physical assets and privately issued securities that the adviser has determined cannot be maintained in the possession or control of a qualified custodian. With respect to the latter category of assets, we are also proposing to require advisers to implement other protections to ensure they are adequately safeguarded, including, for example, more frequent asset verifications. We believe this approach is likely to result in more client assets being maintained by qualified custodians and better tailoring the protections for client assets that cannot be maintained with a qualified custodian. For one-way transfer authority, under this alternative, the surprise examination would have required the independent public accountant to evaluate whether each one-way transfer of client assets was authorized (*e.g.,* client authorized a cash withdrawal from the client's account to be transferred to a particular recipient). We were uncertain whether an independent public accountant would make such an evaluation, however, and if so, whether it would be cost-prohibitive for them to do so. We determined, instead, to promote transparency around all transactions for a client's evaluation in the proposal's approach. The proposed rule would promote this by eliminating accommodation reporting on a qualified custodian account statement, by limiting the circumstances in which advisers are not required to maintain client assets with a qualified custodian, by requiring an independent public accountant to verify transactions with respect to certain assets not maintained with a qualified custodian more frequently, and by eliminating the possibility that assets not kept with a qualified custodian might not be included in the sampling of assets verified under the current rule.

5. Designating Clearing Agencies and Transfer Agents as Qualified Custodians

The Commission considered expanding the definition of a qualified custodian to include clearing agencies that perform the function, under the Exchange Act,[579] of acting as central securities depositories (''CSDs''), as well as transfer agents.[580] Both CSDs and transfer agents are functionally similar to qualified custodians in several respects and are already subject to regulatory safeguards. These entities safeguard a significant volume of assets and are subject to Commission oversight through regulatory standards, registration requirements, supervision, and examination.[581] For example, among other requirements, CSDs must establish, implement, maintain, and enforce written policies and procedures reasonably designed to ensure the integrity of securities issues, and minimize and manage the risks associated with the safekeeping and transfer of securities; implement internal auditing and other controls to safeguard the rights of securities issuers and holders and prevent the unauthorized creation or deletion of securities, and conduct periodic and at least daily reconciliation of securities issues they maintain; and protect assets against custody risk.[582] Similarly, transfer agents are responsible for countersigning securities upon issuance, monitoring to prevent unauthorized issuance of securities, registering the transfer of securities, and effecting the exchange, conversion, and transfer of securities.[583] Expanding the definition of a qualified custodian to include CSDs and transfer agents could benefit investors by increasing the number of potential entities that provide custodial services in compliance with the rule, which could increase competition in the market for such services and reduce costs. In addition, different types of entities may be more or less suited to providing custodial services for certain types of assets, such as privately offered securities, so expanding the definition of a qualified custodian may reduce the costs associated with maintaining these assets with a qualified custodian by providing additional custodial options.

However, CSDs currently perform many functions at an aggregate or omnibus level for institutional participants, so they might need to build systems to account for and interact with individual clients (to, for example, directly furnish quarterly statements). The potential costs CSDs would incur were they to provide services as qualified custodians under this alternative might pose a significant barrier to entry, which could limit the degree to which expanding the definition of a qualified custodian would increase competition in the market for custodial services. Moreover, providing custodial services could significantly alter the risk management features of CSDs, which have been tailored for other purposes and are supported by an architecture that involves a more limited number of institutional participants.

While some transfer agents are currently used by mutual funds in lieu of a qualified custodian with respect to

[578] Broker-dealers are subject to minimum capitalization requirements under the net capital and customer protection rules. *See, e.g.,* 17 CFR 240.15c3–1 (net capital rule); 17 CFR 240.15c3–3 (customer protection rule). Some state-registered investment advisers are also subjected to minimum capitalization requirements. *See, e.g.,* Ark. Admin. Code 214.00.1–303.2; Ga. Code Ann., section 10–5–40; *see also* NASAA Minimum Financial Requirements for Investment Advisers Model Rule (2011), *available at https://www.nasaa.org/wp-content/uploads/2011/07/IA-Model-Rule-Minimum-Financial-Requirements.pdf.*

[579] *See* Exchange Act section 3(a)(23)(A)(i), 15 U.S.C. 78c(a)(23)(A)(i); Rule 17Ad–22(a)(3), 17 CFR 240.17Ad–22(a)(3).

[580] See part II.C.1, Requests for Comment.

[581] *See, e.g.,* Release No. 34–78963 (Sept. 28, 2016), 81 FR 70744, 70745–47 (Oct. 13, 2016) (summarizing authorities applicable to clearing agencies); Release No. 34–76743 (Dec. 22, 2015), 80 FR 81948, 81959–69 (Dec. 31, 2015) (summarizing authorities applicable to transfer agents).

[582] *See* Rule 17Ad–22(e)(11).

[583] Exchange Act section 3(a)(25), 15 U.S.C. 78c(a)(25).

fund shares,[584] they might also have to develop systems and processes to enable them to custody assets other than fund shares. Transfer agents that are used by mutual funds may also have some systems and processes in place to interact with clients, such as those used to furnish quarterly statements, but other transfer agents might incur significant costs building such systems and processes. Like CSDs, the costs associated with providing custodial services might pose a significant barrier to entry for transfer agents, which could limit the degree to which expanding the definition of a qualified custodian would increase competition in the market for custodial services. In addition, while transfer agents are currently subject to regulatory safeguards, they are not currently subject to individual client protections that are as extensive as the entities we are including in the definition of a qualified custodian under the proposed rule. For example, they are not subject to the specific safeguarding requirements of Rule 206(4)–2(a), and their capitalization and risk management practices are oriented to the markets where they operate, not necessarily to the range and variety of clients and assets contemplated by the proposed rule.

G. Request for Comment

The Commission requests comment on all aspects of this initial economic analysis, including whether the analysis has: (i) identified all benefits and costs, including all effects on efficiency, competition, and capital formation; (ii) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation; and (iii) identified and considered reasonable alternatives to the proposed rule. We request and encourage any interested person to submit comments regarding the proposed rule, our analysis of the potential effects of the proposed rule, and other matters that may have an effect on the proposed rule. We request that commenters identify sources of data and information as well as provide data and information to assist us in analyzing the economic consequences of the proposed rule. We also are interested in comments on the qualitative benefits and costs we have identified and any benefits and costs we may not have discussed.

280. The proposed rule affects banks and savings associations, broker-dealers registered with the Commission, futures commission merchants registered with the CFTC, and FFIs. How do rules and regulations of other financial regulators and of self-regulatory organizations affect these entities in their capacity as qualified custodians? How do these existing rules and regulations affect the benefits of the proposed rule and its costs?

281. The proposed rule would expand the scope of assets currently subject to the custody rule. To what extent do investors benefit from advisers having custody of assets newly scoped in under the proposed rule? What is the nature of those benefits? To what extent would those benefits be lost given the requirements of the proposed rule?

282. The proposed rule would explicitly identify discretionary trading authority as an arrangement that triggers the rule. To what extent do investors benefit from discretionary trading services offered by investment advisers? What is the nature of those benefits? To what extent would investment advisers no longer offer discretionary trading services given the requirements of the proposed rule?

283. The proposed rule would generally require that the investment adviser maintain client assets with a qualified custodian pursuant to a written agreement between the qualified custodian and the investment adviser (or between the adviser and client if the adviser is also the qualified custodian). To what extent are investment advisers currently party to custodial agreements? To what extent are the required provisions similar to, or different from, provisions in custodial agreements between investors and qualified custodians? Have we appropriately estimated the costs of the reasonable assurances and written agreement requirements? Do commenters agree that qualified custodians will have in incentive to provide written agreements that are consistent with the requirements of the proposed rule? Have we appropriately identified the costs of the proposed required provisions?

284. To what extent do entities maintaining client physical assets currently enter into written agreements obligating the entity to comply with provisions the same as, or similar to, the provisions required under the proposed rule?

285. We state that existing regulatory requirements for qualified custodians with respect to asset segregation are similar to the requirements of the proposed rule and that, as a result, the costs of the proposed asset segregation requirements would be mitigated. Is this an accurate characterization of existing regulatory requirements? If not, how do existing regulatory requirements differ from those of the proposed rule?

286. We state that for those qualified custodians indemnifying the client against the risk of loss in the event of the qualified custodian's gross negligence, the insurance requirement of the proposed indemnification requirement would likely create a substantial increase in the cost of liability insurance. Is this an accurate characterization? How costly is insurance covering loss in the event of a qualified custodian's gross negligence? How costly is insurance covering loss in the event of a qualified custodian's simple negligence? For example, how much does it cost to insure, per $1,000 of covered assets, losses in the event of a qualified custodian's gross negligence? How much does it cost to insure, per $1,000 of covered assets, losses in the event of a qualified custodian's simple negligence? Do the per-dollar costs change as the amount of covered assets increases? If so, how? What other factor might affect the cost of liability insurance for qualified custodians? What kinds of operational burdens might be associated with purchasing and maintaining liability insurance? To what extent do custodians currently have systems, processes, and liability insurance that are consistent with a simple negligence standard?

IV. Paperwork Reduction Act Analysis

A. Introduction

Certain provisions of our proposal would result in new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[585] The proposed new rule 223–1 and related amendments to rules 206(4)–2 and 204–2 under the Act and Form ADV would have an impact on current collection of information burdens. Specifically, we are proposing new collection of information requirements under proposed rule 223–1 and corresponding amendments to currently approved collection of information burdens under: (i) ''Rule 206(4)–2 under the Investment Advisers Act of 1940—Custody of Funds or Securities of Clients by Investment Advisers'' (OMB number 3235–0241); (ii) ''Rule 204–2 under the Investment Advisers Act of 1940'' (OMB control number 3235–0278); and (iii) ''Form ADV'' (OMB control number 3235–0049). The Commission is submitting these collections of information to the OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR

[584] *See* Rule 206(4)–2(b)(1).

[585] 44 U.S.C. 3501 *et seq.*

1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We discuss below these proposed amendments and new collection of information burdens. Responses provided to the Commission in the context of its examination and oversight program concerning the proposed redesignation of rule 206(4)–2 as new rule 223–1, and corresponding amendments to rule 204–2 would be kept confidential subject to the provisions of applicable law. Responses to the disclosure requirements of the proposed amendments to Form ADV are not kept confidential.

B. Rule 223–1

Proposed rule 223–1, which will effectively replace current rule 206(4)–2 by a redesignation, states that an adviser registered or required to be registered under section 203 of the Act, shall take certain steps to safeguard the client assets of which the adviser has custody, and lays out five requirements with which advisers must comply.[586] Paragraph (a)(1) would require advisers to maintain client's assets at a qualified custodian in a specified manner pursuant to a written contract that contains enumerated elements. Paragraph (a)(1)(ii) would require an adviser to obtain reasonable assurances in writing from a qualified custodian that such custodian will exercise due care over client assets; will indemnify the client against risk of loss; not excuse any obligations to the client based upon the existence of any sub-custodial, securities depository, or other similar arrangements with regard to the client's assets; clearly identify and segregate client assets from the custodian's proprietary assets and liabilities; and not subject client assets to any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors. Paragraph (a)(2) would require an investment adviser that opens an account with a qualified custodian on a client's behalf to notify the client of the account details. Paragraph (a)(3) would require an investment adviser to title or register a client's assets in the client's name or otherwise hold such assets for the benefit of that client; prohibit the commingling of client assets with the adviser's (or its related persons') assets; and require client assets generally to be held free of any right, charge, security interest, lien, or claim in favor of the adviser and its related persons or creditors. Paragraph (a)(4) would require an adviser that maintains custody of client assets to obtain independent verification from an independent public accountant at least once during a calendar year pursuant to a written agreement that provides for the filing of Form ADV–E.

Paragraph (b) lays out limited exceptions from certain requirements of the proposed rule, some which would change the current collections of information burdens of rule 206(4)–2. These include paragraphs (b)(2) excepting the requirement to maintain certain privately offered securities or physical assets with a qualified custodian in certain circumstances; (b)(3) excepting advisers from the independent verification of client assets maintained by a qualified custodian if an adviser has custody solely as a consequence of the authority to deduct advisory fees; (b)(4) exempting an adviser from the account statement and certain notification requirements, along with the independent verification requirement, when the advisory client undergoes a financial statement audit annually and upon liquidation in accordance with the rule; (b)(7) creating an exemption from the independent verification requirement if an adviser has custody of client assets solely because of a standing letter of authorization with the client; and (b)(8) excepting advisers from the independent verification of assets requirement under certain circumstances if custody exists solely because the adviser has discretionary authority with respect to those client assets that are maintained in accounts with a qualified custodian where the discretionary authority is limited to transacting in assets that settle exclusively on a delivery versus payment basis.

Each requirement to disclose or obtain information, deliver communications, or cause reporting by an independent public accountant constitutes a ''collection of information'' requirement under the PRA and is mandatory. Advisory clients would use this information to confirm proper handling of their accounts. The Commission's staff uses the information obtained through these collections in its enforcement, regulatory, and examination programs. The respondents to these collections of information requirements would be investment advisers that are registered or required to be registered with the Commission that have custody of client assets. As of September 2022, there were 15,160 investment advisers registered with the Commission and 8,724 advisers reported to have custody of client assets in Item 9 of Form ADV. Although not all investment advisers would be subject to this rule, we expect that most would be for two reasons: first, the proposed rule would be triggered by most services advisers commonly provide to their clients, such as trading on a discretionary basis; and second, the proposed rule's application to ''assets'' would apply to a broad array of client investments, not just to funds or securities as under the current rule. We, therefore, estimate that 13,944 which is the number of all registered advisers that currently report having discretionary authority, would be subject to the proposed rule.[587] The application of the provisions of the proposed rule—and thus the extent to which there are collections of information and their related burdens—would be contingent on a number of factors, such as the types of services the adviser provides, the number of clients to whom it provides those services, and the nature of the relevant assets. Because of the wide diversity of services and relationships offered by investment advisers, we expect that the obligations imposed by the proposed rule would, accordingly, vary substantially among advisers. However, we have made certain estimates of this data solely for the purpose of this PRA analysis.

1. Qualified Custodian Provision

a. Written Agreement

Under the proposed rule investment advisers would be required to enter into a written agreement with a qualified custodian to maintain possession or control of their clients' assets and to satisfy certain other requirements enumerated in the rule, subject to certain exceptions.[588] We estimate that nearly all of the 13,944 registered advisers that we estimate would be subject to the rule will be required to comply with this requirement.[589] We believe that an investment adviser

[586] Proposed rule 223–1.

[587] This estimate is based on the 14,204 advisers who answer yes to Form ADV Item 8(C)(1) and have discretionary authority to determine the ''securities to be bought or sold for a client's account.'' For purposes of this estimate, we have excluded 260 advisers answering yes to Form ADV Item 8(C)(1) but reporting that they solely advise investment company clients in response to Form ADV Item 5.D.(1)(d).

[588] Proposed rule 223–1(a)(1) (the proposed rule would require a written agreement between the adviser and client if the adviser is also the qualified custodian).

[589] While some of these advisers may have custody of certain client assets that the proposed rule would except from the requirement to use a qualified custodian, we assume that these advisers likely also have at least some client assets that must be maintained with a qualified custodian under the proposed rule.

would enter into a single agreement with each qualified custodian that provides custodial services for the adviser's clients, regardless of how many of the adviser's clients the qualified custodian provides custodial services for. Based on the information currently reported by advisers about qualified custodians on in Item 9.F of Form ADV, we estimate that each adviser would enter into approximately 4 written agreements.[590] We therefore estimate that, initially, advisers would enter into a total of 55,776 written agreements.[591] We estimate that each investment adviser and each qualified custodian that enters into an agreement would incur an internal burden of 1 hour each to prepare the written agreement, for a total initial burden hour estimate of 111,552 [592] which we expect would mostly be attributable to the requirement to specify the investment adviser's agreed-upon level of authority to effect transactions in the custodial account as well as any applicable terms or limitations. Based on our estimates, there would be an initial cost to each respondent of this internal hour burden of $43,951,488 to draft and finalize these written agreements.[593]

Once these agreements are created they will require little, if any, modification, except in circumstances where the adviser's level of authority changes (which we estimate would occur approximately once per year). We estimate that these changes would take, on average, 10 minutes per written agreement. Therefore, we estimate that the yearly total internal burden of preparing the written agreement would be 9,482 hours,[594] and there would be an annual cost of this internal hour burden of $3,735,908.[595]

The written agreement proposed by the rule would require a qualified custodian to promptly, upon request, provide records relating to an adviser's clients' assets held in the account at the qualified custodian to the Commission or to an independent public accountant engaged for purposes of complying with the rule.[596] As noted above, we believe that advisers would enter into approximately 4 written agreements on average. We anticipate that 1,842 [597] of the advisers party to these written agreements would be subject to the surprise examination requirement. For these advisers, we estimate that qualified custodians would be required to provide information to an independent public accountant once annually in connection with each adviser for which they have a written agreement under the rule. We estimate that it would take qualified custodians approximately 0.5 hours to provide the required information. Therefore, we estimate the internal annual hour burden for qualified custodians to provide this information to total 3,684 hours.[598] Further, we anticipate that 7,018 advisers to these written agreements would comply with the proposed rule's audit exception.[599] Because we estimate that 5 percent of pooled investment vehicles are liquidated annually at a time other than their fiscal year-end, for these advisers, we estimate that qualified custodians would be required to provide information to an independent public accountant 1.05 times annually. Therefore, we estimate that the total annual burden for respondents to provide information to independent public accountants for the audit related to these advisers would be 14,738 hours.[600] In the aggregate, we estimate the total annual burden for respondents to provide information to independent public accountants for the surprise examination and audit to amount to 18,422 hours.[601]

We estimate that the Commission would examine approximately 2,092 of the advisers required to enter into a written agreement under the rule, which is consistent with the number of advisers generally examined by Commission staff over the last three fiscal years.[602] As noted above, because we estimate that an adviser will on average maintain client assets with approximately four qualified custodians, we estimate that Commission will issue approximately 8,368 requests to qualified custodians under the rule. We believe that these information requests may be more customized and would take custodians approximately 1.5 hours to respond to, slightly longer than it would take a custodian to provide more standardized information requested by an independent public accountant. Accordingly, the internal burden hours for respondents to this collection of information would equal approximately 12,552 hours.[603] In total, for the requirement to provide information to accountants and the Commission, we estimate the collection of information burden on respondents amounts to 30,974 hours annually.[604] Accordingly, we estimate that the annual internal monetized cost burden amounts to approximately $12,203,756.[605]

The proposed rule would require that the written agreement with the qualified

[590] This estimate is based on responses to Form ADV, Part 1A, Item 9.F, which requires advisers to report the number of persons acting as qualified custodian. For all advisers responding to this question, the average number of persons acting as qualified custodians amounted to 4. We believe that it is possible that the proposed rule could result in advisers entering into agreements with a greater number of qualified custodians for custody services related to assets that advisers may not currently maintain with a custodian. At the same time, we believe that it is possible that current custodians will expand their services in order to provide custody services for asset types that they do not currently maintain for advisers. As a result, for the purposes of this analysis, we will rely on the average obtained from Form ADV Part 1A, Item 9.F. data.

[591] This estimate is based on the following calculation: 13,944 advisers × 4 written agreements.

[592] This estimate is based on the following calculation: 55,776 written agreements × 2 hours.

[593] This estimate is based on the following calculation: 111,552 hours (for preparation and review of draft agreement) × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)). Unless otherwise indicated in this section IV, all hourly wages used are from the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 (''SIFMA Wage Report''), updated for 2023, modified to account for an 1800-hour work-year and inflation.

[594] This estimate is based on the following calculation: 55,776 written agreements × .17 hours.

[595] This estimate is based on the following calculation: 9,482 hours × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)).

[596] *See* proposed rule 223–1(a)(1)(i)(A).

[597] *See infra* footnote 619and accompanying text.

[598] This estimate is based on the following calculation: 1,842 (advisers that we estimate will obtain a surprise examination) × 4 (average number of written agreements per adviser) × .5 hours.

[599] Advisers to pooled investment vehicles: 4,961. 20% of advisers with custody that have pension and profit sharing plan clients (3,068 × .20): 614. 20% of advisers with custody that have charitable organization clients(3,205 × .20): 641. 20% of advisers with custody that have state or municipal government entity clients (986 × .20): 197. 20% of advisers with custody that have corporations and other business entity clients (3,025 × .20): 605. Total advisers expected to use the audit provision (4,961 + 614 + 641 + 197 + 605): 7,018 advisers; *See also infra* footnote 654.

[600] This estimate is based on the following calculation: 7,018 (number of advisers using the audit exception) × 4 (average number of qualified custodians per adviser) × 1.05 (average number of audits annually) × .5 hours = burden for respondents to provide information to independent public accountants for the audit related to these advisers.

[601] 3,684 + 14,738 hours.

[602] This estimate is based on the following calculation: 13,944 advisers subject to the rule and required to enter into a written agreement with a qualified custodian × 15% (the approximate number of registered advisers the Commission examined in each of fiscal years 2019, 2020, and 2021). *See* U.S. Securities and Exchange Commission, Division of Examinations, *2022 Examination Priorities* at 4 (Mar. 2022), *available at https://www.sec.gov/files/2022-exam-priorities.pdf.*

[603] This estimate is based on the following calculation: 8,368 written agreements × 1.5 hours.

[604] This estimate is based on the following calculation: 18,422 (hour burden to provide information to accountants) + 12,552 (hour burden to provide information to Commission).

[605] This estimate is based on the following calculation: 30,974 (internal annual burden hours) × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)).

custodian provide that the qualified custodian will send account statements (unless the client is an entity whose investors will receive audited financial statements as part of the financial statement audit process pursuant to the audit provision of the proposed rule), at least quarterly, to the client and the investment adviser, identifying the amount of each client asset in the custodial account at the end of the period as well as all transactions in the account during that period.[606] We estimate that the average burden for custodians to provide quarterly financial statements to advisers is limited. Because qualified custodians are already sending quarterly account statements to clients,[607] we estimate that one additional burden incurred would be in connection with qualified custodians adding advisers to their distribution lists. We estimate this would aggregate approximately 14,385 hours in initial burden hours.[608] We estimate that this initial internal burden equates to an initial internal monetized cost burden of approximately $4,869,322.50.[609]

We also believe that this proposed rule would result in a small additional burden in terms of modifications to quarterly statements related to including, at the client's request, information related to assets not maintained by the qualified custodian,[610] customizing the statements for any client that requests such assets to be included, and adding language that identifies those assets.[611] We estimate this would aggregate approximately 959 hours annually.[612] We estimate that this annual internal burden equates to an annual internal monetized cost burden of approximately $324,621.50.[613]

As discussed above, the proposed rule would require the written agreement to contain a provision requiring the qualified custodian, at least annually, to obtain and provide to the adviser a written internal control report that includes an opinion of an independent public accountant.[614] We estimate that approximately 959 qualified custodians [615] would have to obtain an internal control report relating to custodial services, and would have to provide the report to the adviser. We understand that the cost to prepare an internal control report relating to custody would vary based on the size and services offered by the qualified custodian, but that on average an internal control report would cost approximately $750,000 per year.[616] We believe that 95% of custodians currently obtain internal control reports, and, therefore, estimate total aggregate monetized costs attributable to this section of the proposed rule to be $35,962,500 annually.[617]

b. Reasonable Assurances

The proposed rule would require an adviser to obtain reasonable assurances in writing from a qualified custodian regarding certain client protections.[618] As discussed above, one way that advisers are likely to satisfy this requirement is by seeking confirmation from a qualified custodian that the custodial agreement with the advisory client contains contractual language reflecting the reasonable assurances required by the rule. We estimate the amount of time it would take an adviser to request, and a qualified custodian to provide, information necessary to satisfy this requirement to be approximately 15 minutes, and we expect that any related changes a qualified custodian makes to a custodial agreement to reflect the reasonable assurances provided to the adviser would take approximately 1 hour. We believe this exchange is most likely to occur in the context of the negotiation and execution of the written agreement. Therefore, we estimate that the initial aggregate time burden for this collection of information would amount to 69,720 hours.[619] We believe that the initial monetized costs imposed by the proposed rule approximate $27,469,680.[620] We believe that most custodial agreements change very little from year to year, and therefore, we estimate the total annual internal hour burden to be 13,944.[621] We believe that the monetized costs imposed by the proposed rule would approximate $5,493,936 annually.[622]

2. Notice to Clients

The proposed rule, like the current rule, would require an investment adviser to notify its client in writing promptly upon opening an account with a qualified custodian on its behalf.[623] The notice is designed to alert a client to the existence of the qualified custodian that maintains possession or control of client assets and whom to contact regarding such assets. One change from the current rule is that the proposed rule would explicitly require that the notice include the custodial account number, an important detail that is not required under the current rule. However, we do not believe including a custodial account number to the notice would significantly impact the costs incurred by advisers as they are already required to provide a nearly identical notice under the current rule. Therefore, we estimate that the initial burden of updating their processes and systems to ensure account numbers are included in the relevant notices is 1 hour with a total estimated monetized cost of $4,720,044.[624]

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[606] Proposed rule 223–1(a)(1)(i)(B). The proposed requirement is similar to the approach in the current rule with regard to the investment adviser forming a reasonable belief after due inquiry that the qualified custodian sends account statements, at least quarterly, to the client. *See* custody rule 206(4)–2(a)(3).

[607] *See* custody rule 206(4)–2(a)(3).

[608] 15 hours (development of distribution list) × 959 (estimated number of qualified custodians). We believe that any ongoing annual burden in connection with this requirement would be *de minimis*.

[609] This estimate is based on the following calculation: 14,385 hours (estimated internal hour burden of preparing and distributing quarterly account statements) × $338.50 (blended rate for a programmer $316 and a compliance manager $361)).

[610] *See* proposed rule 223–1(a)(1)(i)(B) (''Such account statements shall not identify assets for which the qualified custodian lacks possession or control, unless requested by the client and the qualified custodian clearly identifies any such assets that appear on the account statement'').

[611] *See id.* Since custodians are aware of the assets for which they are providing accommodation reporting, we believe that the custodian's removal of current accommodation reporting will be *de minimis*.

[612] 1 hour (modifications to account statements) × 959 (estimated number of qualified custodians).

[613] This estimate is based on the following calculation: 959 hours (estimated internal hour burden of preparing and distributing quarterly account statements) × $338.50 (blended rate for a programmer $316 and a compliance manager $361)).

[614] Proposed rule 223–1(a)(1)(i)(C).

[615] This estimate was obtained by the following calculation: 8,724 (advisers reporting that they have custody)/600 (total number of custodians reported in Form ADV Part 1A, Question 9.F. = 14.54 (mathematical average number of advisers served by each custodian obtained solely for the purpose of performing the calculation); 13,944 (advisers that we estimate would have to comply with the proposed rule)/14.54 (average number of advisers served by each custodian) = 959.

[616] We recognize, however, that as a result of the proposed rule's expansion to cover all assets, rather than funds and securities, the internal control reports currently obtained by qualified custodians may not fully reflect the type of report that would be obtained under the proposed rule.

[617] This estimate is based on the following calculation: 959 (estimated number of qualified custodians operating under written agreements) × $750,000 (average cost of obtaining internal control report) × 5% (percent of custodians that we estimate are not currently obtaining internal control reports).

[618] Proposed rule 223–1(a)(1)(ii).

[619] 1.25 hours × 55,776 written agreements.

[620] 69,720 hours (estimated initial internal hour burden) × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)).

[621] 55,776 written agreements × .25 hours.

[622] 13,944 (estimated annual internal hour burden) × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)).

[623] *See* proposed rule 223–1(a)(2).

[624] The initial burden hours are calculated as follows (14,204 advisers with discretionary authority—260 advisers to investment company clients in response to Form ADV Item 5.D.(1)(d) = 13,944 advisers) × 1 hour × blended rate for a

3. Annual Surprise Examination

The proposed safeguarding rule does not change the current rule's annual surprise exam requirement, but changes to other portions of the rule that expand the application of the rule to certain advisers or that provide exceptions to the surprise exam requirement would impact the number of advisers subject to this requirement if adopted. The current rule requires each registered investment adviser that has custody of client funds or securities to undergo an annual surprise examination by an independent public accountant to verify client assets pursuant to a written agreement with the accountant that specifies certain duties. We estimate that 1,842 advisers would be subject to the surprise examination requirement upon its redesignation under the proposal.[625]

For purposes of estimating the collection of information burden, we have divided the estimated 1,842 advisers into three subgroups. First, we estimate that 381 advisers have custody because they serve as qualified custodians for their clients, or they have a related person that serves as qualified custodian for clients, in connection with advisory services the adviser provides to the clients.[626] We estimate that these advisers are subject to an annual surprise examination with respect to 100 percent of their clients (or 9,006 clients per adviser) based on the assumption that all of their clients maintain custodial accounts with the adviser or its related person.[627] We estimate that each adviser will spend an average of 0.02 hours for each client to create a client contact list for the independent public accountant. The estimated total annual aggregate burden with respect to the surprise examination requirement for this group of advisers is 68,626 hours.[628]

The second group of advisers, estimated at 835, are those that have custody because they have broad authority to access client assets held at an independent qualified custodian, such as through a power of attorney or acting as a trustee for a client's trust.[629] Based on our staff's experience, advisers that have access to client assets through a power of attorney, acting as trustee, or similar legal authority typically do not have access to all of their client accounts, but rather only to a small percentage of their client accounts pursuant to these special arrangements. We estimate that these advisers will be subject to an annual surprise examination with respect to 5 percent of their clients (or 450 clients per adviser) who have these types of arrangements with the adviser.[630] We estimate that each adviser will spend an average of 0.02 hours for each client to create a client contact list for the independent public accountant. The estimated total annual aggregate burden with respect to the surprise examination requirement for this group of advisers is 7,515 hours.[631]

A third group of advisers provides advice to pooled investment vehicles that are not undergoing an annual audit and therefore would undergo the surprise examination with respect to those pooled investment vehicle clients. Based on current IARD data, we estimate that 626 advisers manage private funds and undergo surprise examinations.[632] We estimate that each adviser managing private funds has an average of 6 pooled investment vehicle clients with an average of 14 investors. We estimate that advisers to these pooled investment vehicles will spend 1 hour for the pool and 0.02 hours for each investor in the pool to create a contact list for the independent public accountant, for an estimated total annual burden with respect to the surprise examination requirement for these advisers of 4,808 hours.[633]

These estimates bring the total annual aggregate burden with respect to the surprise examination requirement for all three groups of advisers to 80,949 hours.[634] This estimate does not include the collection of information discussed below relating to the written agreement required by paragraph (a)(4) of the rule.

Related to the surprise exam, the current custody rule and the redesignated safeguarding rule require that an adviser subject to the surprise examination requirement must enter into a written agreement with the independent public accountant engaged to conduct the surprise examination and specify certain duties to be performed by the independent public accountant.[635] We estimate that each adviser will spend 0.25 hour to add the required provisions to the written agreement, with an aggregate of approximately 461 hours for all advisers that undergo surprise examinations.[636] Therefore the total annual burden in connection with the surprise examination is estimated at 81,410 hours under the rule.[637] We estimate the monetized burden related to the surprise exam is $27,623,345.[638]

C. Exceptions

The proposal contains several exceptions that will result in a new ''collection of information'' requirement within the meaning of the PRA and would have an impact on the current collection of information burdens of rule 206(4)–2. These exceptions are discussed below.

1. Certain Assets That Are Unable To Be Maintained With a Qualified Custodian

We are proposing an exception to the requirement to maintain client assets with a qualified custodian where an adviser has custody of privately offered securities or physical assets if the

compliance manager ($361) and a programmer ($316) = $338.50) = $4,720,044.

[625] Based on data from the Investment Adviser Registration Depository (''IARD'') of the advisers that report having discretion, of the 1,842 advisers indicated in response to Item 9.C.(3) that an independent public accountant conducts an annual surprise examination of client funds and securities. The calculations in this section regarding the annual surprise exam represent information as of June 2022 and incorporate Form ADV filings received through the (IARD) through August 31, 2022.

[626] Based on IARD data, 381 advisers indicated that an independent public accountant prepares an internal control report because the adviser or its affiliate acts as a qualified custodian (in response to Item 9.C.(4)). Similarly, 76 advisers indicated that they act as a qualified custodian (in response to Item 9.D.(1), and 321 advisers indicated that their related person(s) act as qualified custodian(s) (in response to Item 9.D.(2)). 76 + 321 = 397.

[627] We base our estimate on IARD data of the average number of clients of all the advisers that will be subject to the surprise examination requirement under the rule. To derive our estimate, we utilized the winsorization method, by setting all values for advisers (above the 99th percentile of number of clients) at the number of clients at the 99th percentile. The method lessens the effect of outliers on client estimates.

[628] 381 advisers × 9,006 (average number of clients subject to the surprise examination requirement) × 0.02 hour = 68,626 hours.

[629] This estimate is based on the total number of advisers subject to surprise examinations less those described above in the first group (custody as a result of serving as, or having a related person serving as, qualified custodian) less those described below in the third group (custody as a result of solely managing private funds). (1,842 − 381) − 626 = 835 advisers.

[630] Based on the IARD data, we estimate that the average number of clients of advisers subject to the surprise examination requirement is 9,006. 9,006 × 0.05 = 450 clients per adviser.

[631] 835 advisers × 450 clients × 0.02 hours = 7,515 hours.

[632] Based on IARD data, we estimate that 626 advisers manage private funds and undergo a surprise examination (responses to Items 7.B. and 9.C.(3)).

[633] ((626 advisers × 6 pools) × 1 hour = 3,756 hours) + ((626 × 6 pools × 14 investors) × .02 hours = 1,052 hours) = 4,808 hours.

[634] 68,626 hours + 7,515 hours + 4,808 hours = 80,949 hours.

[635] *Compare* 17 CFR 275.206(4)–2(a)(4) *with* proposed rule 223–1(a)(4).

[636] 1,842 advisers would be required to obtain a surprise examination × 0.25 = 461.

[637] 80,949 exam hours + 461 written agreement hours = 81,410 hours.

[638] 80,949 exam hours × $338.50 (blended rate for a compliance manager ($361) and a programmer ($316) = $339) + 461 written agreement hours × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426) = $393.50) to amend the written agreement = $27,623,345.

ownership of such assets cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control of such assets. This exception will allow advisers who service client accounts containing such assets to either safeguard the assets themselves or engage another entity to safeguard the assets subject to certain safeguarding requirements discussed below. For the purpose of approximating the average burden for advisers to comply with the collections of information that would be created by this exception, we estimate that 4,961 advisers currently have custody of privately offered securities and physical assets that cannot be maintained with a qualified custodian.[639]

(a) Written Agreement With Independent Public Accountant

An adviser relaying on the proposed exception would be required to enter into a written agreement with an independent public accountant that specifies certain obligations of the accountant.[640] We assume that many advisers will amend agreements that they have with accountants to perform other accounting services for the adviser, such as a surprise examination, while some number of advisers will enter into new agreements with accountants to perform the services required by the proposed rule. On average, we estimate that each adviser will spend 1.25 hours, initially, to prepare the written agreement with an accountant. In the aggregate, we estimate that advisers will spend 6,201 hours, initially, to enter into these agreements.[641] We estimate the aggregate initial monetized cost burden to equal $2,443,194.[642]

We believe that these agreements will change minimally from year to year and, therefore, estimate that advisers will spend approximately 2,481 aggregate hours annually amending these agreements or entering into new agreements.[643] The related total monetized cost burden for these amendments would equal $977,514.[644]

(b) Notice to Accountant

The proposed rule would require the adviser to notify the accountant of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day.[645] As discussed in section II.C.4, above, we believe that this notice would likely be provided by the adviser in connection with the closing of a transaction, and could be provided to the accountant without much additional effort beyond that required in connection with the closing of the transaction. We estimate that this notice would take advisers approximately one minute to deliver to the accountant. We also estimate that advisers will send 8,000 of these notices annually.[646] Accordingly, we estimate that these notices will take advisers approximately 133 hours[647] in the aggregate to send annually with an annual monetized cost of $48,013.[648]

(c) Accountant Verification

The written agreement would require the independent public accountant to verify the purchase, sale, or other transfer promptly upon receiving the required transfer notice. As discussed in section II.C.4, above, we believe the verification process would vary considerably depending on the asset involved. Based on our estimate of 8,000 transactions under the proposed exception annually, we believe that these verifications will result in an aggregate monetized cost burden to advisers of $21,000,000 annually.[649]

(d) All Assets Verified During Surprise Examination or Annual Audit

The proposed rule would require that the existence and ownership of each privately offered security or physical asset of a client that is not maintained with a qualified custodian to be verified during an adviser's annual surprise examination or financial statement audit under the audit provision.[650] We estimate that 95 percent of advisers relying on this exception, or 4,713 advisers,[651] will obtain a financial statement audit and 5 percent of advisers, or 248 advisers, will obtain surprise examinations.[652] For advisers obtaining an audit under the audit provision, we estimate the aggregate annual cost of asset verification to be $282,780,000.[653] We estimate the

[639] Based on IARD data, 4,961 advisers with custody of client assets provided advice to pooled investment vehicles as of June 30, 2022. We believe that this number is overinclusive of some number of advisers solely to funds that do not hold privately offered securities or physical assets. But we also believe that there may be a small number of advisers who are not advisers to pooled investment vehicles who have client assets that would be subject to the exception. We believe that the estimate is reasonable based on the data available.

[640] *See* proposed rule 223–1(b)(2)(iii).

[641] 4,961 (estimated number of advisers with custody of privately offered securities and physical assets that cannot be maintained with a qualified custodian under the proposed rule) × 1.25 hours.

[642] 6,201 (estimated internal hour burden) × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)).

[643] This estimate is based on the following calculation: 4,961 (estimated number of advisers with custody of privately offered securities and physical assets that cannot be maintained with a qualified custodian under the proposed rule) × .5 hours (estimate of average amount of time to amend agreement).

[644] 2,481 (estimated internal hour burden) × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)).

[645] *See* proposed rule 223–1(b)(2)(iv).

[646] This estimate is based on a review of a number of sources of private equity transaction data in and prior to 2021. *See generally,* S&P Global Market Intelligence, 2022 Global Private Equity Outlook (Apr. 20, 2022), *available at https://www.spglobal.com/marketintelligence/en/news-insights/research/2022-global-private-equity-outlook* (''2021 was a record year for the PE industry as investment activity surpassed the trillion-dollar mark for the first time. In total, 24,520 deals globally were closed, with an aggregate deal value worth $1.04 trillion, nearly double the amount from the year before. At the same time, deal volume grew by 41.6% over 2020, proving that investors' predictions of improved deal-making in 2021 came to fruition.''); Pitchbook, Data, Inc., *2021 Annual US PE Breakdown,* (Jan. 11, 2022), *available at https://pitchbook.com/news/reports/2021-annual-us-pe-breakdown* (''At over 8,600, [U.S.] deal count topped 2019's record by 50%.''); Statista, Global private equity (PE) activity from 2002 to 2021 (Mar. 30, 2022) *available at https://www.statista.com/statistics/1292230/private-equity-deal-activity-worldwide/* (''2021 was a record-breaking year for private equity (PE) activity worldwide. Investment activity grew nearly twofold compared to 2020, and reached a value of nearly 1.2 trillion U.S. dollars from 2,616 private equity deals.''); Bain & Co., The Private Equity Market in 2021: The Allure of Growth (Mar. 7, 2022), *available at https://www.bain.com/insights/private-equity-market-in-2021-global-private-equity-report-2022/* (''While the number of individual [buyout] deals jumped to nearly 4,300 in 2021, up 16% from 2020 levels, that doesn't explain the extraordinary growth in capital deployed.''). The estimate takes into account the increasing trend in transaction volume over the past few years, but also takes into account that registered advisers are responsible for only a portion of these total global and total U.S. transactions.

[647] 8,000 (estimated annual transactions)/60 minutes (based on estimate of one minute per notice).

[648] 133 (estimated number of hours) × $361 compliance manager.

[649] 8,000 (estimated number of annual transactions) × 15 hours (estimated average time to verify a transaction) × $175 (blended rate for intermediate accountant ($200), a general accounting supervisor ($252), and general clerk ($73)). The proposed rule requires that an accountant report to the Commission any material discrepancies and our estimate for those notices is included in the estimated average time to verify a transaction.

[650] *See* proposed rule 223–1(b)(2)(v).

[651] 4,961 (advisers relying on exception)/95% (estimated number of advisers relying on the exception obtaining audits) = 4,713.

[652] 4,961 (advisers relying on exception)/5% (estimated number of advisers relying on the exception obtaining surprise exams) = 248.

[653] 4,713 (estimated number of advisers subject to the exception relying on the audit provision) × $60,000 (additive estimated cost of audit). The additive costs to the audit (and surprise examination) of full asset verification are mitigated by proposed rule 223–1(b)(2)(iii), which requires an accountant to verify any purchase, sale, or other transfer of beneficial ownership of assets subject to the exception promptly after receipt of notice from the adviser. The extent of this mitigation is hard to estimate with certainty. We estimate that all asset verification will approximately double the cost of

aggregate annual cost of asset verification for all assets during a surprise examination to be $40,176,000.[654] In sum, the total annual monetized collection of information burden related to the exception for privately offered securities and physical assets is $322,956,000.[655]

2. Audit Provision

The proposed rule would expand the availability of the audit provision from limited partnerships, limited liability companies, and other types of pooled investment vehicle clients to any advisory client entity whose financial statements are able to be audited. Advisers that seek to comply with the audit provision would be required to deliver, promptly after the completion of the audit, the financial statements of the entity to all investors.

The collection of information burden imposed on an adviser relating to the distribution of audited financial statements to each investor in a client entity that the adviser manages should be minimal, as the financial statements could be included with account statements or other mailings or delivered electronically. Based on our experience with the audit provision in the current custody rule, we have estimated previously that the average burden for advisers to deliver audited financial statements to investors in the client entity is 1 minute per investor.[656] Based on our estimate of the number of advisers to audited pooled investment vehicles,[657] with an adjustment for our expectation that an increasing number of advisers will obtain audits of client entities,[658] we estimate that the aggregate annual hour burden in connection with the distribution of audited financial statements is 7,098 hours,[659] and there would be an annual cost of this internal hour burden of $1,242,150.[660]

The proposed rule would require an adviser or the client entity to enter into a written agreement with the independent public accountant to ensure that the independent public accountant that audits the client entity notifies the Commission (i) within one business day of issuing an audit report to the entity that contains a modified opinion and (ii) within four business days of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed.[661] We assume that, regardless of whether the adviser or the client entity enters into the written agreement, the accountant would incur the hour burden of preparing the agreement. We also assume that, if the client entity was party to the agreement, the client entity would delegate the task of reviewing the agreement to the adviser. This estimate also assumes that the adviser would enter into a separate agreement for each client entity, even if multiple client entities use the same auditor. We believe that written agreements are commonplace and reflect industry practice when a person retains the services of a professional such as an accountant, and they are typically prepared by the independent public accountant in advance. We therefore estimate that each adviser will initially spend 1.25 hours to add the required provisions to, or confirm that the required provisions are in, the written agreement, with an initial aggregate of 48,735 hours[662] for all advisers that satisfy the requirements of the audit engagement. We further estimate that each adviser will spend 0.92 hours[663] on an annual basis to reassess current written agreements and execute new agreements as an adviser adds entity clients for an annual aggregate of 35,869 hours[664] and an annual cost of this internal hour burden of $19,476,867[665] for all advisers that satisfy the requirements of the audit provision.

D. Total Hour Burden Associated With Proposed Rule 223–1

Accordingly, we estimate investment advisers that would be subject to the proposed rule would incur a total annual hour burden resulting from the collections of information discussed above of approximately 398,152 hours,[666] at a time cost of $154,579,839.[667] The total external burden costs would be $378,598,500.[668]

A chart summarizing the various proposed components of the total annual burden for investment advisers with custody of client assets is below.

an audit, estimated at $60,000 per audit. *See infra* section IV.C.2.

[654] 248 (estimated number of advisers subject to the exception) × $162,000. We previously estimated that advisers subject to the surprise examination with respect to 100 percent of their clients will each spend an average of approximately $162,000 annually. As with the cost of an audit, we estimate that full asset verification will approximately double the cost of the surprise examination.

[655] $282,780,000 + $40,176,000.

[656] 2009 Adopting Release, *supra* note 11.

[657] Based on IARD data as of June 30, 2022, 4,961 advisers with custody of client assets provided advice to pooled investment vehicles. We estimate that each adviser has an average of 6 pooled investment vehicle clients with an average of 14 investors.

[658] Because the proposed rule expands the types of entities that can obtain an audit (*i.e.,* is not limited to pooled investment vehicles as in the current rule), we expect that an increasing number of advisers will seek to comply with the proposed rule by obtaining an audit. To estimate the number of entities that may utilize the expanded availability of the audit provision, we selected the following categories of clients with custody based on IARD data as of June 30, 2022: Investment advisers with custody that have pension and profit sharing plan clients: 3,068 (Average number of pension and profit sharing clients: (6); Investment advisers with custody that have charitable organization clients: 3,205 (Average number of charitable organization clients: (3); Investment advisers with custody that have state or municipal government entity clients: 986 (Average number of state or municipal government entity clients: (3); Investment advisers with custody that have corporations and other business entity clients: 3,025 (Average number of corporations and other business entity clients: (5). We estimate that 20% of advisers to these categories of clients will utilize the expanded availability of the audit provision.

[659] (4,961 advisers to pooled investment vehicles × 6 pooled investment vehicle clients × 14 investors × 1 minute)/60 minutes = 6,945 hours; (3,068 advisers to pension and profit sharing clients × 20% × 6 clients × 1 minute)/60 minutes = 61 hours; (3,205 advisers to charitable organization clients × 20% × 3 clients × 1 minute)/60 minutes = 32 hours; (986 advisers to state or municipal government entity clients × 20% × 3 clients × 1 minute)/60 minutes = 10 hours; (3,025 advisers to corporations and other business entity clients × 20% × 5 clients × 1 minute)/60 minutes = 50 hours; 6,945 hours + 61 hours +32 hours +10 hours +50 hours = 7,098 hours.

[660] This estimate is based on the following calculation: 7,098 hours × $175 (blended rate for an intermediate accountant ($200), a general accounting supervisor ($252), and a general clerk ($73).

[661] Proposed rule 223–1(b)(4)(v).

[662] 4,961 advisers to pooled investment vehicles × 6 pooled investment vehicle clients = 29,766 client written agreements; 3,068 advisers to pension and profit sharing clients × 20% × 6 clients = 3,682 client written agreements; 3,205 advisers to charitable organization clients × 20% × 3 clients = 1,923 client written agreements; 986 advisers to state or municipal government entity clients × 20% × 3 clients = 592 client written agreements; 3,025 advisers to corporations and other business entity clients × 20% × 5 clients = 3,025 client written agreements; (29,766 + 3,682 + 1,923 + 592 + 3,025) × 1.25 hours per agreement = 48,735 hours.

[663] This includes the internal initial burden estimate amortized over a three-year period (1.25 hours/3 years) and another 0.5 hours of additional ongoing burden hours = 0.92 hours.

[664] (29,766 + 3,682 + 1,923 + 592 + 3,025) × 0.92 hours per ongoing annual burden = 35,869 hours.

[665] This estimate is based on the following calculation: 35,869 hours × $543 (rate for assistant general counsel).

[666] This estimate is based upon the following calculations: 111,552 + 9,482 + 12,552 + 18,422 + 14,385 + 959 + 69,720 + 13,944 + 6,201 + 2,481 + 133 + 13,944 + 80,949 + 461 + 7,098 + 35,869 hours = 398,152 hours.

[667] This estimate is based upon the following calculations: $43,951,488 + $3,735,908 + $12,203,756 + $4,869,322.50 + $324,621.50 + $27,469,680 + $5,493,936 + $4,720,044 + $27,623,345 + $2,443,194 + $977,514 + $48,013 + $1,242,150 + $19,476,867 = $154,579,839.

[668] This estimate is based upon the following calculations: $35,962,500 + $19,680,000 + $322,956,000 = $378,598,500.

Rule 223–1 description of new requirements	Number of responses	Internal burden hours	External burden costs
Final Estimates for Qualified Custodian Protections Under 223–1(a)(1)			
Initial burden for drafting, negotiating, and executing new written custodial agreements with required provisions between the adviser and qualified custodian (''QC'') (IA–QC custodial contract).	55,776 (4 per adviser with custody).	111,552 (2 per response).	
Annual burden for drafting, negotiating, and executing new written custodial agreements with required provisions between the adviser and qualified custodian (IA–QC custodial contract).	55,776 (4 per adviser with custody).	9,482 (.17 hour per response).	
Annual burden for QC to provide records relating to clients' assets to the Commission *.	8,368 (4 per adviser examined).	12,552 (1.5 hour per response).	
* This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year.			
Annual burden for QC to provide records relating to clients' assets to an independent public accountant *.	36,844 (4 per adviser obtaining a surprise examination or audit).	18,422 (.5 hour per response).	
* This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year.			
Initial burden for QC to send account statements, at least quarterly, to the client, or its independent representative, and to adviser.	959 (estimated qualified custodians).	14,385 hours (15 hours per qualified custodian).	
Annual burden for QC to modify and send account statements	959 (estimated qualified custodians).	959 (1 hour per qualified custodian).	
Annual burden for QC to obtain internal control report	.....	.....	$35,962,500
Initial burden for adviser obtaining reasonable assurances from the QC.	55,776 (1 per adviser).	69,720 (1.25 hours per response).	
Annual burden for adviser obtaining reasonable assurances from the QC.	55,776 (1 per adviser).	13,944 (.25 hours per response).	
Final Estimates for Exceptions for Certain Assets that are Unable to be Maintained with a Qualified Custodian Under 223–1(b)(2)			
Initial burden for written agreement with independent public accountant (IPA).	4,961 (estimated number of advisers with custody of privately offered securities and physical assets that cannot be maintained with a qualified custodian under the proposed rule).	6,201 (1.25 hours per adviser).	
Annual burden for written agreement with IPA	4,961	2,481 (.5 hour per adviser).	
Annual burden to notify the IPA of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day.	8,000 (estimated number of annual transactions).	133 hours (1 minute per transaction).	
Annual burden to verify the purchase, sale, or other transfer promptly upon receiving the required transfer notice *.	.....	.....	$19,680,000
* This does not contain an internal burden estimate because the burden under this requirement is solely an external monetary burden.			
Annual burden to verify all assets during a surprise exam or an annual audit *.	.....	.....	$322,956,000
* This does not contain an internal burden estimate because the burden under this requirement is solely an external monetary burden.			
Final Estimates for Complying with the Notice Requirement Under 223–1(a)(2)			
Initial burden for complying with the notice requirement*	13,944 advisers (1 per adviser).	13,944 hours (1 hour per adviser).	
* This would be a one-time burden to include account numbers in the notices.			
Final Estimates for Independent Verification or Surprise Examination Under 223–1(a)(4)			
Annual burden for complying with the independent verification/surprise examination of client assets by an IPA under a written agreement between the IPA and the adviser *.	1,842 advisers are subject to the surprise exam.	80,949 hours [1].	
* This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year.			

Rule 223–1 description of new requirements	Number of responses	Internal burden hours	External burden costs
Annual burden to enter into a written agreement with an IPA engaged to conduct the surprise examination and specify certain duties to be performed by the independent public accountant*. * This is not broken up into initial and ongoing burden because the annual burden is estimated to be the same each year.	1,842 advisers	461 hours (.25 per adviser).	
Exception for Entities Subject to the Annual Audit 223–1(b)(4)			
Annual burden for distributing audited financial statements	7,018 advisers	7,098 hours.	
Annual burden for drafting, negotiating, and executing the required written agreement between the IPA and adviser regarding notifications from the IPA to the Commission of specified events.	7,018 advisers	35,869 hours.	
TOTAL ESTIMATED FINAL BURDEN FOR RULE 223–1			
Total estimated burden for rule 223–1	319,856	398,152 hours	$378,598,500
Currently approved burden for rule 206(4)–2	24,133,429	288,202 hours	$174,367,000
Comparison of proposed rule 223–1 burdens to current rule 206(4)-2 burdens.	(23,813,573)	109,950 hours	$204,231,500

Notes:
1. Advisers can be subject to the surprise exam for several reasons. For a more detailed breakout of the types of advisers and their respective burdens see section IV.B.3.

E. Rule 204–2

Under section 204 of the Advisers Act, investment advisers registered or required to register with the Commission under section 203 of the Advisers Act must make and keep for prescribed periods such records (as defined in section 3(a)(37) of the Exchange Act), furnish copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204–2 sets forth the requirements for maintaining and preserving specified books and records. This collection of information is found at 17 CFR 275.204–2 and is mandatory. The Commission staff uses the collection of information in its examination and oversight program. As noted above, responses provided to the Commission in the context of its examination and oversight program concerning the proposed amendments to rule 204–2 would be kept confidential subject to the provisions of applicable law.

We are proposing amendments to rule 204–2 to correspond to proposed new rule 223–1. Specifically, we are proposing to require investment advisers to maintain the following records for client accounts: (1) client account identification, (2) custodian information, including copies of qualified custodian agreements with the adviser, a record of required reasonable assurances from the qualified custodian, and if applicable, a copy of the adviser's written reasonable determination that ownership of certain specified client assets cannot be recorded and maintained under a qualified custodian's possession or control, (3) the basis for the adviser having custody of client assets in the account, (4) any account statements received or sent by the adviser, (5) transaction and position information, and (6) any SLOAs and related records to verify that an adviser can avail itself of the proposed exception to the surprise examination requirement.[669] The proposed amendments also would require an adviser to maintain copies of all written notices to clients required under proposed rule 223–1 and any responses thereto, and copies of documents relating to independent public accountant engagements.

Each of these records would be required to be maintained in the same manner, and for the same period of time, as other books and records required to be maintained under rule 204–2(a). Specifically, investment advisers would be required to maintain and preserve these records in an easily accessible place for not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser. Requiring maintenance of these records would facilitate the Commission's ability to inspect and enforce compliance with proposed rule 223–1. The information generally is kept confidential.[670]

The respondents to this collection of information are investment advisers registered or required to be registered with the Commission that have custody of client assets. As noted above, based on Form ADV filings, as of June 30, 2022, we estimate that 13,944 registered investment advisers would have custody of client assets under proposed rule 223–1 and would be subject to the proposed amendments to rule 204–2.

For the proposed retention of SLOAs and related records, however, we believe that not every adviser with custody of client assets will have clients that issue SLOAs. Thus, such advisers would not seek to rely on the proposed SLOA exception. Of the 13,944 advisers with custody of client assets, we estimate that approximately 20%, or approximately 2,789 advisers, will have clients that issue SLOAs. Because we believe that many such advisers already retain copies of client SLOAs in their books and records, in our view this particular collection of information requirement would have a negligible impact on them. As a result, we estimate that this collection of information will result in an increased burden of .25 hours for each adviser seeking to rely on the proposed SLOA exception. Therefore, we estimate that the annual total internal burden of retaining copies of, and records relating to, client SLOAs would be approximately 697.25 hours,[671] represented by a monetized cost of $57,174.50.

The approved annual aggregate burden for rule 204–2 is currently

[669] Proposed rule 204–2(b)(2)(vi).

[670] *See* section 210(b) of the Advisers Act (15 U.S.C. 80b–10(b)).

[671] This estimate is based on the following calculation: .25 hours per adviser × 2,789 advisers.

2,764,563 hours, based on an estimate of 13,724 registered advisers, or 201.44 hours per registered adviser.[672] For the proposed recordkeeping amendments that correspond to proposed changes to the custody rule as discussed in this release, we estimate that the proposed amendments would result in an increase in the collection of information burden estimate by 21 hours for each of the estimated 13,944 registered advisers with custody of client assets. We, therefore, estimate that the revised annual aggregate hourly burden for rule 204–2 would be 3,347,352 hours, represented by a monetized cost of $217,333,279 based on an estimate of 15,160 registered advisers, of which we estimate 13,944 would have custody of client assets under the proposed rule. This represents an increase of 582,789[673] annual aggregate hours in the hour burden and an annual monetized cost increase of $41,352,853 from the currently approved total aggregate monetized cost for rule 204–2.[674] These increases are attributable to a larger registered investment adviser population since the most recent approval and adjustments for inflation, as well as the proposed rule 204–2 amendments as discussed in this proposing release.

A chart summarizing the various components of the total annual burden for investment advisers with custody of client assets is below.

	Internal hour burden		Wage rate [1]	Internal time costs	Annual external cost burden
Final Estimates for Rule 204–2 for Client Communications					
Retention of written client notifications and responses	3	×	$82 (compliance clerk)	$246	
Total burden per adviser	3			$246	
Total number of affected advisers	× 13,944			× 13,944	
Sub-total burden	41,832			$3,430,224	
Final Estimates for Rule 204–2 for Client Accounts					
Creation and retention of records documenting client account identifying information, including adviser discretionary authority.	2	×	$73 (general clerk)	$146	
	1	×	$82 (compliance clerk)	$82	
Total burden per adviser	3			$228	
Total number of affected advisers	× 13,944			× 13,944	
Sub-total burden	41,832			$3,179,232	
Creation and retention of records documenting custodian identifying information corresponding to each client account, including copies of qualified custodian agreements with adviser, a record of required reasonable assurances from the qualified custodian, and if applicable, a copy of the adviser's written reasonable determination that ownership of certain specified client assets cannot be recorded and maintained under a qualified custodian's possession or control.	2	×	$73 (general clerk)	$146	
	1	×	$82 (compliance clerk)	$82	
Total burden per adviser	3			$228	
Total number of affected advisers	× 13,944			× 13,944	
Sub-total burden	41,832			$3,179,232	
Creation and retention of records documenting adviser's basis of custody of client assets.	2	×	$73 (general clerk)	$146	
	1	×	$82 (compliance clerk)	$82	
Total burden per adviser	3			$228	
Total number of affected advisers	× 13,944			× 13,944	
Sub-total burden	41,832			$3,179,232	
Retention of copies of account statements	2	×	$82 (compliance clerk)	$164	
Total burden per adviser	2			$164	
Total number of affected advisers	× 13,944			× 13,944	
Sub-total burden	27,888			$2,286,816	
Creation and retention of records of detailed transaction and position information for each client account.	3	×	$82 (compliance clerk)	$246	
Total burden per adviser	3			$246	
Total number of advisers	× 13,944			× 13,944	
Sub-total burden	41,832			$3,430,224	
Retention of copies of, and records relating to, standing letters of authorization.	.25	×	$82 (compliance clerk)	$20.50	
Total burden per adviser	.25			$20.50	

[672] 2,764,563 hours/13,724 registered advisers = 201.44 hours per adviser.

[673] 3,347,352 hours − 2,764,563 hours = 582,789 hours.

[674] $217,333,279 − $175,980,426 = $41,352,853.

	Internal hour burden		Wage rate [1]	Internal time costs	Annual external cost burden
Total number of advisers	× 2,789			× 2,789	
Sub-total burden	697.25			$57,174.50	
Final Estimates for Rule 204–2 for Independent Public Accountant					
Retention of copies of all audited financial statements, internal control reports, and required written agreements between independent public accountant and adviser or its client.	3	×	$73 (general clerk)	$219	
	1	×	$82 (compliance clerk)	$82	
Total burden per adviser	4			$301	
Total number of affected advisers	× 13,944			× 13,944	
Sub-total burden	55,776			$4,197,144	
Total Estimated Final Burden for Rule 204–2					
Total burden for this rulemaking	293,521.25			$22,939,278.50	
Previously approved burden plus the additional burden due to the increase in the number of advisers.	3,053,831			$194,394,000	
Total burden	3,347,352			$217,333,279	

Notes:
[1] The Commission's estimates of the relevant wage rates are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013. The estimated figures are modified by firm size, employee benefits, overhead, and adjusted to account for the effects of inflation. *See* the SIFMA Wage Report.

F. Form ADV

The proposed amendments to Form ADV would increase the information requested in Form ADV Part 1A. More specifically, we are proposing amendments to Form ADV Part 1A, Schedule D, and the Instructions and Glossary of Form ADV that are designed to help advisers identify when they may have custody of client assets, to provide the Commission with information related to advisers' practices to safeguard client assets information about advisers' practices to safeguard client assets, to provide the Commission with information related to these practices, and to provide the Commission with additional data to improve our ability to identify compliance risks.

The estimated new burdens below also take into account changes in the numbers of advisers since the last approved PRA for Form ADV and increased costs due to inflation. Based on the prior amendments to Form ADV, we estimated the annual compliance burden to comply with the collection of information requirement of Form ADV is 433,004 burden hours per year and an external cost burden estimate of $14,125,083.[675] Compliance with the disclosure requirements of Form ADV is mandatory, and the responses to the disclosure requirements will not be kept confidential.

We propose the following changes to our PRA methodology for Form ADV:

• *Form ADV Parts 1 and 2.* Form ADV PRA has historically calculated a per adviser per year hourly burden for Form ADV Parts 1 and 2 for each of (i) the initial burden and (ii) the ongoing burden, which reflects advisers' filings of annual and other-than-annual updating amendments. We noted in previous PRA amendments that most of the paperwork burden for Form ADV Parts 1 and 2 would be incurred in the initial submissions of Form ADV. However, recent PRA amendments have continued to apply the total initial hourly burden for Parts 1 and 2 to all currently registered or reporting SEC-registered investment advisers (''RIAs'') and exempt reporting advisers (''ERAs''), respectively, in addition to the estimated number of new advisers expected to be registering or reporting with the Commission annually. We believe that the total initial hourly burden for Form ADV Parts 1 and 2 going forward should be applied only to the estimated number of expected new advisers annually. This is because currently registered or reporting advisers have generally already incurred the total initial burden for filing Form ADV for the first time. On the other hand, the estimated expected new advisers will incur the full total burden of initial filing of Form ADV, and we believe it is appropriate to apply this total initial burden to these advisers. We propose to continue to apply any new initial burdens resulting from proposed amendments to Form ADV Parts 1 and 2, as applicable, to all currently registered or reporting investment advisers plus all estimated expected new RIAs and ERAs annually.

• *Private fund reporting.* We have previously calculated advisers' private fund reporting as a separate initial burden. The currently approved burden for all registered and exempt reporting advisers, including expected new registered advisers and new exempt reporting advisers, with respect to reported private funds, is 1 hour per private fund reported, which we have previously amortized over three years for all private fund advisers. We propose to continue to calculate advisers' private fund reporting as a separate reporting burden, but we propose to apply the initial burden only with respect to the expected new private funds.

[675] *See* Investment Adviser Marketing, Final Rule, Investment Advisers Act Release No. 5653 (Dec. 22, 2020) [81 FR 60418 (Mar. 5, 2021)] and corresponding submission to the Office of Information and Regulatory Affairs at *Reginfo.gov* (''2021 Form ADV PRA'').

TABLE 10—FORM ADV PRA ESTIMATES

	Initial hours per year	Internal annual amendment burden hours [1]	Wage rate [2]	Internal time costs	Annual external cost burden [3]
PROPOSED AMENDMENTS TO FORM ADV					
RIAs (burden for Parts 1 and 2, not including private fund reporting) [4]					
Proposed additions (per adviser) to Part 1A Item 9 and corresponding schedules.	1 hour for Part 1A.	0.4 hours [5]	$318 per hour (blended rate for senior compliance examiner and compliance manager) [6].	1.4 hours × $318 per hour = $445.20.	
Current burden per adviser [7]	29.72 hours [8]	11.8 hours [9]	$273.00 per hour (blended rate for senior compliance examiner and compliance manager).	(29.72 + 11.8) × $273.00 = $11,334.96.	$2,069,250 aggregated (previously presented only in the aggregate) [10].
Revised burden per adviser	29.72 hours + 1 hour = 30.72 hours.	0.4 hours + 11.8 hours = 12.2 hours.	$318 (blended rate for senior compliance examiner and compliance manager).	(30.72 + 12.2) × $318 = $13,648.56.	$4,780.50 [11].
Total revised aggregate burden estimate.	32,117.44 [12]	191,686.4 hours [13].	Same as above	(32,177,44 + 191,686.4) × $318 = $71,169,621.12.	$11,162,546 [14].
RIAs (burden for Part 3) [15]					
No proposed changes Current burden per RIA	20 hours, amortized over three years = 6.67 hours [16].	1.58 hours [17]	$273 (blended rate for senior compliance examiner and compliance manager).	$273 × (6.67 + 1.58) = $2,249.52.	$2,433.74 per adviser [18].
Total updated aggregate burden estimate.	70,646.67 hours [19].	15,646.74 hours [20].	$318 (blended rate for senior compliance examiner and compliance manager.	$27,441,303.32 ($318 × (70,646.67 hours + 15,646.74 hours).	$9,930,272.08 [21].
ERAs (burden for Part 1A, not including private fund reporting) [22]					
No proposed changes. Current burden per ERA	3.60 hours [23]	1.5 hours + final filings [24].	$273 (blended rate for senior compliance examiner and compliance manager).	.....	$0
Total revised aggregate burden estimate.	1,245.60 [25]	8,777.60 hours [26]	$318 (blended rate for senior compliance examiner and compliance manager.	$3,187,377.60 ($318 × (1,245.6 + 8,777.60 hours)).	$0
Private Fund Reporting [27]					
No proposed changes. Current burden per adviser to private fund.	1 hour per private fund [28].	N/A—included in the existing annual amendment burden.	$273 (blended rate for senior compliance examiner and compliance manager).	.....	Cost of $46,865.74 per fund, applied to 6% of RIAs that report private funds [29].
Total updated aggregate burden estimate.	1,150 hours [30] ...	N/A	$318 (blended rate for senior compliance examiner and compliance manager).	$5,173,478.40 ($318 × 16,269 [30] hours)).	$14,856,439.58 [31].
TOTAL ESTIMATED BURDENS, INCLUDING AMENDMENTS					
Current per adviser burden/external cost per adviser.	23.82 hours [32].			23.82 hours × $273 = $6,502.86 per adviser cost of the burden hour.	$777 [33].
Revised per adviser burden/external cost per adviser.	15.62 hours [34].			15.62 hours × $318 = $4,966.43 per adviser cost of the burden hour.	$1,669.03 [35].
Current aggregate burden estimates	433,004 initial and amendment hours annually [36].			433,004 × $273 = $118,210,092 aggregate cost of the burden hour.	$14,125,083 [37].
Revised aggregate burden estimates.	336,389.45 [38] Initial and amendment hours annually.			336,389.45 × $318 = $106,971,844.04 aggregate cost of the burden hour.	$35,949,257.66 [39].

Notes:

[1] This column estimates the hourly burden attributable to annual and other-than-annual updating amendments to Form ADV, plus RIAs' ongoing obligations to deliver codes of ethics to clients.

[2] As with Form ADV generally, and pursuant to the currently approved PRA (*see* 2021 Form ADV PRA), we expect that for most RIAs and ERAs, the performance of these functions will most likely be equally allocated between a senior compliance examiner and a compliance manager, or persons performing similar functions. The Commission's estimates of the relevant wage rates are based on the SIFMA Wage Report, modified by firm size, employee benefits, overhead, and adjusted to account for the effects of inflation.

[3] External fees are in addition to the projected hour per adviser burden. Form ADV has a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Parts 2 and 3 of the form. In addition to the estimated legal and compliance consulting fees, investment advisers of private funds incur one-time costs with respect to the requirement for investment advisers to report the fair value of private fund assets.

[4] Based on Form ADV data as of June 2022, we estimate that there are 15,160 RIAs (''current RIAs'') and 552 advisers that are expected to become RIAs annually (''newly expected RIAs'').

[5] We estimate that 12,570 RIAs (80% of the total of 15,712 combined current and expected RIAs that are required to complete Parts 1 and 2) would incur a burden of 0.5 hour, and 3,142 RIAs (20% of 15,712 current and expected RIAs that are required to complete Parts 1 and 2) would incur a burden of 0 hours. (12,570 RIAs × 0.5) + (3,142 RIAs × 0)/15,712 = 0.4 blended average hours per RIA.

[6] The $318 wage rate reflects current estimates from the SIFMA Wage Report of the blended hourly rate for a senior compliance examiner ($276) and a compliance manager ($360). ($276 + $360)/2 = $318.

[7] Per above, we are proposing to revise the PRA calculation methodology to apply the full initial burden only to expected RIAs, as we believe that current RIAs have generally already incurred the burden of initially preparing Form ADV.

[8] *See* 2020 Form ADV PRA Renewal (stating that the estimate average collection of information burden per adviser for Parts 1 and 2 is 29.22 hours, prior to the most recent amendment to Form ADV). *See also* 2021 Form ADV PRA (adding 0.5 hours to the estimated initial burden for Part 1A in connection with the most recent amendment to Form ADV). Therefore, the current estimated average initial collection of information hourly burden per adviser for Parts 1 and 2 is 29.72 hours (29.22 + 0.5 = 29.72).

[9] The currently approved average total annual burden for RIAs attributable to annual and other-than-annual updating amendments to Form ADV Parts 1 and 2 is 10.5 hours per RIA, plus 1.3 hours per year for each RIA to meet its obligation to deliver codes of ethics to clients (10.5 + 1.3 = 11.8 hours per adviser). *See* 2020 Form ADV PRA Renewal (these 2020 hourly estimates were not affected by the 2021 amendments to Form ADV). As we explained in previous PRAs, we estimate that each RIA filing Form ADV Part 1 will amend its form 2 times per year, which consists of one interim updating amendment (at an estimated 0.5 hours per amendment), and one annual updating amendment (at an estimated 8 hours per amendment), each year. We also explained that we estimate in that each RIA will, on average, spend 1 hour per year making interim amendments to brochure supplements, and an additional 1 hour per year to prepare brochure supplements as required by Form ADV Part 2. *See id.*

[10] *See* 2020 Form ADV PRA Renewal (the subsequent amendment to Form ADV described in the 2021 Form ADV PRA did not affect that estimate).

[11] External cost per RIA includes the external cost for initially preparing Part 2, which we have previously estimated to be approximately 10 hours of outside legal counsel for a quarter of RIAs, and 8 hours of outside management consulting services for half of RIAs. *See* 2020 Form ADV Renewal (these estimates were not affected by subsequent amendments to Form ADV). The proposal does not add to this burden. This burden remains 10 hours and 8 hours, respectively, for ¼ and ½ of RIAs, respectively). (((.25 × 15,160 RIAs) × ($565 × 10 hours)) + ((0.50 × 15,160 RIAs) × ($842 × 8 hours)))/15,160 RIAs = $4,780.50 per adviser.

[12] Per above, we are proposing to revise the PRA calculation methodology for current RIAs to not apply the full initial burden to current RIAs, as we believe that current RIAs have generally already incurred the initial burden of preparing Form ADV. Therefore, we calculate the initial burden associated with complying with the proposed amendment of 1 initial hours × 15,160 current RIAs = 15,160, initial hours in the first year aggregated for current RIAs. We are not amortizing this burden because we believe current advisers will incur it in the first year. For expected RIAs, we estimate that they will incur the full revised initial burden, which is 30.72 hours per RIA. Therefore, 30.72 hours × 552 expected RIAs = 16,957.44 aggregate hours for expected RIAs. We do not amortize this burden for expected new RIAs because we expect a similar number of new RIAs to incur this initial burden each year. Therefore, the total revised aggregate initial burden for current and expected RIAs is 15,160 hours + 16,957.44 hours = 32,117.44 aggregate initial hours.

[13] 12.2 amendment hours × (15,160 current RIAs + 552 expected new RIAs) = 191,686 aggregate amendment hours.

[14] Per above, for current RIAs, we are proposing to not apply the currently approved external cost for initially preparing Part 2, because we believe that current RIAs have already incurred that initial external cost. For current RIAs, therefore, we are applying only the external cost we estimate they will incur in complying with the proposed amendment. Therefore, the revised total burden for current RIAs is (((.25 × 15,160 RIAs) × ($565 × 1 hour)) + ((0.50 × 15,160 RIAs) × ($842 × 1 hour))) = $8,523,710 aggregated for current RIAs, We do not amortize this cost for current RIAs because we expect current RIAs will incur this initial cost in the first year. For expected RIAs, we apply the currently approved external cost for initially preparing Part 2 plus the estimated external cost for complying with the proposed amendment. Therefore, $4,780.50 per expected RIA × 552 = $2,638,836 aggregated for expected RIAs. We do not amortize this cost for expected new RIAs because we expect a similar number of new RIAs to incur this external cost each year. $8,523,710 aggregated for current RIAs + $2,638,836 aggregated for expected RIAs = $11,162,546 aggregated external cost for RIAs.

[15] Even though we are not proposing amendments to Form ADV Part 3 (''Form CRS''), the burdens associated with completing Part 3 are included in the PRA for purposes of updating the overall Form ADV information collection. Based on Form ADV data as of October 31, 2021, we estimate that 8,877 current RIAs provide advice to retail investors and are therefore required to complete Form CRS, and we estimate an average of 347 expected new RIAs to be advising retail advisers and completing Form CRS for the first time annually.

[16] See Form CRS Relationship Summary; Amendments to Form ADV, Investment Advisers Act Release No. 5247 (June 5, 2019) [84 FR 33492 (Sep. 10, 2019)] (''2019 Form ADV PRA''). Subsequent PRA amendments for Form ADV have not adjusted the burdens or costs associated with Form CRS. Because Form CRS is still a new requirement for all applicable RIAs, we have, and are continuing to, apply the total initial burden to all current and expected new RIAs that are required to file Form CRS, and amortize that initial burden over three years for current RIAs.

[17] As reflected in the currently approved PRA burden estimate, we stated that we expect advisers required to prepare and file the relationship summary on Form ADV Part 3 will spend an average 1 hour per year making amendments to those relationship summaries and will likely amend the disclosure an average of 1.71 times per year, for approximately 1.58 hours per adviser. *See* 2019 Form ADV PRA (these estimates were not amended by the 2021 amendments to Form ADV).

[18] *See* 2020 Form ADV PRA Amendment (this cost was not affected by the subsequent amendment to Form ADV and was not updated in connection with that amendment; while this amendment did not break out a per adviser cost, we calculated this cost from the aggregate total and the number of advisers we estimated prepared Form CRS). Note, however, that in our 2020 Form ADV PRA Renewal, we applied the external cost only to expected new retail RIAs, whereas we had previously applied the external cost to current and expected retail RIAs. We believe that since Form CRS is still a newly adopted requirement, we should continue to apply the cost to both current and expected new retail RIAs. *See* 2019 Form ADV PRA.

[19] 9,556 current RIAs × 6.67 hours each for initially preparing Form CRS = 63,706.67 aggregate hours for current RIAs initially filing Form CRS. For expected new RIAs initially filing Form CRS each year, we are not proposing to use the amortized initial burden estimate, because we expect a similar number of new RIAs to incur the burden of initially preparing Form CRS each year. Therefore, 347 expected new RIAs × 20 initial hours for preparing Form CRS = 6,940 aggregate initial hours for expected RIAs. 63,706.67 hours + 6,940 hours = 70,646.67 aggregate hours for current and expected RIAs to initially prepare Form CRS.

[20] 1.58 hours × (9,556 current RIAs updating Form CRS + 347 expected new RIAs updating Form CRS) = 15,646.74 aggregate amendment hours per year for RIAs updating Form CRS.

[21] We have previously estimated the initial preparation of Form CRS would require 5 hours of external legal services for an estimated quarter of advisers that prepare Part 3, and 5 hours of external compliance consulting services for an estimated half of advisers that prepare Part 3. *See* 2020 PRA Renewal (these estimates were not amended by the most recent amendment to Form ADV). The hourly cost estimate of $565 and $842 for outside legal services and management consulting services, respectively, are based on an inflation-adjusted figure in the SIFMA Wage Report. Therefore, (((.25 × 9,556 current RIAs preparing Form CRS) × ($565 × 5 hours)) + ((0.50 × 9,556 current RIAs preparing Form CRS) × ($842 × 5 hours))) = $26,864,305. For current RIAs, since this is still a new requirement, we amortize this cost over three years for a per year initial external aggregated cost of $8,954,768.33. For expected RIAs that we expect would prepare Form CRS each year, we use the following formula: (((.25 × 347 expected RIAs preparing Form CRS) × ($565 × 5 hours)) + ((0.50 × 347 expected RIAs preparing Form CRS) × ($842 × 5 hours))) = $975,503.75 aggregated cost for expected RIAs. We are not amortizing this initial cost because we estimate a similar number of new RIAs would incur this initial cost in preparing Form CRS each year, $8,954,768.33 + $975,503.75 = $9,930,272.08 aggregate external cost for current and expected RIAs to initially prepare Form CRS.

[22] Based on Form ADV data as of June 30, 2022, we estimate that there are 5,481 currently reporting ERAs (''current ERAs''), and an average of 346 expected new ERAs annually (''expected ERAs'').

[23] *See* 2021 Form ADV PRA.

[24] The previously approved average per adviser annual burden for ERAs attributable to annual and updating amendments to Form ADV is 1.5 hours. *See* 2021 Form ADV PRA. As we have done in the past, we add to this burden the burden for ERAs making final filings, which we have previously estimated to be 0.1 hour per applicable adviser, and we estimate that an expected 371 current ERAs will prepare final filings annually, based on Form ADV data as of December 2020.

[25] For current ERAs, we are proposing to not apply the currently approved burden for initially preparing Form ADV, because we believe that current ERAs have already incurred this burden. For expected ERAs, we are applying the initial burden of preparing Form ADV of 3.6 hours. Therefore, 3.6 hours × 346 expected new ERAs per year = 1,245.60 aggregate initial hours for expected ERAs. For these expected ERAs, we are not proposing to amortize this burden because we expect a similar number of new ERAs to incur this burden each year. Therefore, we estimate 1,245.60 aggregate initial annual hours for expected ERAs.

[26] The previously approved average total annual burden of ERAs attributable to annual and updating amendments to Form ADV is 1.5 hours. *See* 2020 Form ADV Renewal (this estimate was not affected by the subsequent amendment to Form ADV). As we have done in the past, we added to this burden the currently approved burden for ERAs making final filings of 0.1 hour, and multiplied that by the number of final filings we are estimating ERAs would file per year (371 final filings based on Form ADV data as of December 2020). (1.5 hours × 5,481 currently reporting ERAs) + (0.1 hour × 371 final filings) = 8,258.60 updated aggregated hours for currently reporting ERAs. For expected ERAs, the aggregate burden is 1.5 hours for each ERA attributable to annual and other-than-annual updating amendments to Form ADV × 346 expected new ERAs = 519 annual aggregated hours for expected new ERAs updating Form ADV (other than for private fund reporting). The total aggregate amendment burden for ERAs (other than for private fund reporting) is 8,258.60 + 519 = 8,777.60 hours.

[27] Based on Form ADV data as of June 30, 2022, we estimate that 5,142 current RIAs advise 50,968 private funds. Previously, based on Form ADV data as of October 31, 2021, we have estimated 136 new RIAs will advise 407 reported private funds per year. We have also estimated that 4,959 current ERAs advise 23,476 private funds, and estimate an expected 372 new ERAs will advise 743 reported private funds per year. Therefore, we estimate that there are 74,444 currently reported private funds reported by current private fund advisers (50,968 + 23,476), and there will be annually 1,150 new private funds reported by expected private fund advisers (407 + 743). The total number of current and expected new RIAs that report or are expected to report private funds is 5,278 (5,142 current RIAs that report private funds + 136 expected RIAs that would report private funds).

[28] *See* 2020 Form ADV PRA Renewal (this per adviser burden was not affected by subsequent amendments to Form ADV).

[29] We previously estimated that an adviser without the internal capacity to value specific illiquid assets would obtain pricing or valuation services at an estimated cost of $37,625 each on an annual basis. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. IA–3221 (June 22, 2011) [76 FR 42950 (July 19, 2011)]. However, because we estimated that external cost in 2011, we are proposing to use an inflation-adjusted cost of $46,865.74, based on the CPI calculator published by the Bureau of Labor Statistics at *https://www.bls.gov/data/inflation_calculator.htm.* As with previously approved PRA methodologies, we continue to estimate that 6% of RIAs have at least one private fund client that may not be audited. See 2020 Form ADV PRA Renewal.

[30] Per above, for currently reported private funds, we are proposing to not apply the currently approved burden for initially reporting private funds on Form ADV, because we believe that current private fund advisers have already incurred this burden. Therefore, we calculated the burden on current private fund advisers for only the proposed incremental new additional burden attributable to private fund reporting of 0.2 hours per private fund × 74,444 currently reported private funds = 14,889 aggregate hours for current private fund advisers. We expect advisers to incur the initial burden in the first year and are therefore not amortizing this burden. For the estimated 1,150 new private funds annually of expected private fund advisers, we calculate the initial burden of both the proposed incremental new additional burden attributable to private fund reporting of 0.2 hours per private fund and the 1 hour initial burden per private fund. Therefore, 1.2 hours per expected new private fund × 1,150 expected new private funds = 1,380 aggregate hours for expected new private funds. For these expected new private funds, we are not proposing to amortize this burden, because we expect new private fund advisers to incur this burden with respect to new private funds each year. 14,889 hours + 1,380 hours = 16,269 aggregate hours for private fund advisers.

[31] As with previously approved PRA methodologies, we continue to estimate that 6% of registered advisers have at least one private fund client that may not be audited, therefore we estimate that the total number of audits for current and expected RIAs is 6% × 5,278 current and expected RIAs reporting private funds or expected to report private funds = 316.68 audits. We therefore estimate that approximately 317 registered advisers incur costs of $46,865.74 each on an annual basis (see note 29 describing the cost per audit), for an aggregate annual total cost of $14,856,439.58.

[32] 433,004 currently approved burden hours/18,179 advisers (current and expected annually) = 23.82 hours per adviser. *See* 2021 Form ADV PRA.

[33] $14,125,083 currently approved aggregate external cost/18,179 advisers (current and expected annually) = $777 blended average external cost per adviser.

[34] 336,389.45 aggregate annual hours for current and expected new advisers (see infra note 38)/(15,160 current RIAs + 552 expected RIAs + 5,481 current ERAs +346 expected ERAs*) = 15.62 blended average hours per adviser. * The parenthetical totals 21,539 current and expected advisers.

[35] $35,949,257.66 aggregate external cost for current and expected new advisers (see infra note 39)/(21,539 advisers current and expected annually) = $1,669.03 blended average hours per adviser.

[36] *See* 2021 Form ADV PRA.

[37] *See* 2021 Form ADV PRA.

[38] 32,117.44 hours (internal initial burden for Parts 1 and 2) + 191,686.40 hours (internal annual amendment burden for Parts 1 and 2) + 70,646.67 hours (internal initial burden for Part 3) + 15,646.74 hours (internal annual amendment burden for Part 3) + 1,245.60 hours (internal initial burden for ERAs) + 8,777.60 hours (internal annual amendment burden for ERAs)+ 16,269 hours (internal initial burden for private funds) = 336,389.45 aggregate annual hours for current and expected new advisers.

[39] $11,162,546.00 (annual external cost burden for Parts 1 and 2) + $9,930,272.08 (annual external cost burden for Part 3) + $14,856,439.58 (annual external cost burden for private funds) = $35,949,257.66.

G. Request for Comments

We request comment on whether our estimates for burden hours and any external costs as described above are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

In addition to these general requests for comment, we also request comment specifically on the following issues:

- Our analysis relies upon certain assumptions, such as 13,944 advisers will enter into written agreements as required by the rule, 959 qualified custodians will be counterparties to those written agreements, and 55,776 written agreements will initially be executed. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that a new written agreement will require approximately one hour per adviser and per qualified custodian. Our analysis also assumes that subsequent annual changes to the written agreement require an aggregate of 10 minutes of adviser and qualified custodian time per agreement. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that 1,842 of the advisers to the written agreements would be subject to the surprise examination requirement and we estimate that qualified custodians would be required to provide information to an independent public accountant once annually for each adviser. Further, our analysis relies on the assumption that it would take qualified custodians approximately 5 hours to provide the required information. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that 7,018 advisers to the written agreements would comply with the proposed rule's audit exception and that qualified custodians would be required to provide information to an independent public accountant 1.05 times annually for these advisers. Also, our analysis relies on the assumption that a qualified custodian will take .5 hours to provide information to the independent public accountant. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that the Commission would examine approximately 2,092 of the advisers required to enter into a written agreement under the rule and assume that the Commission will issue approximately 8,368 requests to qualified custodians under the rule. Additionally, we assume qualified custodians would take 1.5 hours to respond to the information requested by an independent public accountant. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that it would take qualified custodians 15 hours each to update distribution lists to add advisers to the distribution of quarterly statements and one hour per each qualified custodian to make modifications and send quarterly account statements annually. Do commenters agree with this assumption? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that, on average, an internal control report for a qualified custodian costs approximately $750,000. Further, our analysis relies on the assumption that 95% of custodians currently obtain internal control reports. As a result, our analysis assumes an annual external cost burden of obtaining internal control reports to be $35,962,500. Do commenters agree with this assumption? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumptions that it would take 15 minutes for an adviser to obtain the proposed reasonable assurances requirements from a qualified custodian and one hour to update any written agreement, if necessary, to reflect the reasonable assurances. Further, we estimate that the exchange is most likely to occur in the context of the negotiation and execution of the written agreement. Additionally, our analysis relies on the assumption that it will take

approximately .25 hours to update the reasonable assurances annually. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?

- Our analysis relies on the assumption that each of the 1,842 advisers expected to undergo a surprise examination under the proposed rule will spend 0.25 hour to enter into a written agreement with the independent public accountant engaged to conduct the surprise examination. Our analysis also relies on the assumption that these advisers can be categorized into three groups for purposes of the calculation of the burden. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that 381 advisers subject to the surprise examination requirement have custody because they serve as qualified custodians for their clients, or they have a related person that serves as qualified custodian for clients. Additionally, our analysis relies on the assumption that these advisers are subject to an annual surprise examination with respect to 100 percent of their clients (or 9,006 clients per adviser) based on the assumption that all of their clients maintain custodial accounts with the adviser or its related person. Our analysis assumes that each adviser will spend an average of 0.02 hours for each client to create a client contact list for the independent public accountant to conduct the asset verification. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that 834 advisers subject to the surprise examination requirement have custody because they have broad authority to access client assets held at an independent qualified custodian, such as through a power of attorney or acting as a trustee for a client's trust. Also, our analysis assumes that these advisers will be subject to an annual surprise examination with respect to 5 percent of their clients (or 450 clients per adviser) who maintain these types of arrangements with the adviser. In addition, our analysis assumes that each adviser will spend an average of 0.02 hours for each client that is subject to these arrangements to create a client contact list for the independent public accountant. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that 626 advisers manage private funds and undergo surprise examinations. For these advisers, our analysis relies on the assumption that each adviser managing private funds has an average of 6 pooled investment vehicle clients with an average of 14 investors. Our analysis relies on the assumption that these advisers will spend 1 hour for the pool and 0.02 hours for each investor in the pool to create a contact list for the independent public accountant. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that 4,961 advisers currently have custody of privately offered securities and physical assets that cannot be maintained with a qualified custodian. Our analysis further relies on the assumption that there will be approximately 8,000 purchases, sales, or other transfers of beneficial ownership of assets subject to the exception in proposed rule 223–1(b)(2). Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that it would take each adviser 1.25 hours, initially, to prepare the written agreement with an accountant for verification of assets under proposed rule 223–1(b)(2)(iii). Additionally, our analysis relies on the assumption that these agreements will change minimally from year to year and that advisers will spend approximately .5 hours annually amending these agreements or entering into new agreements. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that the adviser's required notice to an accountant under proposed rule 223–1(b)(2)(iv) would likely be provided by the adviser in connection with the closing of a transaction, and would take advisers approximately one minute to deliver to the accountant. Do commenters agree with this assumption? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that accountant verifications of transfers of beneficial ownership will have an annual cost burden of $19,680,000 to advisers. Do commenters agree with this assumption? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that the additional cost of asset verification for all assets during a surprise examination or audit under the audit provision aggregates to $322,956,000 annually. Do commenters agree with this assumption? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that distributions of audited financial statements to investors in the client entity will take advisers approximately 1 minute per investor. Our analysis relies on the assumption that there are 4,961 advisers to audited pooled investment vehicles, with an upward adjustment to 7,018 to account for our expectation that an increasing number of advisers will obtain audits of client entities. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that each of the 7,018 advisers that rely on the audit provision will spend 1.25 hours to add the provisions required under proposed rule 223–1(b)(4)(v) to the written agreement with the independent public accountant. Our analysis also relies on the assumption that each adviser will spend 0.92 hours on an annual basis to reassess these written agreements and execute new agreements as an adviser adds entity clients. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis also relies on the assumption that of the 13,944 advisers with custody of client assets, we estimate that approximately 20%, or approximately 2,789 advisers, will have clients that issue SLOAs. Further, our analysis assumes that many such advisers already retain copies of client SLOAs in their books and records and we assume, therefore, that this collection of information will result in an increased burden of only .25 hours for each adviser seeking to rely on the proposed SLOA exception. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?
- Our analysis relies on the assumption that 12,570 advisers (80% of the total of 15,712 combined current and expected advisers that are required to complete Parts 1 and 2 of the Form ADV) would incur an additional burden of 5 hour under the proposed amendments to Form ADV Part 1A, and 3,142 advisers (20% of 15,712 current and expected advisers that are required to complete Parts 1 and 2 of Form ADV) would incur a burden of 0 hours. Do commenters agree with these assumptions? If not, why not, and what data would commenters propose?

The agency is submitting the proposed collections of information to OMB for approval. Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct

them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549 1090, with reference to File S7–04–23. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release; therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File S7–04–23, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

V. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with section 3(a) of the Regulatory Flexibility Act (''RFA'').[676] It relates to: (i) new rule 223–1 under the Advisers Act; (ii) proposed rule 204(d)–1; (iii) proposed amendments to rule 204–2; and (iv) proposed amendments to Form ADV Part 1A.

A. Reason for and Objectives of the Proposed Action

1. Proposed Rule 223–1

We are proposing amendments to the custody rule, which we adopted in 1962 and amended in 2003 and 2009. The current custody rule generally requires an adviser to:

- Maintain client funds and securities with a qualified custodian (broker-dealers, banks or savings associations, futures commission merchants, and certain foreign financial institutions);
- Have a reasonable basis upon due inquiry for believing qualified custodians send account statements directly to advisory clients;
- Undergo an annual surprise examination by an independent public accountant to verify that a sampling of client funds and securities exists or have the audited financial statements of a pooled investment vehicle prepared in accordance with generally accepted accounting principles and distributed to investors in the pool; and
- Obtain a report of the internal controls of related person qualified custodians relating to custody from an independent public accountant.

The proposed changes to the custody rule are designed to recognize the expansion in products and services investment advisers offer to their clients, evolution in the types of investments and ways of evidencing their ownership, and developments in the market for custodial services. We have accounted for these advancements by clarifying the rule's scope and implementing more impactful and tailored protections. Specifically, the rule would subject investment advisers to requirements pertaining to the use of a qualified custodian, delivery of notices to clients, segregation of client assets, and independent public accountant assessments. The rule would also subject investment advisers to requirements relating to the safeguarding of client assets that are not able to be maintained by a qualified custodian. Importantly, the proposal maintains the core purpose of protecting client assets from loss, misuse, theft, misappropriation, and the insolvency or financial reverses of the adviser. We believe that modernized rules would help advisers better recognize and protect against vulnerabilities to advisory client assets and would improve our oversight and risk-assessment abilities. The reasons for, and objectives of, the proposed amendments are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections III and IV, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section IV.

2. Proposed Rule 204–2

We also are proposing amendments to rule 204–2 to correspond to proposed rule 223–1. Specifically, we are proposing to require investment advisers to maintain the following records for client accounts: (1) client account identification, (2) custodian identification, (3) the basis for the adviser having custody of client assets in the account, (4) any account statements received or sent by the adviser, (5) transaction and position information, and (6) any standing letters of authorization and records relating thereto. The proposed amendments also would require an adviser to maintain copies of all written notices to clients required under proposed rule 223–1 and any responses thereto, and copies of documents relating to independent account engagements.

Although the current rule requires certain recordkeeping relating to investment advisers' custody rule compliance, the proposal would align the recordkeeping requirements with proposed rule 223–1. We are proposing to amend the current rule to require advisers to retain documentation that would allow the Commission examination staff to verify advisers' compliance with proposed rule 223–1, particularly in the categories of client communications, client accounts, and independent public account engagements, and reliance on the proposed rule's exceptions. The proposed recordkeeping rules are designed to work in concert with proposed rule 223–1 so that a complete custodial record with respect to client assets is maintained and preserved. This would help facilitate the Commission's inspection and enforcement capabilities, including assessing compliance with rules, and therefore, it would provide important investor protections.

3. Proposed Amendments to Form ADV

We are also proposing to amend Item 9 of Part 1A, Schedule D, and the Instructions and Glossary of Form ADV to improve information available to us and to the general public about advisers' practices in safeguarding client assets. We are proposing amendments to Form ADV to align reporting obligations with the proposed changes to the custody rule and to help advisers identify when they may have custody of client assets, to provide the Commission with information related to advisers' practices to safeguard client assets, and to provide the Commission with additional data to improve our ability to identify compliance risks. More accurate and comprehensive information would inform the Commission's examination initiatives and would allow the Commission and its staff to better assess risks specific advisers pose to investors.

The proposed revisions would require an adviser to report the amount and number of clients falling into each category of custody (*i.e.,* direct or indirect) and to require advisers to report similar information about client assets over which they have custody resulting from (1) having the ability to deduct advisory fees; (2) having discretionary trading authority; (3) serving as a general partner, managing member, trustee (or equivalent) for clients that are private funds; (4) serving as a general partner, managing member, trustee (or equivalent) for clients that are not private funds; (5) having a general power of attorney over client assets or check-writing authority; (6)

[676] 5 U.S.C. 603(a).

having a standing letter of authorization; (7) having physical possession of client assets; (8) acting as a qualified custodian; (9) a related person with custody that is operationally independent; and (10) any other reason.[677] Amendments to the form would require an adviser to indicate whether it is relying on any of the exceptions from the safeguarding rule and, if so, to indicate on which exception(s) the adviser is relying. We are also proposing to require advisers to report whether client assets for which the adviser triggers the rule are maintained at a qualified custodian and the number of clients and approximate amount of assets not maintained with a qualified custodian. Advisers would also be required to report certain identifying information about the qualified custodians and independent public accountants. The reasons for and objectives of, the proposed amendments to Form ADV are discussed in more detail in section II.I above. The burdens of these requirements on small advisers are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section IV.

B. Legal Basis

The Commission is proposing new rule 223–1 and to redesignate rule 206(4)–2 pursuant to the authority set forth in sections 206(4), 211(a), and 223 of the Advisers Act [15 U.S.C. 80b–6(4), 80b–11(a), and 80b–23]; to proposed rule 204(d)–1 pursuant to authority set forth in sections 204, 211(a), and 223 of the Advisers Act [15 U.S.C. 80b–4 and 80b–11(a)]; to amend rule 204–2 pursuant to the authority set forth in sections 204, 211, and 223 of the Advisers Act [15 U.S.C. 80b–4, 80b–11, 80b–23]; and to amend Form ADV pursuant to the authority set forth in sections 203(c)(1), 204, 211(a), and 223 of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, 80b–11(a), and 80b–23].

C. Small Entities Subject to the Rule and Rule Amendments

In developing these proposals, we have considered their potential impact on small entities that would be subject to the proposed amendments. The proposed amendments would affect many, but not all, investment advisers registered with the Commission, including some small entities.

Under Commission rules, for the purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[678] Our proposed new rules and amendments would not affect most investment advisers that are small entities (''small advisers'') because they are generally registered with one or more state securities authorities and not with the Commission. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by state regulators. Based on IARD data, we estimate that as of June 30, 2022, approximately 522 SEC-registered advisers are small entities under the RFA.[679]

1. Small Entities Subject to Amendments to the Custody Rule

As discussed above in section III (the Economic Analysis), the Commission estimates that based on IARD data as of June 30, 2022, approximately 13,944 investment advisers would be subject to the new rule 223–1 under the Advisers Act, the related proposed amendments to rule 204–2 under the Advisers Act, and the related proposed amendments to Form ADV.[680]

Of the approximately 522 SEC-registered advisers that are small entities under the RFA, 321 would be subject to the new rule 223–1, the corresponding amendments to rule 204–2, and the amendments to Form ADV. This is because, as discussed above in the PRA, we estimate that all small entities that have custody would be subject to the requirements of the proposed rule.[681]

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

1. Proposed Rule 223–1

Proposed rule 223–1 would impose certain reporting and compliance requirements on certain investment advisers, including those that are small entities. All registered investment advisers that have custody of client assets, which we estimate to be 13,944 advisers, would be required to comply with the proposed safeguarding rule's segregation, qualified custodian protection, notice to client, and independent verification requirements. Although all of these advisers would also be subject to the qualified custodian requirements, some would satisfy these requirements by entering into contracts with qualified custodians, while others would satisfy them by satisfying conditions of a limited exception for investments in privately offered securities and physical assets. The proposed requirements and rule amendments, including compliance, reporting, and recordkeeping requirements, are summarized in this IRFA (section V.A., above). All of these proposed requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections III and IV (the Economic Analysis and Paperwork Reduction Act Analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section IV.

As discussed above, there are approximately 522 small advisers currently registered with us, and we estimate that 480 of those small advisers registered with us would be subject to amendments to the safeguarding rule (92% of all registered small advisers).[682] As discussed above in our Paperwork Reduction Act Analysis in section IV above, the proposed amendments to rule 223–1 under the Advisers Act would create a new annual burden of approximately 28.4 hours per adviser, or 9,116 hours in aggregate for small advisers.[683] We therefore expect the annual monetized aggregate cost to

[677] Proposed Form ADV, Part 1A, Item 9.A.(2). Advisers are currently required to report information with respect to funds and securities over which their related persons have custody, including the dollar amount and number of clients whose funds or securities are in the adviser's custody and whether any related person has custody of any clients' cash or bank accounts or securities and the relevant dollar amount and number of clients. *See* Form ADV, Part 1A Item 9.A.(2) through, Item 9.B. Based on its responses, an adviser is also required to report additional custody-related information in Schedule D of Form ADV, Part 1A.

[678] Advisers Act rule 0–7(a).

[679] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[680] *See supra* note 553.

[681] *See* PRA discussion *supra* section IV.

[682] *See supr*a note 587and accompanying text.

[683] 396,041 hours/13,944 advisers subject to the proposed rule = 28.4 hours per adviser. 28.4 hours × 480 small advisers = 13,632 hours.

small advisers associated with our proposed amendments to the safeguarding rule would be $5,371,008.[684]

2. Proposed Amendments to Rule 204–2

Proposed amendments to rule 204–2 would require investment advisers to maintain the following records for client accounts: (1) client account identification, (2) custodian identification, (3) the basis for the adviser having custody of client assets in the account, (4) any account statements received or sent by the adviser, (5) transaction and position information, and (6) any standing letters of authorization and records relating thereto. The proposed amendments also would require an adviser to maintain copies of all written notices to clients required under proposed rule 223–1 and any responses thereto, and copies of documents relating to independent account engagements. Each of these records would correspond to proposed rule 223–1, and also would be required to be maintained in the same manner, and for the same period of time, as other books and records required to be maintained under rule 204–2(a).

As discussed above, there are approximately 522 small advisers currently registered with us. We estimate that 92% percent of all advisers registered with us that have investment discretion over client assets (and thus deemed custody of such assets) [685] would be subject to proposed rule 223–1 and corresponding amendments to the books and records rule. As discussed above in our Paperwork Reduction Act Analysis in section IV.E above, the proposed amendments to rule 204–2 under the Advisers Act would increase the annual burden by approximately 21 hours per affected adviser, or 10,080 hours in aggregate for small advisers with custody of client assets.[686] We therefore believe the annual monetized aggregate cost to small advisers associated with our proposed amendments would be $3,971,520.[687]

3. Proposed Amendments to Form ADV

Proposed amendments to Form ADV would impose certain reporting and compliance requirements on certain investment advisers, including those that are small entities, requiring them to provide information about their practices in safeguarding client assets. The proposed requirements and rule amendments, including recordkeeping requirements, are summarized above in this IRFA (section V.A). All of these proposed requirements are also discussed in detail, above, in section II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections III and IV (the Economic Analysis and Paperwork Reduction Act Analysis) and below. The professional skills required to meet these specific burdens are also discussed in section IV.

Our Economic Analysis (section III above) discusses these costs and burdens for respondents, which include small advisers. As discussed above in our Paperwork Reduction Act Analysis in section IV.F above, the proposed amendments to Form ADV would increase the annual burden for advisers (other than exempt reporting advisers, who would not be required to respond to the new Form ADV questions we are proposing) by approximately 1.4 hours per adviser, or 730.8 hours in aggregate for small advisers (other than exempt reporting advisers).[688] We therefore expect the annual monetized aggregate cost to small advisers (other than exempt reporting advisers, for whom there would be no additional cost) associated with our proposed amendments would be $232,394.40.[689]

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed rule amendments.

F. Significant Alternatives

1. Proposed New Rule 223–1 and Amendments to Rule 204–2 and Form ADV

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. We considered the following alternatives for small entities in relation to proposed new rule 223–1 and the corresponding proposed amendments to rule 204–2 under the Advisers Act and to Form ADV: (i) differing compliance or reporting requirements that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposals, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, the Commission believes that establishing different compliance or reporting requirements for small advisers, or exempting small advisers from the proposed rule, or any part thereof, would be inappropriate under these circumstances. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small firms, it would be inconsistent with the purposes of the Advisers Act to specify differences for small entities under proposed rule 223–1 and corresponding changes to rule 204–2 and Form ADV. As discussed above, we believe that the proposed safeguarding rule would result in multiple benefits to clients. For example, segregation requirements and the imposition of certain minimum standard requirements for assets maintained at a qualified custodian would provide investors with additional safeguards to protect their assets from the financial reverses, including insolvency, of an investment adviser and to prevent client assets from being lost, misused, stolen, or misappropriated. We believe that these benefits should apply to clients of smaller firms as well as larger firms. In addition, as discussed above, our staff would use the corresponding information that advisers would report on the proposed amended Form ADV for risk-assessment and to help prepare for examinations of investment advisers. Establishing different conditions for large and small advisers that have custody of client assets would negate these benefits. Though we are not exempting small advisers from portions of the proposals, we believe that the exception from the surprise examination requirement for discretionary authority for client assets that settle exclusively on a DVP basis will mitigate the creation of new burdens for many advisers, particularly smaller advisers. We also have requested comment on whether we should provide different compliance dates for differing types of advisers including smaller advisers.

Regarding the second alternative, we believe the current proposal is clear and that further clarification, consolidation, or simplification of the compliance requirements is not necessary. As

[684] 13,632 aggregate small adviser hours × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)) = $5,371,008.

[685] 522 small advisers × 92% = 480 small advisers with custody.

[686] 21 hours × 480 small advisers with custody = 10,080 hours.

[687] 10,080 aggregate small adviser hours × $394 (blended rate for a compliance manager ($361) and a compliance attorney ($426)) = $3,971,520.

[688] 1.4 hours × 522 small advisers = 730.8 hours.

[689] 730.8 hours × $318 = $232,394.40. *See supra* Table 10 for a discussion of who we believe would perform this function, and the applicable blended rate.

discussed above: the proposed rule would provide a requirement to segregate client assets to prevent them from potential misuse or misappropriation; would require that advisers maintain a written agreement with or obtain reasonable assurances from qualified custodians concerning certain minimal safeguarding requirements that we believe are critical to providing important protections for advisory client assets; and would provide certain limited exceptions from requirements to maintain assets with a qualified custodian or obtain an independent verification of assets. These provisions would address a number of safeguarding risks for assets maintained at a qualified custodian that the current rule does not address while extending the protections of the rule from ''funds and securities'' to ''assets'' to account for new and evolving financial products that may be maintained in client accounts. The proposed provisions would strengthen investment advisers' safeguarding practices, which we believe currently has gaps.

Further, we believe our proposal would allow the Commission examination staff to verify all advisers' compliance with the proposed amendments to rule 204–2, particularly in the categories of client communications, client accounts, and independent public account engagements, and reliance on the exceptions to proposed new rule 223–1. The proposed recordkeeping rules are designed to work in concert with proposed new rule 223–1 so that a complete custodial record with respect to client assets is maintained and preserved. This would help facilitate the Commission's inspection and enforcement capabilities, including assessing compliance with rules, and therefore, it would provide important investor protections.

Regarding the third alternative, we determined to use a combination of performance and design standards in the current proposal. The general requirement to maintain assets with a qualified custodian would apply to all advisers to establish certain minimum standard requirements under the proposed safeguarding rule, subject to narrowly tailored exemptions and exceptions from certain requirements (*e.g.,* the surprise exam) if certain conditions are met. By design, these exemptions and exceptions address specific circumstances to ensure safekeeping of client assets, but also to provide relief from certain requirements in circumstances where an adviser's ability to misuse or misappropriate client assets are limited. The corresponding changes to rule 204–2 and Form ADV also are narrowly tailored to address proposed new rule 223–1.

G. Solicitation of Comments

We encourage written comments on the matters discussed in this IRFA. We solicit comment on the number of small entities subject to proposed new rule 223–1 and related amendments to rules 206(4)–2 and 204–2, and Form ADV, as well as the potential impacts discussed in this analysis; and whether the proposal could have an effect on small entities that has not been considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

VI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [690] we must advise OMB whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment or innovation. We request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Statutory Authority

The Commission is proposing new rule 223–1 by a redesignation of rule 206(4)–2 of the Advisers Act under the authority set forth in sections 206(4), 211(a), and 223 of the Advisers Act [15 U.S.C. 80b–6(4), 80b–11(a), and 80b–23]. The Commission is proposing corresponding amendments to rule 204–2 under the Advisers Act under the authority set forth in 206(4), 211(a), and 223 of the Advisers Act [15 U.S.C. 80b–6(4), 80b–11(a), and 80b–23]. The Commission is proposing to amend Form ADV pursuant to the authority set forth in sections 203(c)(1), 204, 211(a), and 223 of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, 80b–11(a), and 80b–23].

[690] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

Text of Proposed Rules and Rule and Form Amendments

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for part 275 is revised to read, in part, as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.204–2 is also issued under 15 U.S.C. 80b–6.

* * * * *

Section 275.223–1 is also issued under 15 U.S.C. 80b–18b.

■ 2. Amend § 275.204–2 by:
■ a. Removing and reserving paragraphs (a)(8) and (a)(17)(iii).
■ b. Revising paragraph (b).

The revisions read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

* * * * *

(b) If an investment adviser subject to paragraph (a) of this section is subject to § 275.223–1 (Rule 223–1) of this chapter, the investment adviser shall make and keep true, accurate, and current the following books and records:

(1) Client *communications.* A copy of all written client notifications required under § 275.223–1(a)(2) (Rule 223–1(a)(2)), and any responses thereto.

(2) Client *accounts.* For each client account:

(i) Account *identification.* A record of the advisory account name, client contact information (including name, mailing address, phone number, email address), and advisory account number, client type (as identified in Item 5.D of Form ADV), or other identifying information used by the investment adviser to identify the account, and copies of all account opening records. The record must show the advisory account inception date, whether the investment adviser has discretionary authority (as defined by § 275.223–1(d)(4) (Rule 223–1(d)(4)) with respect to any client assets in the account, whether the investment adviser has

authority to deduct advisory fees from the account, and, if applicable, the termination date of the account, asset disposition upon termination, and the reason for the termination.

(ii) Custodian *identification.* A record that identifies and matches, for each client of which the adviser has custody of client assets, the account name and account number, or any other identifying information, from any person or entity, including any qualified custodian, that maintains client assets to the corresponding advisory account record for each client required by paragraph (b)(2)(i) of this section. To the extent applicable, the record must contain a copy of the required written agreement with each qualified custodian under § 275.223–1(a)(1)(i) (Rule 223–1(a)(1)(i)), including any amendments thereto, and copies of all records received from the qualified custodian thereunder relating to client assets. The record must also reflect the basis for the reasonable assurances that the investment adviser obtains from the qualified custodian under § 275.223–1(a)(1)(ii) (Rule 223–1(a)(1)(ii)). To the extent applicable, the record must contain a copy of the investment adviser's required written reasonable determination that ownership of certain specified client assets cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control (as defined by § 275.223–1(d)(8) (Rule 223–1(d)(8)) of such assets, as required under § 275.223–1(b)(2) (Rule 223–1(b)(2)).

(iii) *Basis for being subject to Rule 223–1.* A memorandum or other record that indicates the basis of the investment adviser's custody (as defined in § 275.223–1(d)(3) (Rule 223–1(d)(3)) of the client's assets (as defined by § 275.223–1(d)(1) (Rule 223–1(d)(1)), including whether a related person (as defined by § 275.223–1(d)(11) (Rule 223–1(d)(11)) holds the investment adviser's client assets (or has any authority to obtain possession of them) in connection with the investment adviser's advisory services.

(iv) *Account statements.* Copies of each account statement delivered by the qualified custodian to the client and to the investment adviser pursuant to § 275.223–1(a)(1)(i)(B) (Rule 223–1(a)(1)(i)(B)), copies of any account statement delivered by the investment adviser to the client, including copies of any account statement delivered by the investment adviser to the client containing the required notification under § 275.223–1(a)(2) (Rule 223–1(a)(2)). If the client is a pooled investment vehicle, the record must also reflect the delivery of account statements, notices, or financial statements (as applicable) to all investors in such client pursuant to § 275.223–1(c) (Rule 223–1(c)).

(v) Transaction *and position information.*

(A) A detailed record of all trade and transaction activity for each such client account that includes the date and price or amount of all purchases, sales, receipts, deliveries (including one-way delivery of assets, and free receipt and delivery of securities and certificate numbers, as applicable), deposits, transfers, withdrawals, cash flows, corporate action activity, maturities, expirations, expenses, income posted to the account, and all other debits and credits to or from the account.

(B) Copies of confirmations of all trades effected by or for the account of each client that show the date and price of each trade, and any instruction received by the investment adviser concerning transacting in the client's assets (as defined by Rule 223–1(d)(1)).

(C) A record for each asset (as defined by Rule 223–1(d)(1)) in which each client has a position, which record shall show the name of such client having any interest in such asset, the amount or interest of such client, and the location of such asset.

(D) A memorandum describing the basis upon which the adviser has determined that the presumption that any related person is not operationally independent under § 275.223–1(d)(7) has been overcome.

(vi) *Standing letters of authorization.* Copies of, and records relating to, any standing letter of authorization (as defined in § 275.223–1(d)(12) (Rule 223–1(d)(12)) issued by a client to the investment adviser.

(2) *Independent public accountant.*

(i) Copies of all audited financial statements prepared pursuant to § 275.223–1(b)(4) (Rule 223–1(b)(4)).

(ii) A copy of any internal control report:

(A) Obtained by a qualified custodian and received by an investment adviser pursuant to § 275.223–1(a)(1)(i)(C) (Rule 223–1(a)(1)(i)(C)); and

(B) Obtained by the investment adviser if the investment adviser is also the client's qualified custodian.

(iii) A copy of any written agreement between the independent public accountant and the investment adviser or its client, as applicable, required under Rule 223–1.

* * * * *

§ 275.206(4)–2 [Removed]

■ 3. Section 275.206(4)–2 is removed.

■ 4. Section 275.223–1 is added to read as follows:

§ 275.223–1 Safeguarding client assets.

(a) Safekeeping *required.* If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), you shall take the following steps to safeguard client assets of which you have custody:

(1) Qualified *custodian.*

(i) *Written agreement.* A qualified custodian must maintain possession or control of your client's assets pursuant to a written agreement between you and the qualified custodian (or between you and the client if you are also the qualified custodian) that must provide the following provisions, which you must reasonably believe have been implemented:

(A) The qualified custodian will promptly, upon request, provide records relating to your clients' assets held in the account at the qualified custodian to the Commission or to an independent public accountant engaged for purposes of complying with paragraph (a)(4), (b)(1), or (b)(4) of this section;

(B) The qualified custodian will send account statements, at least quarterly, to the client, or its independent representative, and to you, identifying the amount of each client asset in the account at the end of the period and setting forth all transactions in the account during that period, including investment advisory fees. Such account statements shall not identify assets for which the qualified custodian lacks possession or control, unless requested by the client and the qualified custodian clearly identifies any such assets that appear on the account statement;

(C) At least annually, the qualified custodian will obtain, and provide to you a written internal control report that includes an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, are suitably designed, and are operating effectively to meet control objectives relating to custodial services (including the safeguarding of the client assets held by that qualified custodian during the year), and

(1) If you are the qualified custodian, or if the qualified custodian is a related person, the independent public accountant that prepares the internal control report must verify that client assets are reconciled to a custodian other than you or your related person and be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each

calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules;

(D) Specifies your agreed-upon level of authority to effect transactions in the account as well as any applicable terms or limitations, and permits you and the client to reduce that authority; and

(ii) *Reasonable assurances obtained by adviser.* You must obtain reasonable assurances in writing from the qualified custodian (or, if you are also the qualified custodian, the written agreement required by paragraph (a)(1)(i) of this section must provide) that the custodian will comply with the following requirements, and you must maintain an ongoing reasonable belief that the custodian is complying with these requirements:

(A) The qualified custodian will exercise due care in accordance with reasonable commercial standards in discharging its duty as custodian and will implement appropriate measures to safeguard client assets from theft, misuse, misappropriation, or other similar type of loss;

(B) The qualified custodian will indemnify the client (and will have insurance arrangements in place that will adequately protect the client) against the risk of loss of the client's assets maintained with the qualified custodian in the event of the qualified custodian's own negligence, recklessness, or willful misconduct;

(C) The existence of any sub-custodial, securities depository, or other similar arrangements with regard to the client's assets will not excuse any of the qualified custodian's obligations to the client;

(D) The qualified custodian will clearly identify the client's assets as such, hold them in a custodial account, and will segregate all client assets from the qualified custodian's proprietary assets and liabilities; and

(E) The qualified custodian will not subject client assets to any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors, except to the extent agreed to or authorized in writing by the client.

(2) *Notice to clients.* If you open an account with a qualified custodian on your client's behalf, you must promptly notify the client, or its independent representative, in writing of the qualified custodian's name, address, and account number, and the manner in which the client's assets are maintained, when the account is opened and following any changes to this information. If you send account statements to a client to which you are required to provide this notice, include in the notification provided to that client and in any subsequent account statement you send that client a statement urging the client to compare the account statements from the custodian with those from the adviser.

(3) *Segregation of client assets.* The client's assets must:

(i) Be titled or registered in the client's name or otherwise held for the benefit of that client;

(ii) Not be commingled with your assets or your related persons' assets; and

(iii) Not be subject to any right, charge, security interest, lien, or claim of any kind in favor of you, your related persons, or your creditors, except to the extent agreed to or authorized in writing by the client.

(4) *Independent verification.* The client assets of which you have custody are verified by actual examination at least once during each calendar year by an independent public accountant, provided that, if you, or a related person in connection with advisory services you provide to clients, maintain client assets pursuant to this section as a qualified custodian, the independent public accountant must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. The independent verification must be performed pursuant to a written agreement between you and the accountant, at a time that is chosen by the accountant without prior notice or announcement to you and that is irregular from year to year. The written agreement must provide for the first examination to occur within six months of becoming subject to this paragraph, except that, if you maintain client assets pursuant to this section as a qualified custodian, the agreement must provide for the first examination to occur no later than six months after obtaining your internal control report. The written agreement, which you must reasonably believe has been implemented, must require the accountant to:

(i) File a certificate on Form ADV–E (17 CFR 279.8) with the Commission within 120 days of the time chosen by the accountant in paragraph (a)(4) of this section, stating that it has examined the assets and describing the nature and extent of the examination;

(ii) Upon finding any material discrepancies during the course of the examination, notify the Commission within one business day of the finding, by electronic means directed to the Division of Examinations; and

(iii) Upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, file within four business days Form ADV–E accompanied by a statement that includes:

(A) The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant; and

(B) An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

(b) *Exceptions.*

(1) *Shares of mutual funds.* With respect to shares of an open-end company as defined in section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–5(a)(1)) (''mutual fund''), you may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with paragraph (a) of this section.

(2) *Certain assets unable to be maintained with a qualified custodian.* You are not required to comply with paragraph (a)(1) of this section with respect to client assets that are privately offered securities or physical assets, provided:

(i) You reasonably determine, and document in writing, that ownership cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control of such assets;

(ii) You reasonably safeguard the assets from loss, theft, misuse, misappropriation, or your financial reverses, including your insolvency;

(iii) An independent public accountant, pursuant to a written agreement between you and the accountant,

(A) verifies any purchase, sale, or other transfer of beneficial ownership of such assets, promptly, upon receiving the notice required by paragraph (b)(2)(iv) of this section; and

(B) notifies the Commission by electronic means directed to the Division of Examinations within one business day upon finding any material discrepancies during the course of performing its procedures;

(iv) You notify the independent public accountant engaged to perform the verification required by paragraph (b)(2)(iii) of this section of any purchase, sale, or other transfer of beneficial ownership of such assets within one business day; and

(v) The existence and ownership of each of the client's privately offered securities or physical assets that are not maintained with a qualified custodian are verified during the annual independent verification conducted pursuant to paragraph (a)(4) of this section or as part of a financial statement audit performed pursuant to paragraph (b)(4) of this section.

(3) *Fee deduction.* Notwithstanding paragraph (a)(4) of this section, you are not required to obtain an independent verification of client assets maintained by a qualified custodian if:

(i) You have custody of the client assets solely as a consequence of your authority to make withdrawals from client accounts to pay your advisory fee;

(ii) If the qualified custodian is a related person, you can rely on paragraph (b)(6) of this section.

(4) *Entities subject to annual audit.* You are not required to comply with paragraphs (a)(1)(i)(B) and (a)(2) of this section and you shall be deemed to have complied with paragraphs (a)(4) of this section with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle or any other entity) if it undergoes a financial statement audit as follows at least annually and upon liquidation:

(i) The audit is performed by an independent public accountant that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules;

(ii) The audit meets the definition in 17 CFR 210.1–02(d) (Rule 1–02(d) of Regulation S–X), the professional engagement period of which shall begin and end as indicated in Regulation S–X Rule 2–01(f)(5); and

(iii) Audited financial statements are prepared in accordance with U.S. Generally Accepted Accounting Principles (''U.S. GAAP'') or, in the case of financial statements of entities organized under non-U.S. law or that have a general partner or other manager with a principal place of business outside the United States, contain information substantially similar to statements prepared in accordance with U.S. GAAP and material differences with U.S. GAAP are reconciled;

(iv) Within 120 days (or 180 days in the case of a fund of funds or 260 days in the case of a fund of funds of funds) of an entity's fiscal year end, the entity's audited financial statements, including any reconciliations to U.S. GAAP or supplementary U.S. GAAP disclosures, as applicable, are distributed to investors in the entity (or their independent representatives); and

(v) Pursuant to a written agreement between the independent public accountant and the adviser or the entity, the independent public accountant that completes the audit notifies the Commission by electronic means directed to the Division of Examinations:

(A) Within one business day of issuing an audit report to the entity that contains a modified opinion, and

(B) Within four business days of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed.

(5) *Registered investment companies.* You are not required to comply with this section [(17 CFR 275.223–1)] with respect to the account of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 to 80a–64).

(6) *Certain related persons.* Notwithstanding paragraph (a)(4) of this section, you are not required to obtain an independent verification of client assets if:

(i) You have custody under this rule solely because a related person holds, directly or indirectly, client assets, or has any authority to obtain possession of them, in connection with advisory services you provide to clients; and

(ii) Your related person is operationally independent of you.

(7) *Standing letters of authorization.* Notwithstanding paragraph (a)(4) of this section, you are not required to obtain an independent verification of client assets if you have custody of client assets solely because of a standing letter of authorization.

(8) *Discretionary authority.* Notwithstanding paragraph (a)(4) of this section, you are not required to obtain an independent verification of client assets if you have custody of client assets solely because you have discretionary authority with respect to those assets, provided this exception applies only for client assets that are maintained with a qualified custodian in accordance with paragraph (a)(1) of this rule and for accounts where your discretionary authority is limited to instructing your client's qualified custodian to transact in assets that settle exclusively on a delivery versus payment basis.

(9) *Reliance on multiple exceptions.* Notwithstanding the use of ''solely'' in paragraphs (b)(3), (b)(6), (b)(7), and (b)(8) of this section, the exceptions in paragraphs (b)(3), (b)(6), (b)(7), and (b)(8) of this section are not mutually exclusive.

(c) *Delivery to pooled investment vehicle clients.* To satisfy the requirements of paragraph (a)(1), (a)(2), (b)(1), or (b)(4), the account statements, notices, or financial statements (as applicable) must be sent to all of the investors in each pooled investment vehicle client, provided that, if an investor is a pooled investment vehicle that is controlling, controlled by, or under common control with (''a control relationship'') you or your related persons, the sender must look through that pool (and any pools in a control relationship with you or your related persons) in order to send to investors in those pools.

(d) *Definitions.* For the purposes of this section:

(1) *Assets* means funds, securities, or other positions held in the client's account.

(2) *Control* means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. Control includes:

(i) Each of your firm's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control your firm;

(ii) A person is presumed to control a corporation if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or

(B) Has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities;

(C) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership;

(D) A person is presumed to control a limited liability company if the person:

(1) Directly or indirectly has the right to vote 25 percent or more of a class of the interests of the limited liability company;

(2) Has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the limited liability company; or

(3) Is an elected manager of the limited liability company; or

(E) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

(3) *Custody* means holding, directly or indirectly, client assets, or having any authority to obtain possession of them. You have custody if a related person holds, directly or indirectly, client assets, or has any authority to obtain possession of them, in connection with

advisory services you provide to clients. Custody includes:

(i) Possession of client assets (but not of checks drawn by clients and made payable to third parties) unless you receive them inadvertently and you return them to the sender promptly but in any case within three business days of receiving them;

(ii) Any arrangement (including, but not limited to a general power of attorney or discretionary authority) under which you are authorized or permitted to withdraw or transfer beneficial ownership of client assets upon your instruction; and

(iii) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives you or your supervised person legal ownership of or access to client assets.

(4) *Discretionary authority* means the authority to decide which assets to purchase and sell for the client.

(5) *Independent public accountant* means a public accountant that meets the standards of independence described in 17 CFR 210.2–01 (rule 2–01 of Regulation S–X).

(6) *Independent representative* means a person that:

(i) Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership (or members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle) and by law or contract is obliged to act in the best interest of the advisory client or the limited partners (or members, or other beneficial owners);

(ii) Does not control, is not controlled by, and is not under common control with you; and

(iii) Does not have, and has not had within the past two years, a material business relationship with you.

(7) *Operationally independent:* for purposes of paragraph (b)(6) of this section, a related person is presumed not to be operationally independent unless each of the following conditions is met and no other circumstances can reasonably be expected to compromise the operational independence of the related person:

(i) Client assets in the custody of the related person are not subject to claims of the adviser's creditors;

(ii) Advisory personnel do not have custody or possession of, or direct or indirect access to client assets of which the related person has custody, or the power to control the disposition of such client assets to third parties for the benefit of the adviser or its related persons, or otherwise have the opportunity to misappropriate such client assets;

(iii) Advisory personnel and personnel of the related person who have access to advisory client assets are not under common supervision; and

(iv) Advisory personnel do not hold any position with the related person or share premises with the related person.

(8) *Possession or control* means holding assets such that the qualified custodian is required to participate in any change in beneficial ownership of those assets, the qualified custodian's participation would effectuate the transaction involved in the change in beneficial ownership, and the qualified custodian's involvement is a condition precedent to the change in beneficial ownership.

(9) *Privately offered securities* means securities:

(i) Acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(ii) That are uncertificated; and the ownership of which can only be recorded on the non-public books of the issuer or its transfer agent in the name of the client as it appears in the records you are required to keep under Rule 204–2; and

(iii) That are transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(10) *Qualified custodian* means:

(i) A bank as defined in section 202(a)(2) of the Advisers Act (15 U.S.C. 80b–2(a)(2)) or a savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811), provided that the bank or savings association holds the client assets in an account designed to protect such assets from creditors of the bank or savings association in the event of the insolvency or failure of the bank or savings association;

(ii) A broker-dealer registered under section 15(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(1)), holding the client assets in customer accounts;

(iii) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(iv) A foreign financial institution that:

(A) Is incorporated or organized under the laws of a country or jurisdiction other than the United States, provided that you and the Commission are able to enforce judgments, including civil monetary penalties, against the foreign financial institution;

(B) Is regulated by a foreign country's government, an agency of a foreign country's government, or a foreign financial regulatory authority as defined in section 202(a)(24) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–2(a)(24)] as a banking institution, trust company, or other financial institution that customarily holds financial assets for its customers;

(C) Is required by law to comply with anti-money laundering and related provisions similar to those of the Bank Secrecy Act [31 U.S.C. 5311, *et seq.*] and regulations thereunder;

(D) Holds financial assets for its customers in an account designed to protect such assets from creditors of the foreign financial institution in the event of the insolvency or failure of the foreign financial institution;

(E) Has the requisite financial strength to provide due care for client assets;

(F) Is required by law to implement practices, procedures, and internal controls designed to ensure the exercise of due care with respect to the safekeeping of client assets; and

(G) Is not operated for the purpose of evading the provisions of this rule 223–1.

(11) *Related person* means any person, directly or indirectly, controlling or controlled by you, and any person that is under common control with you.

(12) *Standing letter of authorization* means an arrangement among you, the client, and the client's qualified custodian in which you are authorized, in writing, to direct the qualified custodian to transfer assets to a third-party recipient on a specified schedule or from time to time, provided:

(i) The client's qualified custodian is not your related person;

(ii) The client's authorization includes the client's signature, the third-party recipient's name, and either its address or account number at a custodian to which the transfer should be directed; and

(iii) You have no ability or authority to designate or change any information about the third-party recipient, including name, address, and account number.

(13) *U.S. generally accepted accounting principles (U.S. GAAP)* means accounting principles recognized

by the Commission as generally accepted in accordance with section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s).

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 5. The authority citation for part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.,* Pub. L. 111–203, 124 Stat. 1376.

■ 6. Amend Form ADV (referenced in § 279.1) by:

■ a. In General Instructions, revising the second sub-bullet point paragraph to the first bullet point paragraph under Instruction 4 related to Other-than-annual amendments;

■ b. In Glossary of Terms, revising the definitions of items 12 (Custody) and 13 (Discretionary Authority or Discretionary Basis);

■ c. In Glossary of Terms, add new items defining the terms Assets, Operationally Independent, Qualified Custodian, and Standing Letter of Authorization and redesignating the items accordingly;

■ d. In Part 1A, revising Item 9;

■ e. In Schedule D, adding section 9.C.1; and revising section 9.C.3.

The additions and revisions read as follows:

Note: The text of Form ADV does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM ADV (Paper Version)

UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND REPORT BY EXEMPT REPORTING ADVISERS

Form ADV General Instructions

* * * * *

4. When am I required to update my Form ADV?

* * * * *

- Other-than-annual amendments: In addition to your annual updating amendment,
  - If you are registered with the SEC or a *state securities authority*, you must amend Part 1A, 1B, 2A and 2B (as applicable) of your Form ADV, including corresponding sections of Schedules A, B, C, D, and R, by filing additional amendments (other-than-annual amendments) promptly, if:
    - you are adding or removing a relying adviser as part of your umbrella registration;
    - information you provided in response to Items 1 (except 1.O. and section 1.F. of Schedule D), 3, 9 (except 9.A.(2) and 9.D.(2), unless your response to Item 9.D.(1) changed)), or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of Part 1B or sections 1 or 3 of Schedule R becomes inaccurate in any way;

* * * * *

GLOSSARY OF TERMS

* * * * *

Assets: For purposes of Item 9 and related sections of Schedule D, has the same meaning as defined in Rule 223-1.

* * * * *

Custody: Has the same meaning as in Rule 223-1.

* * * * *

Discretionary Authority, Discretionary Basis, or Discretionary Trading Authority: Your firm has discretionary authority or manages assets on a discretionary basis or has discretionary trading authority if it has the authority to decide which assets to purchase and sell for the client without consulting the client. Your firm also has discretionary

authority if it has the authority to decide which investment advisers to retain on behalf of the client without consulting the client.

* * * * *

Operationally Independent: For the purposes of Item 9 and related sections of Schedule D, has the same meaning as in Rule 223-1.

* * * * *

Qualified Custodian: Has the same meaning as in Rule 223-1.

* * * * *

Standing Letter of Authorization: Has the same meaning as in Rule 223-1.

PART 1A

* * * * *

a. Item 9 Custody

In this Item, we ask whether you or a related person has *custody* of *client assets* and about your custodial practices.

A. (1) Do you have *custody* of *client assets* (excluding *clients* that are investment companies registered pursuant to the Investment Company Act of 1940 or business development companies that elect to be regulated as such) either directly or because a *related person* has custody of *client assets* in connection with advisory services that you provide to the *client*:

☐ Yes

☐ No

You must answer "yes" to Item 9.A.(1) if you reported discretionary RAUM in Item 5.F.(2)(a); answered "yes" to Item 8.C.(1) indicating you have discretionary authority over client assets; or if you have the ability to deduct your advisory fee directly from client accounts. If you answered "no" to Item 9.A.(1), do not complete the remainder of Item 9.

(2) As of your most recent fiscal year end, what is the approximate amount of *client assets* (rounded to the nearest $1,000) of which you directly or a *related person* in connection with advisory services that you provide to the *client* have *custody* and for how many *clients* attributable to each of the following?

Basis for Custody	Direct Custody by Adviser		Indirect Custody through a *Related Person*	
	(i) Approximate Amount of *Client Assets*	(ii) Number of *Clients*	(iii) Approximate Amount of *Client Assets*	(iv) Number of *Clients*
(a) Ability to deduct your advisory fees from *client* accounts				
(b) *Discretionary Authority*				
(c) Serving as a general partner, managing member, trustee (or equivalent) for *clients* that are *private funds*				
(d) Serving as a general partner, managing member, trustee (or equivalent) for *clients* that are not *private funds*				
(e) Having general power of attorney or check-writing authority				
(f) Having a *standing letter of authorization*				
(g) Having physical possession of *client* assets				
(h) Acting as a *qualified custodian*				
(i) Through a *related person* that is *operationally independent*	XXXXXX	XXXXXX		
(j) Other				
(k) Total				

Because an adviser may have custody for more than one reason in the table above, the sum of (a) – (j) may not equal the amount in (k) Total.

B. (1) Are you relying on any of the exceptions in rule 223-1(b) to comply with rule 223-1?

☐ Yes

☐ No

(2) If you answered "yes" to Item 9.B.(1), on which exceptions in rule 223-1(b) are you relying (check all that apply).

☐ Shares of Mutual Funds (Rule 223-1(b)(1))

☐ Certain Assets Unable to be Maintained with a *Qualified Custodian* (Rule 223-1(b)(2))

If you checked the box above, list in section 9.C.(3) of Schedule D the accountants performing the verification required by Rule 223-1(b)(2)(iii)(A).

☐ Fee Deduction (Rule 223-1(b)(3))

☐ Entities Subject to Annual Audit (Rule 223-1(b)(4))

If you checked the box above, list in section 9.C.(3) of Schedule D the accountants that performed the audit required by rule 223-1(b)(4). You do not have to list independent public accountant information in section 9.C of Schedule D if you already provided this information with respect to the private funds you advise in section 7.B.(1) and that accountant only performs audits required by rule 223-1(b)(4) for those private funds.

☐ Certain *Related Persons* (Rule 223-1(b)(6))

☐ *Standing Letters of Authorization* (Rule 223-1(b)(7))

☐ *Discretionary Authority* (Rule 223-1(b)(8))

C. (1) Are any *client assets* of which you or a *related person* have *custody* maintained by a *qualified custodian* in accordance with rule 223-1 under the Advisers Act?

☐ Yes

☐ No

If you answered "yes" to Item 9.C.(1) you must complete section 9.C.(1) of Schedule D for each Qualified Custodian, including yourself or a related person, that maintains your client assets.

D. (1) Are any *client assets* of which you or a *related person* have *custody* ***not*** maintained by a *qualified custodian* in accordance with rule 223-1 under the Advisers Act?

☐ Yes

☐ No

(2) If you answered "yes" to item 9.D.(1), what are the number *clients* and approximate amount of *client assets* (rounded to the nearest $1,000) not maintained by a *qualified custodian?*

(i) $_____(ii) No. of *clients*: _____

E. (1) Are you required to obtain a surprise examination in accordance with rule 223-1(a)(4) under the Advisers Act?

☐ Yes

☐ No

If you are an adviser to pooled investment vehicle(s) or other entities relying on the audit provision under rule 223-1(b)(4) and do not otherwise need to obtain a surprise examination for other clients, indicate "No" in response to Item 9.E.(1). If you responded "Yes" to Item 9.E.(1), list in section 9.C.(3) of Schedule D the accountant engaged to perform the surprise examination required by rule 223-1(a)(4).

* * * * *

Schedule D

* * * * *

SECTION 9.C.(1) Qualified Custodian

You must complete the following information for each *qualified custodian* that maintains your *clients' assets*. You must complete a separate Schedule D section 9.C.(1) for each *qualified custodian*.

Check only one box:

☐ Add ☐ Delete ☐ Amend

(1) Full legal name of the *qualified custodian*: _____

(2) The location of the *qualified custodian's* office responsible for the services provided:

_____

_____ (number and street)

_____

_____ (city) (state/country) (zip+4/postal code)

(3) *Qualified custodian's* regulatory contact information:

_____

_____
Name

_____

_____
Telephone Number, including country code

_____

_____
E-mail Address

_____

_____
Number and street (if different from above)

_____

_____
City, state/country and zip+4/postal code (if different from above)

(4) Type of entity:

☐ Broker/Dealer
SEC Registration Number: _____
☐ U.S. Bank or Savings Association
☐ Futures Commission Merchant
☐ Foreign Financial Institution
Primary Regulator/Country: _____

(5) Legal Entity Identifier (if applicable): _____

(6) Number of *clients* and approximate amount of *client assets* (rounded to the nearest $1,000) held at the *qualified custodian* listed above:
(i) Number of *clients*: _____
(ii) Approximate amount of *client assets*: $_____

(7) Is the *qualified custodian* listed above a *related person*? ☐ Yes ☐ No

(i) If so, provide the following information about the independent public accountant that prepared the internal control report required by Rule 223-1(a)(1)(i)(C).

(1) Name of the independent public accountant: _____

(2) The location of the independent public accountant's office responsible for the services provided:

_____

_____ (number and street)

_____

_____ (city) (state/country) (zip+4/postal code)

(3) Is the independent public accountant registered with the Public Company Accounting Oversight Board?

☐ Yes ☐ No

If "yes," Public Company Accounting Oversight Board-Assigned Number:_____

(4) If "yes" to (3) above, is the independent public accountant subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules?

☐ Yes ☐ No

(5) Did the internal control report prepared by the independent public accountant identified above contain an unqualified opinion?

☐ Yes ☐ No ☐ Report Not Yet Received for Most Recent Fiscal Year End

* * * * *

SECTION 9.C.(3) Independent Public Accountants

You must complete the following information for each independent public accountant engaged to perform a surprise examination, a financial statement audit of an entity whose assets you manage, or the verification of *client assets* required under rule 223-1(b)(2)(iii)(A). You must complete a separate Schedule D section 9.C.(3) for each independent public accountant.

Check only one box:

☐ Add ☐ Delete ☐ Amend

(1) Name of the independent public accountant: _____

(2) The location of the independent public accountant's office responsible for the services provided:

_____

_____ (number and street)

_____

_____ (city) (state/country) (zip+4/postal code)

(3) Is the independent public accountant registered with the Public Company Accounting Oversight Board?

☐ Yes ☐ No

If "yes," Public Company Accounting Oversight Board-Assigned Number:_____

(4) If "yes" to (3) above, is the independent public accountant subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules?

☐ Yes ☐ No

(5) The independent public accountant is engaged to:

A. ☐ perform a surprise examination
B. ☐ perform an audit
C. ☐ perform the verification required by Rule 223-1(b)(2)(iii)(A).

(6) Since *the end of your most recent fiscal year*, did all of the reports prepared by the independent public accountant identified above contain unqualified opinions?

☐ Yes ☐ No ☐ Report Not Yet Received for Most Recent Fiscal Year End

If you check "Report Not Yet Received for Most Recent Fiscal Year End," you must promptly file an amendment to your Form ADV to update your response when the accountant's report is available.

* * * * *

By the Commission.

Dated: February 15, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–03681 Filed 3–8–23; 8:45 am]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Longsolid and Round Hickorynut and Designation of Critical Habitat; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2020–0010; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BD32

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Longsolid and Round Hickorynut and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened species status under the Endangered Species Act of 1973 (Act), as amended, for the longsolid (*Fusconaia subrotunda*) and round hickorynut (*Obovaria subrotunda*), freshwater mussels. We also designate critical habitat for both species. For the longsolid, in total, approximately 1,115 river miles (1,794 river kilometers) fall within 12 units of critical habitat in Pennsylvania, Kentucky, West Virginia, Virginia, Tennessee, and Alabama. For the round hickorynut, in total, approximately 921 river miles (1,482 river kilometers) fall within 14 units of critical habitat in Pennsylvania, Ohio, Indiana, Kentucky, West Virginia, Tennessee, Alabama, and Mississippi. We also finalize a rule under the authority of section 4(d) of the Act for both species that provides measures that are necessary and advisable to provide for the conservation of these species.

DATES: This rule is effective April 10, 2023.

ADDRESSES: This final rule is available on the internet at *https://www.regulations.gov.* Comments and materials we received are available for public inspection at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010.

Supporting materials we used in preparing this rule, such as the species status assessment reports and supporting information that we developed for the critical habitat designation, are available at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010. For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file and are available at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010, and on the Service's Environmental Conservation Online System (ECOS) website at *https://ecos.fws.gov/ecp/species/9880* and *https://ecos.fws.gov/ecp/species/9879.*

FOR FURTHER INFORMATION CONTACT: Janet Mizzi, Field Supervisor, U.S. Fish and Wildlife Service, Asheville Ecological Services Field Office, 160 Zillicoa St., Asheville, NC 28801; telephone 828–258–3939. 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:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the longsolid and round hickorynut meet the definition of threatened species; therefore, we are listing them as such and finalizing a designation of their critical habitat. Both listing a species as an endangered or threatened species and designating critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule lists the longsolid and round hickorynut as threatened species, and issues regulations under section 4(d) of the Act (a ''4(d) rule'') for the conservation of both species. This rule designates critical habitat for the longsolid in 12 units totaling approximately 1,115 river miles (mi) (1,794 river kilometers (km)) within portions of 7 counties in Pennsylvania, 16 counties in Kentucky, 10 counties in West Virginia, 4 counties in Virginia, 6 counties in Tennessee, and 3 counties in Alabama. Additionally, this rule designates critical habitat for the round hickorynut in 14 units totaling approximately 921 river mi (1,482 river km) within portions of 2 counties in Pennsylvania, 3 counties in Ohio, 4 counties in Indiana, 18 counties in Kentucky, 11 counties in West Virginia, 3 counties in Tennessee, 3 counties in Alabama, and 1 county in Mississippi.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the longsolid and round hickorynut are threatened species due to the following threats: habitat degradation or loss (Factor A) from a variety of sources (*e.g.,* dams and other barriers, resource extraction); degraded water quality from chemical contamination and erosion from development, agriculture, mining, and forest conversion (Factor A); direct mortality from dredging (Factor E); residual impacts (reduced population size) from historical harvest (Factor B); and the proliferation of invasive, nonnative species (Factor E). These threats also contribute to the negative effects associated with the species' small population sizes (Factor E).

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Previous Federal Actions

Please refer to the proposed listing and critical habitat rule (85 FR 61384) for the longsolid and round hickorynut published on September 29, 2020, for a

detailed description of previous Federal actions concerning these species.

Peer Review

A species status assessment (SSA) team prepared SSA reports for the longsolid and round hickorynut. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA reports represent a compilation of the best scientific and commercial data available concerning the status of each of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting them.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the SSA reports. As discussed in the proposed rule, we sent the SSA reports to 10 independent peer reviewers on both the longsolid and round hickorynut and received 3 responses on the longsolid SSA report, and no responses on the round hickorynut SSA report. The peer reviews for the longsolid SSA report can be found at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010. In preparing the proposed rule, we incorporated the results of these reviews, as appropriate; both SSA reports were the foundation for the proposed rule and this final rule. A summary of the peer review comments and our responses can be found in the *Peer Reviewer Comments* section of this final rule.

Summary of Changes From the Proposed Rule

This final rule incorporates several changes from what was contained in our proposed rule (85 FR 61384; September 29, 2020) based on the comments we received during the comment period. Minor, nonsubstantive changes and corrections were made throughout this rule and in the SSA reports in response to comments (*e.g.,* updated range map for round hickorynut based on survey information in Ohio, revised forest conversion section in the discussion of threats). The information we received during the comment period did not change our determination that the longsolid and round hickorynut are threatened species.

We received substantive comments on the proposed listing and proposed 4(d) rule (see Summary of Comments and Recommendations, below), and we made changes as follows:

- We received comments from multiple State agencies across the ranges of the longsolid and round hickorynut. The State agencies generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions associated with threats to the longsolid and round hickorynut. Minor edits associated with threats and their association with populations in West Virginia have been incorporated into the preamble of this rule, and additional citations have been added to support statements regarding contaminants and resource extraction and their effects on stream habitats and macroinvertebrates. These added citations are Pond et al. (2008) and Entrekin et al. (2015). Additionally, special management recommendations for the nonnative round goby (*Neogobius melanostomus*) have been incorporated into the discussion of the longsolid's French Creek critical habitat unit (Unit LS 1) in Pennsylvania.
- We received comments requesting clarification of broodstocking activities as they relate to the 4(d) exception associated with conservation and restoration efforts by State wildlife agencies. Accordingly, the first exception for incidental take associated for both species' 4(d) rules clarifies this activity includes population monitoring, relocation, and collection of broodstock; tissue collection for genetic analysis; captive propagation; and subsequent stocking into currently occupied and unoccupied areas within both species' historical ranges.
- We received comments requesting clarification on the third exception in the 4(d) rule for bank restoration projects that use bioengineering methods to reduce bank erosion and instream sedimentation and improve habitat conditions for both species. Specifically, the commenter indicated, and we agree, that this exception should be referred to as bank stabilization projects, which may include channel restoration activities, and relocation of mussels prior to implementation of these types of projects may be (as opposed to must be) necessary. Accordingly, this exception of the 4(d) rule reflects these changes.
- Several commenters indicated that the Service should consider forest management best management practices (BMPs; *i.e.,* practices that reduce the amount of nonpoint pollution from forest management) as part of the overall conservation benefit for the species, account for these beneficial actions in any threat analysis, and incorporate an associated exception into the 4(d) rules for both species. Additionally, Warrington et al. (2017) was described as being cited erroneously in the proposed rule's preamble. Forested watersheds contribute to the current condition of each species and have been factored in as a positive factor (*i.e.,* benefit) in the SSAs and proposed rule. State-approved forest management BMPs vary across the large geographic areas occupied by the longsolid and round hickorynut, but we support and encourage their use throughout the species' ranges. Accordingly, this final rule includes an exception to the prohibitions in both species' 4(d) rules for State-approved forest management BMPs in response to public comments we received on the proposed rule.

We also note that forestry activities were not a primary threat in our current and future condition analyses, and that the conversion of forested habitats to other land uses, such as agriculture or urban development, contribute to greater habitat and water quality degradation than forest management. Clarity regarding forest conversion to other land uses, not forestry, and its contribution to freshwater mussel habitat degradation and loss has been incorporated into the preamble of this rule. Several populations of the longsolid and round hickorynut occur on U.S. Forest Service lands; therefore, any actions that may affect these populations are subject to section 7 consultation under the Act (16 U.S.C. 1531 *et seq.*).

This rule does not make any changes to the boundaries of the proposed critical habitat designation for either species based on public comments we received.

I. Final Listing Determination

Background

Please refer to the September 29, 2020, proposed rule (85 FR 61384) and the SSA reports for full summaries of species information. These documents are available *at https://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0010, and on the ECOS website at *https://ecos.fws.gov/ecp/species/9880* and *https://ecos.fws.gov/ecp/species/9879.*

The longsolid (*Fusconaia subrotunda*) is a freshwater river mussel belonging to the Unionidae family, also known as the naiads and pearly mussels. Longsolid adults are light brown in color, darkening with age. The shell is thick and medium-sized (up to 5 inches (in) (125 millimeters (mm)), and typically has a dull sheen (Williams et al. 2008, p. 322). There is variability in the inflation of the shell depending on population and latitudinal location

(Ortmann 1920, p. 272; Watters et al. 2009, p. 130).

The longsolid is currently found in the Ohio, Cumberland, and Tennessee River basins, overlapping within the States of Alabama, Kentucky, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia (Service 2018, appendix A; see figure 1, below). It is considered extirpated from Georgia, Indiana, and Illinois.

Additionally, it is classified as an endangered species by the State of Ohio, and considered to have various levels of concern, imperilment, or vulnerability (see table 1–1 in the SSA report) by the States of Alabama, Kentucky, North Carolina, Pennsylvania, Tennessee, Virginia, and West Virginia.

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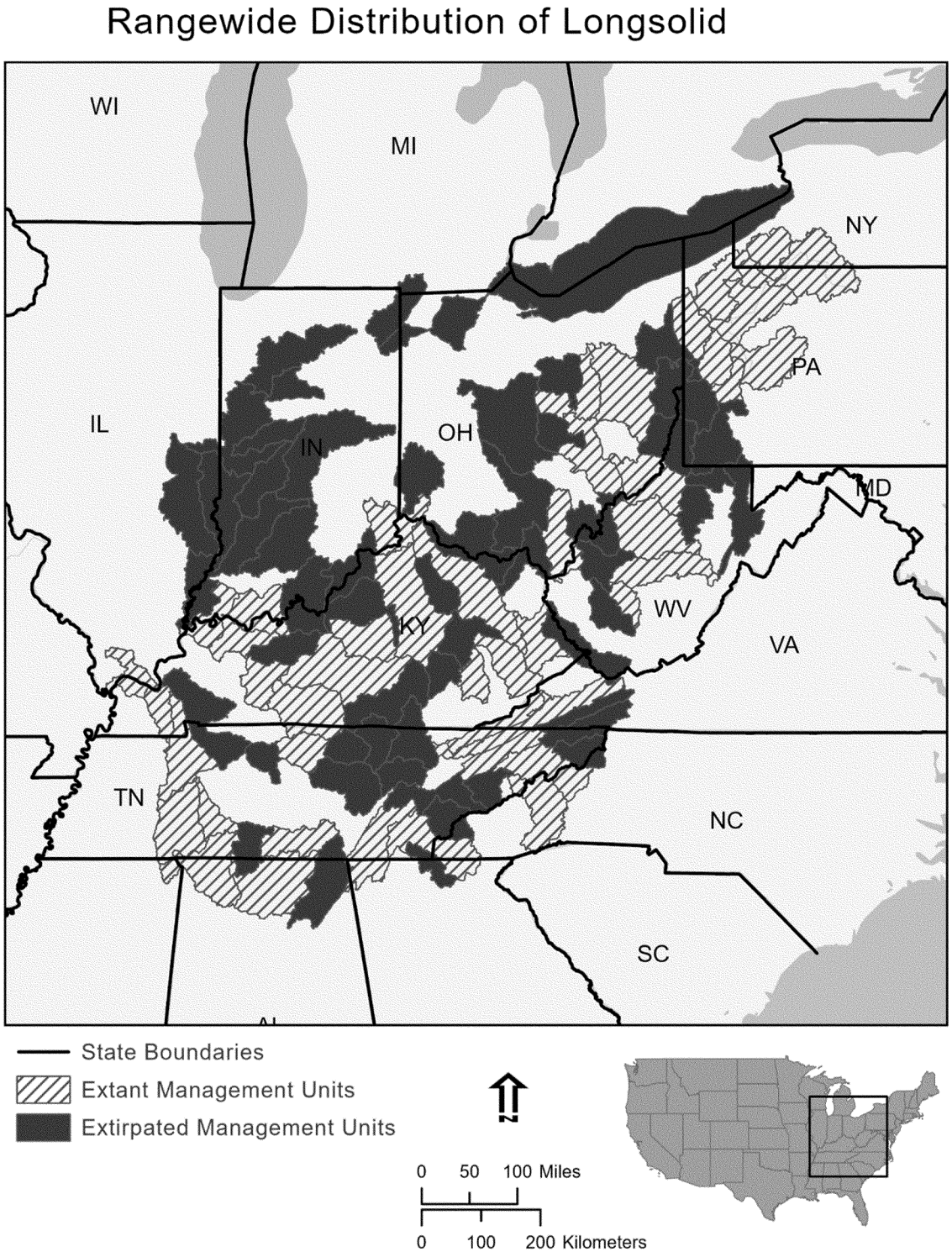


Figure 1. Longsolid range map, distributed across the Ohio, Cumberland, and Tennessee River basins. A total of 60 populations within 45 management units (i.e., 8-digit hydrologic unit code (HUC) watersheds (HUC-8)) are currently considered extant.

Similar to the longsolid, the round hickorynut also belongs to the Unionidae family of naiads and pearly mussels. Round hickorynut adult mussels are greenish-olive to dark or chestnut brown, sometimes blackish in older individuals, and may have a yellowish band dorsally (Parmalee and Bogan 1998, p. 168). Inflation of the shell is variable depending on population and latitudinal location (Ortmann 1920, p. 272; Williams et al. 2008, p. 474). The shell is thick, solid, and up to 3 in (75 mm) in length, but usually is less than 2.4 in (60 mm)

(Williams et al. 2008, p. 473; Watters et al. 2009, p. 209). A distinctive characteristic is that the shell is round in shape, nearly circular, and the umbo (the raised portion of the dorsal margin of a shell) is centrally located.

Within the United States, the round hickorynut is currently found in the Great Lakes, Ohio, Cumberland, Tennessee, and Lower Mississippi River basins, overlapping within the States of Alabama, Indiana, Kentucky, Michigan, Mississippi, Ohio, Pennsylvania, Tennessee, and West Virginia (Service 2019, appendix A; see figure 2, below). It is considered extirpated from Georgia, Illinois, and New York. Additionally, it has State-level conservation status, ranging across various levels of concern, imperilment, or vulnerability (see table 1–1 in the SSA report), in the States of Alabama, Indiana, Kentucky, Michigan, Pennsylvania, Tennessee, and West Virginia. The round hickorynut also occurs within the Canadian Province of Ontario, where it was listed as an endangered species in 2005, due to the loss of and significant declines in populations (Committee on the Status of Species at Risk in Ontario 2013, p. 4); a single remaining population (showing no recruitment (Morris 2018, pers. comm.)) occurs in Lake St. Clair and the East Sydenham River.

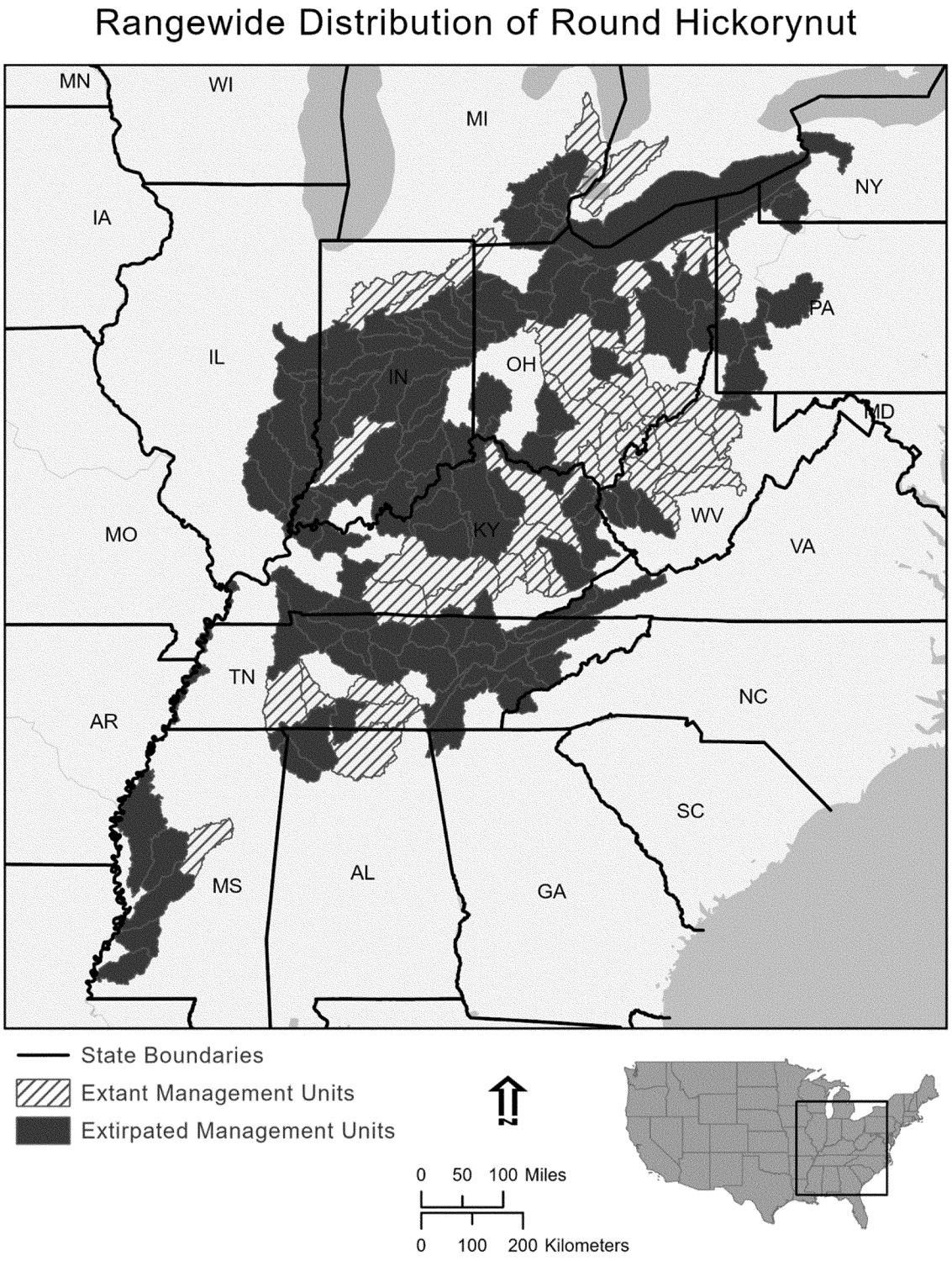


Figure 2. Round hickorynut range map, distributed across the Great Lakes, Ohio, Cumberland, Tennessee, and Lower Mississippi River basins, and the Ontario Province of Canada. A total of 69 populations within 36 management units (HUC-8) are currently considered extant.

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Thorough reviews of the taxonomy, life history, ecology and State listing status of the longsolid and round hickorynut are presented in detail in the SSA reports (Service 2018, pp. 14, 15, 22–30; Service 2019, pp. 14, 15, 22–29).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations in title 50 of the Code of Federal Regulations (CFR) set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019). We collectively refer to these actions as the 2019 regulations.

As with the proposed rule, the regulations that are in effect and therefore applicable to this final rule are 50 CFR part 424, as amended by (a) revisions that we issued jointly with the National Marine Fisheries Service in 2019 regarding both the listing, delisting, and reclassification of endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019); and (b) revisions that we issued in 2019 eliminating for species listed as threatened species are September 26, 2019, the Service's general protective regulations that had automatically applied to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA reports document the results of our comprehensive biological review of the best scientific and commercial data regarding the status of both species, including an assessment of potential threats to the species. The SSA reports do not represent our decision on whether either species should be listed as an endangered or threatened species under the Act. However, they do provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the longsolid's and round hickorynut's viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and

biological environment (for example, climate changes, pathogen). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA reports for the longsolid and round hickorynut; the full SSA reports can be found on *https://www.regulations.gov* at Docket FWS–R4–ES–2020–0010, and on the Service's ECOS website at *https://ecos.fws.gov/ecp/species/9880* and *https://ecos.fws.gov/ecp/species/9879.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the longsolid and round hickorynut, their resources, and the threats that influence both species' current and future condition, in order to assess each species' overall viability and the risks to that viability.

Species Needs

We assessed the best available information to identify the physical and biological needs to support individual fitness at all life stages for the longsolid and round hickorynut. Full descriptions of all needs are available in chapter 4 of the SSA reports (Service 2018, pp. 25–30; Service 2019, pp. 30–36), which can be found in docket number FWS–R4–ES–2020–0010 on *https://www.regulations.gov.* Based upon the best available scientific and commercial information, and acknowledging existing ecological uncertainties (see section 4.3 in the SSA reports), the resource and demographic needs for both the longsolid and round hickorynut are characterized as:

- Clean, flowing water with appropriate water quality and temperate conditions, such as (but not limited to) dissolved oxygen above 2 to 3 parts per million (ppm), ammonia generally below 0.5 ppm total ammonia-nitrogen, temperatures generally below 86 degrees Fahrenheit (°F) (30 degrees Celsius (°C)), and (ideally) an absence of excessive total suspended solids and other pollutants.
- Natural flow regimes that vary with respect to timing, magnitude, duration, and frequency of river discharge events.
- Predominantly silt-free, stable sand, gravel, and cobble substrates.
- Suspended food and nutrients in the water column including (but not limited to) phytoplankton, zooplankton, protozoans, detritus, and dissolved organic matter.
- Availability of sufficient host fish numbers to provide for glochidia infestation and dispersal. Host fishes for the longsolid are currently unknown but likely include (but may not be limited to): minnows of the family Cyprinidae as well as potentially freshwater sculpins of the genus *Cottus.* Host fish species documented for the round hickorynut include the banded sculpin (*Cottus carolinae*), eastern sand darter (*Ammocrypta pellucida*), emerald darter (*Etheostoma baileyi*), greenside darter (*Etheostoma blennioides*), Iowa darter (*Etheostoma exile*), fantail darter (*Etheostoma flabellare*), Cumberland darter (*Etheostoma gore*), spangled darter (*Etheostoma obama*), variegate darter (*Etheostoma variatum*), blackside darter (*Percina maculata*), and frecklebelly darter (*Percina stictogaster*).
- Connectivity among populations. Although the species' capability to disperse is evident through historical occurrence of a wide range of rivers and streams, the fragmentation of populations by small and large impoundments has resulted in isolation and only patches of what once was occupied contiguous river and stream habitat. Genetic exchange occurs between and among mussel beds via sperm drift, host fish movement, and movement of mussels during high flow events. For genetic exchange to occur, connectivity must be maintained. Most freshwater mussels, including the longsolid and round hickorynut, are typically found in mussel beds that vary in size and are often separated by stream reaches in which mussels are absent or rare (Vaughn 2012, p. 983). These species are often a component of a healthy mussel assemblage within optimal mussel habitats; therefore, the beds in which they occur are necessary for the species to be sufficiently resilient over time.

Current Conditions

Current (and future) conditions are described using categories that estimate the overall condition of the longsolid and round hickorynut mussel populations. These categories include:

- High—Sufficiently resilient populations with evidence of recruitment and multiple age classes represented. They are likely to maintain viability and connectivity among populations, and populations are not linearly distributed (*i.e.,* occur in tributary streams within a management unit). Populations are expected to persist in 20 to 30 years and beyond and withstand stochastic events. (*Thriving; capable of expanding range.*)
- Medium—Spatially restricted populations with limited connectivity and reduced levels of recruitment or age class structure. Resiliency is less than under high conditions, but the majority of populations (approximately 75 percent) are expected to persist beyond 20 to 30 years. (*Stable; not necessarily thriving or expanding its range.*)
- Low—Small and highly restricted populations, with no evidence of recent recruitment or age class structure, and limited detectability. These populations have low resiliency, are not likely to withstand stochastic events, and potentially may be extirpated in 20 to 30 years. Populations are linearly distributed within a management unit. (*Surviving and observable, but population likely declining.*)

Given the longsolid's and round hickorynut's ranges include lengthy rivers, such as the Ohio, Allegheny, Cumberland, and Tennessee Rivers, all of which include populations fragmented primarily by dams, we identified separate populations for each hydrologic unit code (HUC) (Seaber et al. 1987, entire; U.S. Geological Survey 2018, entire) at the fourth of 12 levels (*i.e.,* HUC–8 watershed). The HUC–8 watersheds are analogous to medium-sized river basins across the United States. Our analysis describes conditions relevant to longsolid and round hickorynut populations and the overarching HUC–8 watersheds, identified herein as a ''management unit.'' A management unit could harbor one or more populations. See chapter 2 in the SSA reports for further explanation of the analysis methodology (Service 2018, pp. 15–19; Service 2019, pp. 17–22).

Longsolid

The longsolid's current range extends over nine States, including New York,

Pennsylvania, West Virginia, Ohio, Kentucky, Virginia, Tennessee, North Carolina, and Alabama; the species is now considered extirpated in Georgia, Illinois, and Indiana. This range encompasses three major river basins (the Ohio, Cumberland, and Tennessee basins); the species now no longer exists in the Great Lakes basin (loss of six historical populations and four management units). In addition, its representation in the Cumberland River basin is currently within a single population and management unit (loss of nine historical populations and eight management units). Overall, the longsolid is presumed extirpated from 62 percent (100 of 160 populations) of its historically occupied populations, including 6 populations (the entirety) in the Great Lakes basin, 62 populations in the Ohio River basin, 8 populations in the Cumberland River basin, and 24 populations in the Tennessee River basin (see appendix B in the SSA report (Service 2018, pp. 131–154)). Of the current populations, 3 (5 percent) are estimated to be highly resilient, 8 (13 percent) are estimated to be moderately resilient, and 49 (79 percent) are estimated to have low resiliency.

The longsolid was once a common, occasionally abundant component of the mussel assemblage in rivers and streams where it is now extirpated. Examples include the Beaver River, Pennsylvania (Ortmann 1920, p. 276); Ohio River, Pennsylvania (Tolin 1987, p. 11); Mahoning River, Pennsylvania (Ortmann 1920 p. 276); Wabash River, Indiana/Illinois (Cummings et al. 1992, p. 46); Nolin River, Kentucky (Taylor 1983a, p. 111); and the South Fork Holston River, Virginia/Tennessee (Parmalee and Pohemus 2004, p. 234). Significant declines of the longsolid have been observed and documented in the Ohio and Cumberland Rivers (Neel and Allen 1964, p. 434, Haag and Cicerello 2016, p. 139) and in the Muskingum River system, which harbors the last remaining populations (Muskingum, Tuscarawas, and Walhonding) in Ohio (Watters and Dunn 1993–94, p. 252; Watters et al. 2009, p. 131).

Round Hickorynut

The current range of the round hickorynut extends over nine States, including Alabama, Indiana, Kentucky, Michigan, Mississippi, Ohio, Pennsylvania, Tennessee, and West Virginia; the species is now considered extirpated in Georgia, Illinois, and New York. This range encompasses five major river basins (Great Lakes, Ohio River, Cumberland River, Tennessee River, and Lower Mississippi River). Round hickorynut representation in the Cumberland River basin is restricted to two linear populations within two management units, while it exists in the Lower Mississippi River basin in a single population. Therefore, while the species currently maintains representation from historical conditions, it is at immediate risk of losing 40 percent (2 of 5 basins) of its representation due to these small, isolated populations under a high degree of threats from habitat loss and water quality degradation.

Overall, the round hickorynut has lost approximately 232 of 301 known populations (77 percent), and 102 of 138 management units (74 percent). This includes 25 populations in the Great Lakes basin, 146 populations in the Ohio River basin, 23 populations in the Cumberland River basin, 29 populations in the Tennessee River basin, and 9 populations in the Lower Mississippi River basin (see appendix B in the SSA report (Service 2019, pp. 191–212)). Of the current populations, 4 (6 percent) are estimated to be highly resilient, 16 (23 percent) are estimated to be moderately resilient, and 49 (71 percent) are estimated to have low resiliency.

The round hickorynut was once a much more common, occasionally abundant component of the mussel assemblage in rivers and streams across much of the eastern United States. Population extirpations have been extensive and widespread within every major river basin where the round hickorynut is found. Surveys throughout eastern North America have not targeted the round hickorynut specifically, and as a result, there could have been additional population losses or declines that have gone undocumented. Conversely, it is possible that there are populations that have gone undetected. However, the majority of the species' range has been relatively well-surveyed for freshwater mussel communities, and the likelihood is low that substantial or stronghold populations remain undetected. Patterns of population extirpation and declines are pronounced, particularly in the Ohio River basin, which appears to be the basin most important for redundancy and representation for the species due to its documented historical distribution and remaining concentration of populations within the basin.

Populations of the round hickorynut have been lost from entire watersheds and management units in which the species once occupied multiple tributaries, such as the Allegheny, Coal, Little Scioto, Miami, and Vermilion River management units in the Ohio River basin. The State of Ohio, for example, has lost 49 populations of round hickorynut, along with 17 management units (Watters et al. 2009, p. 210). The species is also critically imperiled in Canada, and as a result, the future of the species in Canada may be reliant on hatchery-supported activities or augmentation activities coordinated with the United States.

Precipitous declines and extirpations of round hickorynut populations have been documented in the Great Lakes, Ohio, Cumberland, Tennessee, and Lower Mississippi basins. Chronological museum collections and published literature accounts of the species demonstrate that individuals were more abundant in populations and there were more populations across the range (see appendix D in the SSA report (Service 2019, pp. 214–238)). While this documentation could be a result of more intensive survey effort in the core of the species' distribution, regardless, the extirpation of formerly abundant and extensive populations, has been most pronounced in the Ohio and Cumberland basins.

Examples of rivers where the round hickorynut is extirpated within these basins include: Crooked Creek, Pennsylvania (Ortmann 1913, p. 298); West Branch Mahoning River, Ohio (Swart 1940, p. 42); Coal River, West Virginia (Carnegie Museum and University of Michigan Museum of Zoology records); Olentangy River, Ohio (Stein 1963, p. 109); Blaine Creek, Kentucky (Bay and Winford 1984, p. 19); Embarras River, Illinois (Parmalee 1967, p. 80); Big Vermilion River, Illinois (Parmalee 1967, p. 80); Cumberland River, Kentucky (Neel and Allen 1964, p. 442); Stones River, Tennessee (Ohio State University Museum records); and Red River, Tennessee/Kentucky (Ohio State University Museum records).

Threats Analysis

The following discussions include evaluations of three threats and associated sources that are affecting the longsolid and round hickorynut and their habitats: (1) Habitat degradation or loss, (2) invasive and nonnative species, and (3) negative effects associated with small population size, including potential cumulative or synergistic effects (Service 2018 and 2019, chapter 6). We note that potential impacts associated with overutilization were evaluated, but we found no evidence of current effects on the species' viability (noting historical effects from harvest on the longsolid that no longer occur). In addition, potential impacts from disease, parasites, and predation, as well as potential impacts to host

species, were evaluated but were found to have minimal effects on viability of either species based on current knowledge (Service 2018, pp. 70, 73–74; Service 2019, pp. 91–95). Finally, we also considered effects associated with enigmatic population declines, which have been documented in freshwater river mussel populations since the 1960s; despite speculation and repeated aquatic organism surveys and water quality monitoring, the causes of these events are unknown (Haag 2019, p. 43). In some cases, the instream habitat often remains basically intact and continues to support other aquatic organisms such as fish and crayfish. Full descriptions of each of the threats and their sources, including specific examples across the species' range where threats are impacting the species or its habitat, are available in chapter 6 and appendix A of the SSA reports (Service 2018, pp. 43–76, 134–157; Service 2019, pp. 58–96, 169–187).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in both the longsolid and round hickorynut SSA reports, we have not only analyzed individual effects on the two species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of each of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Habitat Degradation or Loss

Development/Urbanization

Development and urbanization activities that may contribute to longsolid and round hickorynut habitat degradation and loss, including reduced water quality, occur throughout the species' range. The term ''development'' refers to urbanization of the landscape, including (but not limited to) land conversion for residential, commercial, and industrial uses and the accompanying infrastructure. The effects of urbanization may include alterations to water quality, water quantity, and habitat (both in-stream and streamside) (Ren et al. 2003, p. 649; Wilson 2015, p. 424). Urban development can lead to increased variability in streamflow, typically increasing the extent and volume of water entering a stream after a storm and decreasing the time it takes for the water to travel over the land before entering the stream (Giddings et al. 2009, p. 1). Deleterious effects on streams (*i.e.,* water collection on impervious surfaces that rapidly flows into storm drains and local streams), including those that may be occupied by the longsolid and round hickorynut include:

(1) *Water Quantity:* Storm drains deliver large volumes of water to streams much faster than would naturally occur, often resulting in flooding and bank erosion that reshapes the channel and causes substrate instability, resulting in destabilization of bottom sediments. Increased, high-velocity discharges can cause species living in streams (including mussels) to become stressed, displaced, or killed by fast-moving water and the debris and sediment carried in it. Displaced individuals may be left stranded out of the water once floodwaters recede.

(2) *Water Quality:* Pollutants (*e.g.,* gasoline, oil drips, fertilizers) that accumulate on impervious surfaces may be washed directly into streams during storm events. Contaminants contained in point and non-point source discharges degrade water and substrate quality, and can result in reduced survival, growth, and reproduction of mussels.

(3) *Water Temperature:* During warm weather, rain that falls on impervious surfaces becomes superheated and can stress or kill freshwater species when it enters streams.

Other development-related impacts to the longsolid and round hickorynut, or their habitats, may occur as a result of:

- Water infrastructure. This includes water supply, reclamation, and wastewater treatment, which results in pollution point discharges to streams. Concentrations of contaminants (including nitrogen, phosphorus, chloride, insecticides, polycyclic aromatic hydrocarbons, and personal care products) increase with urban development (Giddings et al. 2009, p. 2; Bringolf et al. 2010, p. 1,311).
- Utility crossings and right-of-way maintenance. Direct impacts from utility crossings include direct exposure or crushing of individuals, sedimentation, and habitat disturbance. The greatest cumulative impact involves cleared rights-of-way that result in direct runoff and increased stream temperature at the crossing location, and potentially promote maintenance utility and all-terrain vehicle access from the rights-of-way (which destroys banks and instream habitat, and thus can lead to increased erosion (see also Service 2017, pp. 48–49)).
- Anthropogenic activities. These types of activities may act to lower water tables, making the longsolid or round hickorynut susceptible to depressed flow levels. Water infrastructure (see above) and water withdrawals for irrigation, municipal, and industrial water supplies are an increasing concern due to expanding human populations. It is currently unknown whether anthropogenic effects of development and urbanization are likely to impact the longsolid or round hickorynut at the individual or population level. However, secondary impacts such as the increased likelihood of potential contaminant introduction, stream disturbance caused by impervious surfaces, barrier construction, and forest conversion are likely to act cumulatively on longsolid and round hickorynut populations.

Agricultural activities are pervasive across the range of the longsolid and round hickorynut. Examples include (but are not limited to):

- Longsolid: Agricultural erosion is listed among the factors affecting the Clinch and Powell Rivers (Ahlstedt et al. 2016, p. 8).
- Longsolid: Sedimentation and other non-point source pollution, primarily of agricultural origin, are identified as a primary threat to aquatic fauna of the Nolichucky River (Tennessee Valley Authority (TVA) 2006, p. 11).
- Longsolid: Agricultural impacts have been noted to take a toll on mussel fauna in the Goose Creek watershed of the South Fork Kentucky River (Evans 2010, p. 15).
- Longsolid and round hickorynut: The Elk River in Tennessee is a watershed with significant agricultural activity (Woodside et al. 2004, p. 10).
- Round hickorynut: Water withdrawals for irrigation for agricultural uses have increased recently in the Tippecanoe River (Fisher 2019, pers. comm.).
- Round hickorynut: Sedimentation and other point and non-point source pollution, primarily of agricultural origin, are identified as a primary threat to aquatic fauna of Big Darby Creek and Killbuck Creek, Ohio (Ohio Department of the Environmental Protection Agency 2004, p. 1; Ohio Department of the Environmental Protection Agency 2011, p. 31).
- Round hickorynut: Approximately 25 percent of the land use area in the

West Fork River management unit in West Virginia is in agriculture, increasing by as much as 9 percent as most recently reported in 2010 (U.S. Department of Agriculture 2010, p. 8).

- Round hickorynut: Large-scale mechanized agricultural practices threaten the last remaining population in the Lower Mississippi River basin, in the Big Black River, where the species has already undergone range reduction (Peacock and James 2002, p. 123).
- Round hickorynut: The Duck, Buffalo, and Elk Rivers in Tennessee are watersheds with significant agricultural activity in their headwaters and tributaries and are a suspected cause for mussel community declines throughout those rivers (Reed 2014, p. 4).

Transportation

Transportation-related impacts include both road development and river navigation. By its nature, road development increases impervious surfaces as well as land clearing and habitat fragmentation. Roads are generally associated with negative effects on the biotic integrity of aquatic ecosystems, including changes in surface water temperatures and patterns of runoff, changes in sedimentation levels, and increased heavy metals (especially lead), salts, organics, and nutrients to stream systems (Trombulak and Frissell 2000, p. 18). The adding of salts through road de-icing results in high salinity runoff, which is toxic to freshwater mussels. In addition, a major impact of road development is improperly constructed culverts at stream crossings, which can act as barriers if flow through the culvert varies significantly from the rest of the stream, or if the culvert ends up becoming perched (*i.e.,* sitting above the downstream streambed), and fishes that serve as mussel hosts cannot pass through them.

With regard to river navigation, dredging and channelization activities (as a means of maintaining waterways) have altered riverine habitats nationwide (Ebert 1993, p. 157). Channelization affects many physical characteristics of streams through accelerated erosion, increased bed load, reduced depth, decreased habitat diversity, geomorphic instability, and riparian canopy loss (Hartfield 1993, p. 139). All of these impacts contribute to loss of habitat for the longsolid and round hickorynut and alter habitats for host fish. Changes in both the water velocity and deposition of sediments not only alters physical habitat, but the associated increases in turbulence, suspended sediment, and turbidity affect mussel feeding and respiration (Aldridge et al. 1987, p. 25). The scope of channel maintenance activities over extensive areas alters physical habitat and degrades water quality. In addition to dredging and channel maintenance, impacts associated with barge traffic, which includes construction of fleeting areas, mooring cells, docking facilities, and propeller wash, also destroy and disrupt mussel habitat (see Miller et al. (1989, pp. 48–49) as an example for disturbance from barges).

Transportation-related impacts across the range of the longsolid and round hickorynut include (but are not limited to) the following examples:

- Channelization and dredging—Longsolid populations in the Eel, Vermilion, and Embarras Rivers and Killbuck Creek are extirpated. Round hickorynut populations in the Vermilion and Embarras Rivers are extirpated, while populations in the Eel and Killbuck Creek management units are in low condition; these streams have been extensively dredged and channelized (Butler 2007, p. 63; Appendix B). Additionally, dredging for barge traffic and navigation is identified as the primary cause for suitable habitat loss in the Kanawha River (below river mile 79) in West Virginia (Taylor 1983b, p. 3).
- Barge traffic, which includes construction of fleeting areas, mooring cells, docking facilities, and propeller wash, destroys and disrupts mussel habitat, currently affecting at least 15 (25 percent) of the longsolid populations in the Ohio, Cumberland, and Tennessee River basins (Hubbs et al. 2006, p. 169; Hubbs 2012, p. 3; Smith and Meyer 2010, p. 555; Sickel and Burnett 2005, p. 7; Taylor 1983b, p. 5). All six of the Ohio River mainstem longsolid populations that are considered in low condition are affected by channel maintenance and navigation operations; at least five (8 percent) of the round hickorynut populations in the Ohio basin are affected.
- Channel maintenance and navigation are affecting the low condition populations in the lower Allegheny, Kanawha, and Tennessee Rivers due to their clustered distribution and proximity to locks and dams. For the longsolid, these include two Allegheny River populations below Redbank, Pennsylvania (Smith and Meyer 2010, p. 556); one population in the Kanawha River, West Virginia; and three low condition populations in the Tennessee River main stem above Kentucky Dam.
- Although most prevalent on the mainstem Ohio and Tennessee Rivers, commerce and commercial navigation currently affect round hickorynut populations in the Black and Muskingum Rivers.

Contaminants

Contaminants contained in point and non-point discharges can degrade water and substrate quality and adversely impact mussel populations. Although chemical spills and other point sources of contaminants may directly result in mussel mortality, widespread decreases in density and diversity may result in part from the subtle, pervasive effects of chronic, low-level contamination (Naimo 1995, p. 354). The effects of heavy metals, ammonia, and other contaminants on freshwater mussels were reviewed by Mellinger (1972), Fuller (1974), Havlik and Marking (1987), Naimo (1995), Keller and Lydy (1997), and Newton et al. (2003).

The effects of contaminants such as metals, chlorine, and ammonia are profound on juvenile mussels (Augspurger et al. 2003, p. 2,571; Bartsch et al. 2003, p. 2,566). Juvenile mussels may readily ingest contaminants adsorbed to sediment particles while pedal feeding (Newton and Cope 2007, p. 276). These contaminants also affect mussel glochidia, which are sensitive to some toxicants (Goudreau et al. 1993, p. 221; Jacobson et al. 1997, p. 2,386; Valenti et al. 2005, p. 1,243).

Mussels are noticeably intolerant of heavy metals (Havlik and Marking 1987, p. 4). Even at low levels, certain heavy metals may inhibit glochidial attachment to fish hosts. Cadmium appears to be the heavy metal most toxic to mussels (Havlik and Marking 1987, pp. 4–9), although chromium, copper, mercury, and zinc also negatively affect biological processes (Naimo 1995, p. 355; Jacobson et al. 1997, p. 2,389; Valenti et al. 2005, p. 1,243). Chronic mercury contamination from a chemical plant on the North Fork Holston River, Virginia, destroyed a diverse mussel fauna downstream of Saltville, Virginia, and potentially contributed to the extirpation of the longsolid from that river (Brown et al. 2005, p. 1,459). An example of long-term declines and extirpation of mussels attributed to copper and zinc contamination originating from wastewater discharges at electric power plants includes the Clinch River in Virginia (a portion of which the longsolid currently occupies) (Zipper et al. 2014, p. 9). This highlights that, despite localized improvements, these metals can stay bound in sediments, affecting recruitment and densities of the mussel fauna for decades (Price et al. 2014, p. 12; Zipper et al. 2014, p. 9).

Examples of contaminant-related impacts across the range of longsolid and/or round hickorynut include (but are not limited to):

- Contaminants have affected mussel glochidia on the Clinch River, which is a stronghold population for the longsolid (Goudreau et al. 1993, p. 221; Jacobson et al. 1997, p. 2,386; Valenti et al. 2005, p. 1,243); round hickorynut is now considered extirpated in the Tennessee section of the river.
- The toxic effects of high salinity wastewater from oil and natural gas drilling on juvenile and adult freshwater mussels were observed in the Allegheny River, Pennsylvania, and in the Ohio River basin (Patnode et al. 2015, p. 55).
- Numerous streams throughout both species' ranges have experienced mussel and fish kills from toxic chemical spills, such as Fish Creek in Indiana for the round hickorynut (Sparks et al. 1999, p. 12), and the upper Tennessee River system in Virginia for the longsolid (Ahlstedt et al. 2016, p. 8; Neves 1987, p. 9; Jones et al. 2001, p. 20; Schmerfeld 2006, p. 12). Also in the Tennessee River basin, high counts of coliform bacteria originating from wastewater treatment plants have been documented, contributing to degradation of water quality being a primary threat to aquatic fauna (Neves and Angermeier 1990, p. 50).
- Heavy metals and their toxicity to mussels have been documented in the Great Lakes and in the Clinton, Muskingum, Ohio, Fox, Powell, Clinch, and Tennessee Rivers where one or both of these species occur (Havlik and Marking 1987, pp. 4–9; van Hees et al. 2010, p. 606). Coal plants are also located on the Kanawha, Green, and Cumberland Rivers, and the effects of these facilities on water quality and the freshwater mussel fauna, including the longsolid and round hickorynut, are likely similar.

The degradation of water quality as a result of land-based oil and gas drilling activities has a significant adverse effect on freshwater mussels, and specifically on the longsolid in the Ohio River basin and populations in the Allegheny River, as well as the Kanawha, Little Kanawha, and Elk Rivers (Entrekin et al. 2015, p. 2; Ecological Specialists, Inc. 2009, p. 27; Pond et al. 2008, p. 723; Patnode et al. 2015, p. 55).

Agricultural Activities

The advent of intensive row crop agricultural practices has been cited as a potential factor in freshwater mussel decline and species extirpation in the eastern United States (Peacock et al. 2005, p. 550). Nutrient enrichment and water withdrawals, which are threats commonly associated with agricultural activities, are most likely to affect individual longsolid and round hickorynut mussels, although in some instances may be localized and limited in scope. However, chemical control using pesticides, including herbicides, fungicides, insecticides, and their surfactants and adjuvants, are highly toxic to juvenile and adult freshwater mussels (Bringolf et al. 2007, p. 2,092). Waste from confined animal feeding and commercial livestock operations is another potential source of contaminants that comes from agricultural runoff. The concentrations of these contaminants that emanate from fields or pastures may be at levels that can affect an entire population, especially given the highly fragmented distributions of the longsolid and round hickorynut (also see *Contaminants,* above).

Agencies such as the U.S. Department of Agriculture's Natural Resources Conservation Service and Soil and Water Conservation Districts provide technical and financial assistance to farmers and private landowners. Additionally, county resource development councils and university agricultural extension services disseminate information on the importance of minimizing land use impacts, specifically agriculture, on aquatic resources. These programs help identify opportunities for conservation through projects such as exclusion fencing and alternate water supply sources, which help decrease nutrient inputs and water withdrawals, and help keep livestock off of stream banks and shorelines, thus reducing erosion. However, the overall effectiveness of these programs over a large scale is unknown given the longsolid's and round hickorynut's wide distribution and varying agricultural intensities.

Given the large extent of private land and agricultural activities within the ranges of the longsolid and round hickorynut, the effects of agricultural activities that degrade water quality and result in habitat deterioration (also see *Development/Urbanization,* above) are not frequently detected until after the event(s) occur. In summary, agricultural activities are pervasive across the ranges of the longsolid and round hickorynut. The effects of agricultural activities on the longsolid and round hickorynut are a factor in their historical decline and localized extirpations.

Agricultural activities are pervasive across the range of the longsolid and round hickorynut. Specifically, agricultural impacts have affected and continue to affect high, medium, and low condition longsolid populations within these basins, including:

- Longsolid only: French Creek and Allegheny River (Pennsylvania), Hughes River (West Virginia), Tuscawaras River (Ohio), Rolling Fork River (Kentucky), Little River and Valley River (North Carolina), Nolichucky River (Tennessee), Clinch and Powell Rivers (Tennessee and Virginia), and Estill Fork (Alabama).
- Round hickorynut only: South Fork Hughes River (West Virginia), and Pine, Belle, and Black Rivers (Michigan).
- Both species: Shenango River (Pennsylvania); Middle Island Creek, Elk, Little Kanawha, and North Fork Hughes Rivers (West Virginia); Licking and Kentucky Rivers (Kentucky); Elk and Buffalo Rivers (Tennessee); and Paint Rock River (Alabama).

Dams and Barriers

The effects of impoundments and barriers on aquatic habitats and freshwater mussels are relatively well-documented (Watters 2000, p. 261). Dams alter and disrupt connectivity, and alter water quality, which affect longsolid and round hickorynut species. Extinction/extirpation of North American freshwater mussels can be traced to impoundment and inundation of riffle habitats in all major river basins of the central and eastern United States (Haag 2009, p. 107). Humans have constructed dams for a variety of reasons: flood prevention, water storage, electricity generation, irrigation, recreation, and navigation (Eissa and Zaki 2011, p. 253). Dams, either natural (by beavers or by aggregations of woody debris) or manmade, have many impacts on stream ecosystems. Reductions in the diversity and abundance of mussels are primarily attributed to habitat shifts caused by impoundments (Neves et al. 1997, p. 63). The survival of mussels and their overall reproductive success are influenced:

- *Upstream of dams,* by the change from flowing to impounded waters, increased depths, increased buildup of sediments, decreased dissolved oxygen, and the drastic alteration in resident fish populations.
- *Downstream of dams,* by fluctuations in flow regimes, minimal releases and scouring flows, seasonal depletion of dissolved oxygen, reduced or increased water temperatures, and changes in fish assemblages.

Additionally, improperly constructed culverts at stream crossings may act as barriers and have some similar negative effects as dams on stream systems. Fluctuating flows through the culvert can vary significantly from the rest of the stream, preventing fish passage and

scouring downstream habitats. For example, if a culvert sits above the streambed, aquatic organisms cannot pass through it. These barriers fragment habitats along a stream course and contribute to genetic isolation of the aquatic species inhabiting the streams.

Whether constructed for purposes such as flood control, navigation, hydropower, water supply or multi-purpose uses, the construction and continued operation of dams (per existing licensing schedules) is a pervasive negative influence on the longsolid, round hickorynut, and their habitats throughout their ranges. Although there are recent efforts to remove older, failing dams within the ranges of the longsolid and round hickorynut, such as Lock and Dam 6 on the Green River, and Six Mile Dam on the Walhonding River, dams and their effects on longsolid and round hickorynut population distributions have had perhaps the greatest documented negative influence on these species (Hardison and Layzer 2001, p. 79; Layzer et al. 1993, p. 68; Parmalee and Polhemus 2004, p. 239; Smith and Meyer 2010, p. 543; Hubbs 2012, p. 8; Watters and Flaute 2010, p. 2).

Over 20 of the rivers and streams currently occupied by the longsolid are directly affected by dams, thus directly influencing the species' distribution rangewide. For the round hickorynut, all occupied rivers and streams are directly or indirectly affected by dams. See section 6.1.5 of the SSA reports for specific areas where dams and other impoundments occur within the range of the species (Service 2018, pp. 59–63; Service 2019, pp. 73–77).

Changing Climate Conditions

Changing climate conditions that can influence freshwater mussels include increasing or decreasing water temperatures and precipitation patterns that result in increased flooding, prolonged droughts, or reduced stream flows, as well as changes in salinity levels (Nobles and Zhang 2011, pp. 147–148). An increase in the number of days with heavy precipitation over the next 25 to 35 years is expected across the longsolid's range (U.S. Global Climate Change Research Program 2017, p. 207). Although changing climate conditions have potentially affected the longsolid, the timing, frequency, and extent of these effects is currently unknown. Possible impacts to the species could include alteration of the fundamental ecological processes, such as thermal suitability; changes in seasonal patterns of precipitation and runoff, which could alter the hydrology of streams; and changes in the presence or combinations of invasive, native or nonnative species.

We examined information on anticipated climate effects to wide-ranging mussels, which included a study that used representative concentration pathways (RCPs) 2.6 and 8.5 and was conducted on the federally endangered spectaclecase (*Cumberlandia monodonta*). Our analysis of the best available climate change information revealed that within the range of both the longsolid and round hickorynut, shifts in the species-specific physiological thresholds in response to altered precipitation patterns and resulting thermal regimes are possible. Additionally, the expansion of invasive, nonnative species because of climatic changes has the potential for long-term detriments to the mussels and their habitats. Other potential impacts are associated with changes in food web dynamics and the genetic bottleneck that can occur with low effective population sizes (Nobles and Zhang 2011, p. 148). The influences of these changes on the longsolid and round hickorynut are possible in the future (see Scenario 3 discussions under *Future Conditions,* below). Multi-scale climate models that can be interpreted at both the rangewide and population levels, and are tailored to benthic invertebrates, which incorporate genetic and life-history information, are needed before the longsolid and round hickorynut declines can be correlated with climate change. At this time, the best available information indicates that climate change is considered a secondary factor influencing the viability of the longsolid and round hickorynut and is not currently thought to be a primary factor in the longsolid's or round hickorynut's occurrence and distribution across their ranges.

Resource Extraction

The most intensive resource extraction activities affecting the longsolid, round hickorynut, and their habitats are coal mining and oil and gas exploration, which are summarized here. Additional less intensive resource extraction activities affecting the species include gravel mining/dredging, which is detailed in the SSA reports (Service 2018, pp. 64–65; Service 2019, pp. 79–83).

Activities associated with coal mining and oil and gas drilling can contribute chemical pollutants to streams. Acid mine and saline drainage (AMD) is created from the oxidation of iron-sulfide minerals such as pyrite, forming sulfuric acid (Sams and Beer 2000, p. 3). This AMD may be associated with high concentrations of aluminum, manganese, zinc, and other constituents (Tennessee Department of Environment and Conservation (TDEC) 2014, p. 72). These metals, and the high acidity typically associated with AMD, can be acutely and chronically toxic to aquatic life (Jones 1964, p. 96).

Natural gas extraction has negatively affected water quality through accidental spills and discharges, as well as increased sedimentation due to increases in impervious surface and tree removal for drill pads and pipelines (Vidic et al. 2013, p. 6). Disposal of insufficiently treated brine wastewater is known to adversely affect freshwater mussels (Patnode et al. 2015, p. 62). Contaminant spills are also a concern.

Unconsolidated sediment appears to be the largest impact to mussel physical habitat in streams as a result of gas extraction activities (Entrekin et al. 2015, p. 23). Excessive suspended sediments can impair feeding processes, leading to acute short-term or chronic long-term stress. Both excessive sedimentation and excessive suspended sediments can lead to reduced mussel fitness (Ellis 1936, p. 29; Anderson and Kreeger 2010, p. 2). This sediment is generated by construction of the well pads, access roads, and pipelines (for both gas and water).

Examples of the variety of resource extraction activities (coal, oil, gas, and gravel mining) that occur across the range of the longsolid and round hickorynut include (but are not limited to):

- Longsolid: The Cumberland Plateau and Central Appalachian regions of Tennessee and Kentucky (upper Cumberland River system and upper Tennessee River system) continue to experience mining activity that impairs water quality in streams (TDEC 2014, p. 62).
- Longsolid: High levels of copper, manganese, and zinc, metals toxic to freshwater mussels, were found in sediment samples from both the Clinch and Powell Rivers, and mining impacts close to Big Stone Gap, Virginia, have almost eliminated the mussel fauna in the upper Powell River. The longsolid is considered extirpated from the South Fork Powell River and Cane Creek, both tributaries to the upper portion of the Powell River (Ahlstedt and Tuberville 1997, p. 75; appendix D in the SSA report).
- Round hickorynut: Although populations persist in the Rockcastle River and Buck Creek in the Cumberland basin, coal and gravel mining continue to occur in these watersheds.
- Round hickorynut: The extensive mining of gravel in riparian zones

reduces vegetative buffers and causes channel instability and has been implicated in mussel declines in the Walhonding River, Ohio, which harbors a low condition population (Hoggarth 1995–96, p. 150).

• Round hickorynut: The West Fork River in West Virginia has oil and gas activity within the watershed, as well as legacy mining issues, which have resulted in biological impairment throughout the drainage (West Virginia Department of Environmental Protection 2014, pp. 23–29).

• Both species: Impacts from natural gas pipelines have a high potential to occur in West Virginia and Pennsylvania. Tank trucks hauling such fluids can overturn into mussel streams, which has occurred in Meathouse Fork of Middle Island Creek (Clayton 2018, pers. comm.).

• Both species: Natural gas extraction in the Marcellus Shale region (the largest natural gas field in the United States that runs through northern Appalachia) has negatively affected water quality through accidental spills and discharges in populations in the Shenango, Elk, Little Kanawha, and Kanawha management units.

• Both species: Coal mining has been implicated in sediment and water chemistry impacts in the Kanawha River in West Virginia, potentially limiting the Kanawha River populations of both species (Morris and Taylor 1978, p. 153).

• Both species: Resource extraction and AMD have been cited as contributors to the loss of mussel species in the Cumberland basin (Haag and Cicerello 2016, p. 15), including the loss of longsolid from Rockcastle and Caney Fork Rivers, and the loss of round hickorynut in the Caney Fork, Little South Fork, Big South Fork, and Cumberland Rivers (Anderson et al. 1991, p. 6; Layzer and Anderson 1992, p. 97; Warren and Haag 2005, p. 1,383).

• Both species: In the upper Kentucky River watershed, where both species exhibit a lack of recruitment (and also in the Red River for round hickorynut), historical un-reclaimed mines and active coal mines are prevalent (Kentucky Department for Environmental Protection 2015, p. 66).

Forest Conversion

Clearing large areas of forested wetlands and riparian systems eliminates shade once provided by tree canopies, exposing streams to more sunlight and increasing the in-stream water temperature (Wenger 1999, p. 35). The increase in stream temperature and light after deforestation alters macroinvertebrate (and other aquatic species) richness, abundance, and composition in streams to various degrees depending on a species' tolerance to temperature changes and increased light in the aquatic system (Kishi et al. 2004, p. 283; Couceiro et al. 2007, p. 272; Caldwell et al. 2014, p. 2,196).

Sediment runoff from clearing forested areas is a known stressor to aquatic systems (*e.g.,* Webster et al. 1992, p. 232; Jones III et al. 1999, p. 1,455; Broadmeadow and Nisbet 2004, p. 286; Aust et al. 2011, p. 123). The physical characteristics of stream channels are affected when large quantities of sediment are added or removed (Watters 2000, p. 263). Mussels and fishes are potentially affected by changes in suspended and bed material load, changes in bed sediment composition associated with increased sediment production and runoff, changes in channel formation, stream crossings, and inadequately buffered clear-cut areas, all of which can be sources of sediment entering streams (Taylor et al. 1999, p. 13).

Forest conversion to other land uses such as agriculture and urban development has occurred across the range of the longsolid and round hickorynut. Siltation and erosion from forest conversion to other land use activities without BMPs is a well-documented stressor to aquatic systems throughout the eastern United States, and can have an impact depending on the physical, chemical, and biological characteristics of adjacent streams (Allan and Castillo 2007, p. 107). Forest conversion has been documented in all basins in which these species occur.

Also, some forestry practices have the potential to result in increased siltation in riparian systems through the cycle of forest thinning, final harvest, site preparation, and re-planting activities. However, implementation of BMPs and establishment of SMZs can minimize these impacts (Service 2018 and 2019, chapter 6); adherence to these BMPs and SMZs broadly protects water quality, particularly related to sedimentation (as reviewed by Cristan et al. 2016, entire; Warrington et al. 2017, entire; and Schilling et al. 2021, entire).

Invasive and Nonnative Species

When a nonnative species is introduced into an ecosystem, it may have many advantages over native species, such as easy adaptation to varying environments and a high tolerance of living conditions that allow it to thrive in its new habitat. There may not be natural predators to keep the nonnative species in check; therefore, it can potentially live longer and reproduce more often, further reducing the biodiversity in the system. The native species may become an easy food source for invasive, nonnative species, or the invasive species may carry diseases that extirpate populations of native species. Invasive, nonnative species are pervasive across the longsolid's and round hickorynut's ranges. Examples of invasive, nonnative species that affect freshwater mussels like the longsolid and round hickorynut are the Asian clam (*Corbicula fluminea*), zebra mussel (*Dreissena polymorpha*), quagga mussel (*Dreissena bugensis*), black carp (*Mylopharyngodon piceus*), didymo (also known as rock snot; *Didymosphenia geminata*), and hydrilla (also known as water-thyme; *Hydrilla verticillata*).

• The Asian clam alters benthic substrates, may filter mussel sperm or glochidia, competes with native species for limited resources, and causes ammonia spikes in surrounding water when they die off en masse (Scheller 1997, p. 2).

• Dreissenid mollusks, such as the zebra mussel and quagga mussel, adversely affect native species through direct colonization, reduction of available habitat, changes in the biotic environment, or a reduction in food sources (MacIsaac 1996, p. 292). Zebra mussels are also known to alter the nutrient cycle in aquatic habitats, affecting other mollusks and fish species (Strayer 1999, p. 22).

• Given their size and diet preferences, black carp have the potential to restructure benthic communities. Mussel beds consisting of smaller individuals and juvenile recruits are probably most vulnerable to being consumed by black carp (Nico et al. 2005, p. 192). Furthermore, because black carp attain a large size (well over 3.28-ft (1-m) long), and their life span is reportedly over 15 years, they are expected to persist for many years. Therefore, they have the potential to cause harm to native mollusks by way of predation on multiple age classes (Nico et al. 2005, p. 77).

• The two nonnative plant species that are most problematic for the longsolid and round hickorynut (*i.e.,* impacting the species throughout their ranges) are hydrilla and didymo. Hydrilla is an aquatic plant that alters stream habitat, decreases flows, and contributes to sediment buildup in streams (National Invasive Species Council Management Plan 2018, p. 2). High sedimentation can cause suffocation, reduce stream flow, and make it difficult for mussels' interactions with host fish necessary for development. Didymo can alter the

habitat and change the flow dynamics of a site (Jackson et al. 2016, p. 970). Invasive plants grow uncontrolled and can smother habitat, affect flow dynamics, alter water chemistry, and increase water temperatures, especially in drought conditions (Colle et al. 1987, p. 416).

- Specifically for the round hickorynut, the nonnative round goby can out-compete native benthic fishes (such as darters and sculpin) for food and other resources, and may also prey especially heavily on juvenile native mussels, such as round hickorynut (Bradshaw-Wilson et al. 2019, p. 268)

Effects Associated With Small Population Size

Without the level of population connectedness that the species experienced historically (*i.e.,* without barriers such as reservoirs), small, isolated populations that may now be comprised predominantly of adult individuals could be slowly dying out. Even given the very improbable absence of other anthropogenic threats, these disjunct populations could be lost simply due to the consequences of below-threshold effective population sizes. Because only 60 primarily disjunct streams among 160 historically occupied areas continue to harbor populations of the longsolid, and 69 primarily disjunct streams of 301 historically occupied areas continue to harbor populations of the round hickorynut, this is likely partial testimony to the principle of effective population size and its role in population loss.

The longsolid and round hickorynut exhibit several traits that influence population viability, including relatively small population size and low fecundity at many locations compared to other mussels (see appendix A in Service 2018 and 2019). Small population size puts the species at greater risk of extirpation from stochastic events (*e.g.,* drought) or anthropomorphic changes and management activities that affect habitat. In addition, small longsolid or round hickorynut populations may have reduced genetic diversity, be less genetically fit, and be more susceptible to disease during extreme environmental conditions compared to large populations (Frankham 1996, p. 1,505).

Genetic drift occurs in all species, but the lack of drift is more likely to negatively affect populations that have a smaller effective population size (number of breeding individuals) and populations that are geographically spread out and isolated from one another. Relatively low fecundity, commonly observed in species of *Fusconaia,* is another inherent factor that could influence population viability (Geist 2010, p. 91). Survival of juveniles in the wild is already low, and females produce fewer offspring than other mussel species (Haag and Staton 2003, p. 2,125). Factors such as low effective population size, genetic isolation, relatively low levels of fecundity and recruitment, and limited juvenile survival could all affect the ability of these species to maintain current population levels and to rebound if a reduction in population occurs (*e.g.,* through predation, toxic releases or spills, or poor environmental conditions that inhibit successful reproduction). Additionally, based on our presumption of fish hosts of the longsolid and the known species of fish hosts for the round hickorynut, they are small-bodied fishes that have comparatively limited movement (Vaughn 2012, p. 6); therefore, natural expansion of longsolid and round hickorynut populations is limited.

Dendritic (branched) streams and rivers are highly susceptible to fragmentation and may result in multiple habitat fragments and isolated populations of variable size (Fagan 2002, p. 3,247). In contrast to landscapes where multiple routes of movement among patches are possible, pollution or other habitat degradation at specific points in dendritic landscapes can completely isolate portions of the system (Fagan 2002, p. 3,246).

Future Conditions

In the SSA reports, we forecast the longsolid's and round hickorynut's response to plausible future scenarios of environmental conditions and conservation efforts. The future scenarios project the threats into the future and consider the impacts those threats could have on the viability of the longsolid and round hickorynut. We apply the concepts of resiliency, redundancy, and representation to the future scenarios to describe possible future conditions of the longsolid and round hickorynut. The scenarios described in the SSA reports represent only three possible future conditions for each of the species. Uncertainty is inherent in any risk assessment, so we must consider plausible conditions to make our determinations. Viability is not a specific state, but rather a continuous measure of the likelihood that the species will sustain populations over time.

In the SSA reports, we considered three future scenarios. Scenario 1 assesses the species' response to factors influencing current longsolid and round hickorynut populations and management units, assuming the current level of impacts remains constant into the future. Scenario 2 assesses the species' response when factors that negatively influence most of the extant populations and management units are reduced by additional conservation. Scenario 3 assesses the species' response to worsening conditions of the factors that most influence the species due to the implementation of known existing and projected development, resource extraction, hydroelectric projects, etc. An important assumption of the predictive analysis presented herein is that future population resiliency for each species is largely dependent on water quality, water flow, instream habitat conditions, and condition of riparian vegetation (see *Species Needs,* above).

The future conditions timeframe for our analysis is different for each species. A timeframe of 50 to 70 years into the future is evaluated for the longsolid, and 20 to 30 years into the future is evaluated for the round hickorynut. We selected these timeframes based on the availability of trends and threat information, planning documents, and climate modeling that could be reliably projected into the future, and also the consideration of at least two generations for each species (*i.e.,* 25 to 35 years for the long-lived longsolid, and on average 12–13 years (Shepard 2006, p. 7; Ehlo and Layzer 2014, p. 11) for the round hickorynut).

Longsolid

Our assessment predicts that if conditions remain the same or worsen into the future, all 60 populations would experience negative changes to the species' important habitat requisites (see *Species Needs,* above), including the loss of the single remaining population in the Cumberland River basin, and potentially resulting in no highly resilient populations (Scenario 3). Alternatively, the scenario that incorporates additive conservation measures beyond those currently implemented (Scenario 2) could result in the continued persistence of all 60 populations in the future. However, we note that approximately 30 of 60 (50 percent) of these are currently low condition populations, based on either surveys that pre-date 2000 or on the collection of only five or fewer older, non-reproducing individuals. Some of these populations may already be extirpated. The risks facing the longsolid populations varied among scenarios and are summarized below

(see table 8–1 and table ES–1 in the SSA report).

Under Scenario 1, lowered resiliency, representation, and redundancy are expected. Under this scenario, we predict that 1 population of the current 3 high condition populations would remain in high condition, 6 populations (10 percent) in medium condition, and 15 populations (25 percent) in low condition. Redundancy would be reduced with likely extirpation of 38 out of 60 (63 percent) currently extant populations; only the Ohio River basin (one of the three basins currently occupied by the species) would retain one highly resilient population (*i.e.,* the Green River population in the Upper Green management unit). Representation would be reduced, with two of the three currently occupied river basins continuing to harbor longsolid populations.

Under Scenario 2, we predict higher levels of resiliency in some areas of the longsolid's range than was estimated for Scenario 1; representation and redundancy would remain the same level as current conditions, with the species continuing to occur within all currently occupied management units and States across its range. Seven populations (12 percent) are predicted to be in high condition, compared to the current four populations in high condition. Scenario 2 also predicts 20 populations (33 percent) in medium condition and 33 populations (52 percent) in low condition; no populations would become extirpated. All three currently occupied major river basins would remain occupied, and the existing levels of redundancy and representation would improve. It is possible that this scenario is the least likely to occur in the future as compared to Scenario 1 or 3 only because it will take many years (potentially beyond the 50- to 70-year timeframe analyzed in the SSA report) for all of the beneficial effects of management actions that are necessary to be implemented and realized on the landscape.

Under Scenario 3, we predict a significant decrease in resiliency, representation, and redundancy across the species' range. Redundancy would be reduced from three major river basins to two basins with no high condition populations remaining, and the likely extirpation of 44 (73 percent) of the currently extant populations. The resiliency of the remaining 16 populations is expected to be reduced to 3 populations (5 percent) in medium condition and 13 (22 percent) in low condition. In addition to the loss of 44 populations, 32 (29 percent) of the management units are predicted to become extirpated. Representation would be reduced to 13 management units, 2 major river basins, and 3 States (as compared to the current 9 States) occupied by the species.

Round Hickorynut

Our assessment predicts that if conditions remain the same (Scenario 1), 44 of 69 populations (62 percent) would experience negative changes to the important habitat requisites, including the potential loss of 23 populations. This includes the predicted extirpation of the two populations in the Cumberland River basin and the population in the Lower Mississippi River basin. Additionally, under Scenario 3, no highly resilient populations are able to persist, and 90 percent of remaining populations are in low condition. Alternatively, the scenario that includes additive conservation measures beyond those currently implemented (Scenario 2) could result in the continued persistence of all 69 populations in the future. However, approximately 49 of 69 (71 percent) of these populations are currently in low condition. Many of the known populations of the round hickorynut have been collected as 10 or fewer individuals, with limited extent information available, due to the lack of survey effort targeting the species (Service 2019, appendix A). The risks facing round hickorynut populations varied among scenarios and are summarized below (see also table 8–1 and table ES–1 in the SSA report).

Under Scenario 1, lowered resiliency, representation, and redundancy are expected. We predict that only one of the current four high condition populations would remain in high condition. Under this scenario, only the Great Lakes basin (one of the five basins currently occupied by the species) would retain a highly resilient population (*i.e.,* the Grand River). Of the 69 extant populations, 14 (20 percent) would be in medium condition and 31 (45 percent) would be in low condition. We estimate extirpation of 23 out of 69 (33 percent) populations. Redundancy would decline due to these population and management unit losses, resulting in a loss of the species from Pennsylvania and Mississippi. Representation would be reduced through extirpation of populations and management units in the Cumberland and Great Lakes basins, a 40 percent loss of redundancy compared to current conditions. Under this scenario, only three of the five currently occupied river basins (Great Lakes, Ohio, and Tennessee) continue to harbor round hickorynut populations.

Under Scenario 2, we predict higher levels of resiliency in some areas of the round hickorynut's range than is estimated for Scenario 1; representation and redundancy would remain the same level as current conditions with the species continuing to occur within all currently occupied management units and States across the species' 9-State range. Up to 15 populations (23 percent) are predicted to be high condition compared to the current 4 populations in high condition. Scenario 2 also predicts 39 populations (56 percent) in medium condition and 15 populations (22 percent) in low condition. All currently occupied major river basins would remain occupied, and the existing levels of redundancy and representation would improve. There are sufficient population sizes within each basin to facilitate augmentation and restoration efforts, whether it be within-basin translocations or captive propagation techniques. It is possible that this scenario is the least likely to occur in the future as compared to Scenario 1 or 3. This is because it will take many years (potentially beyond the 20- to 30-year time frame analyzed in the SSA report) for all of the beneficial effects of management actions that are necessary to be implemented on the landscape to be realized.

Under Scenario 3, we predict a significant decrease in resiliency, representation, and redundancy across the species' range. Redundancy would be reduced from five major river basins to three basins, with extirpations expected to occur in the Cumberland and Lower Mississippi River basins. No high condition populations would remain, and 49 (71 percent) of the 69 extant populations are likely to become extirpated. The resiliency of the remaining 20 populations is expected to be reduced to 2 populations (10 percent) in medium condition and 18 (90 percent) in low condition. In addition to the potential loss of 49 populations, 23 (68 percent) of the currently extant 36 management units are predicted to no longer harbor the species. Representation could be reduced to 14 management units across 3 major river basins. Extirpations are expected from the States of Pennsylvania, Michigan, and Mississippi, leaving 6 States (as compared to the current 9, and historically 12) occupied by the species.

Determination of Status for the Longsolid and Round Hickorynut

Introduction

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures

for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

In conducting our status assessment of the longsolid and round hickorynut, we evaluated all identified threats under the Act's section 4(a)(1) factors and assessed how the cumulative impact of all threats acts on the viability of the species as a whole. That is, all the anticipated effects from both habitat-based and direct mortality-based threats are examined in total and then evaluated in the context of what those combined negative effects will mean to the current and future condition of the longsolid and round hickorynut. However, for the vast majority of potential threats, the effect on the longsolid and round hickorynut (*e.g.,* total losses of individual mussels or their habitat) cannot be quantified with available information. Instead, we use the best available information to gauge the magnitude of each individual threat on the longsolid and round hickorynut, and then assess how those effects combined (and as may be ameliorated by any existing regulatory mechanisms or conservation efforts) will impact the longsolid's or round hickorynut's current and future viability.

Longsolid—Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we determined that the species' distribution and abundance has been reduced across its range as demonstrated by both the number of occupied management units and the number of populations where it historically occurred. Historically, the species occurred within 160 populations and 105 management units across 12 States; currently, the species occurs in 60 populations and 45 management units across 9 States, which represents a 62 percent reduction of its historically occupied populations (although we note that the remaining populations are well-distributed as opposed to concentrated within its range). The conditions of the remaining 60 extant populations vary between being highly resilient, moderately resilient, or having low resiliency (see *Current Conditions,* above, and section 5.2 in the SSA report (Service 2018, pp. 34–37)).

Currently, 3 populations (5 percent) are highly resilient, 8 (13 percent) are moderately resilient, and 49 (71 percent) have low resiliency. Although downward trends are evident compared to historical information, 11 highly to moderately resilient populations are present within three of the four major river basins the species is historically known to occupy. Current and ongoing threats from habitat degradation or loss (Factor A), residual impacts from past harvest and overutilization (Factor B), and invasive, nonnative species (Factor E) contribute to the species' negative effects associated with small population size (Factor E). The continued occupancy of these 11 populations (in addition to some survey information) implies that recent recruitment is occurring in some populations to help maintain a level of resiliency, redundancy, and representation. Thus, after assessing the best available information, we conclude that the longsolid is not currently in danger of extinction throughout all of its range. Therefore, we proceed with determining whether the longsolid is likely to become an endangered species within the foreseeable future throughout all of its range.

At this point in time, and as noted above, the threats currently acting on the species include habitat degradation or loss from a variety of sources and invasive, nonnative species, all of which contribute to the negative effects associated with the species' small population size. Our analysis revealed that these threats are likely to continue into the foreseeable future, or approximately 50 to 70 years. This timeframe accounts for reasonable predictions of threats continuing into the future based on our examination of empirical data available over the last 30 years (*e.g.,* survey data, how threats are manifesting themselves on the landscape and the species, implementation of management plans and voluntary conservation actions), and also takes into consideration the biology of the species (multiple generations of a long-lived species) and the licensing schedules of dams within the species' range.

The best available information, including our consideration of comments we received on the September 29, 2020 (85 FR 61384), proposed rule, indicates that the threats currently acting upon the longsolid are expected to continue into the foreseeable future, some of which (*e.g.,* water quality and habitat degradation, and invasive, nonnative species) are reasonably expected to worsen over time, including concurrent with increasing human population trends that further reduce the species' resiliency, redundancy, and representation across its range. Our analysis reveals the potential for either none or a single population (*i.e.,* the Green River in Kentucky) to persist as highly resilient (*i.e.,* continued reproduction with varied age classes present) in the foreseeable future, assuming threats remain or worsen on the landscape. Additionally, the majority of the remaining populations would exhibit low resiliency, while many (between 30 and 73 percent of the current low condition populations) would potentially become extinct or functionally extinct (*e.g.,* significant habitat degradation; no reproduction due to highly isolated, non-recruiting individuals). Our future analysis also reveals a high risk that the species would become extirpated in one of the four historically occupied river basins (*i.e.,* Cumberland River basin); it has already been lost from the Great Lakes basin. Thus, after assessing the best available information, we conclude that the longsolid is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Longsolid—Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), vacated the aspect of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (Final Policy; 79 FR 37578; July 1, 2014) that provided that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range.

Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the longsolid, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify portions of the range where the species may be in danger of extinction.

We evaluated the range of the longsolid to determine if the species is in danger of extinction now in any portion of its range. The range of a species can theoretically be divided into portions in an infinite number of ways. We examined the species entire range in an attempt to focus this analysis on portions of the species' range that may meet the definition of an endangered species. For the longsolid, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now in that portion.

The statutory difference between an endangered species and a threatened species is the timeframe in which the species becomes in danger of extinction; an endangered species is in danger of extinction now while a threatened species is not in danger of extinction now but is likely to become so in the foreseeable future. Thus, we considered the time horizon for the threats that are driving the longsolid to warrant listing as a threatened species throughout all of its range. We then considered whether these threats or their effects are occurring in any portion of the species' range such that the species is in danger of extinction now in that portion of its range. We examined the following threats: habitat degradation or loss; invasive, nonnative species; effects associated with small population size; and the potential for cumulative effects. We also considered whether these threats may be exacerbated by small population size (or low condition). Overall, we found that threats are likely acting on individuals or populations, or even basins, similarly across the species' range. These threats are certain to occur, and in those basins with few populations that are predominantly in low condition, these populations are facing the same threats, and these threats can be of greater magnitude in some areas or of greater impact, given small population sizes.

One basin—the Cumberland River—has been reduced by 91 percent with one remaining low condition population. Although there are low condition populations in all three basins in which the species occurs, because this basin has seen its populations significantly reduced to a single population currently in low condition, this circumstance—in combination with the other threats acting on the species throughout its range—may indicate that the species may be in danger of extinction now in this portion of the range.

Small, isolated populations often exhibit reduced levels of genetic variability, which diminishes the species' capacity to adapt and respond to environmental changes, thereby decreasing the probability of long-term persistence. Small populations may experience reduced reproductive vigor, for example, due to inbreeding depression. Isolated individuals may have difficulty reproducing. The problems associated with small population size and vulnerability to random demographic fluctuations or natural catastrophes are further magnified by synergistic interactions with other threats, such as those discussed above. Based on our review of information and the synergistic effects of threats exacerbated by a single low-condition population in the Cumberland River basin, we find that this basin is a portion of the longsolid's range with a potential difference in biological condition.

Because we have determined the Cumberland River basin is a portion of the range that may be in danger of extinction now, we next evaluate whether this portion may be significant. We first examined this area's contribution to the resiliency, redundancy, and representation of the species. We determined that this basin contains 1 of 60 populations (1.7 percent) identified in the SSA report. Therefore, this single population does not contribute significantly, either currently or in the foreseeable future, to the species' total resiliency at a biologically meaningful scale compared to other representative areas. The overall representation described herein would likely be the same under two of the three scenarios. We conclude that the Cumberland River basin population does not contribute meaningfully to the species' viability overall. We evaluated the best available information for the Cumberland River basin in this context, assessing its significance in terms of these conservation concepts and determined that this single portion is not biologically significant to the species.

The single population in the Cumberland River basin does not act as a refugia for the species or as an important spawning ground. In addition, the water quality is similar throughout the species' range with impaired water quality occurring in all three basins. Since the longsolid occurs in similar aquatic habitats across its range, the Cumberland River basin portion provides similar habitat characteristics as the remainder of the range. Therefore, there are no unique habitat characteristics attributable to just the Cumberland River basin portion of the range, and this portion serves a similar role in supporting the species' viability as compared to the rest of the range.

Overall, and in summary, we found one portion of the longsolid's range, the Cumberland River basin, that may have a different status as compared to the remaining portion of the longsolid's range. We found the Cumberland River basin was not a biologically meaningful portion of the longsolid's range; in other words, we found it was not significant in terms of its overall contribution to the species' resiliency, redundancy, and representation, nor was it found to be significant in terms of high-quality habitat or habitat that is otherwise important for the species' life history. As a result, while Cumberland River basin may have a different status, we determined it is not a significant portion of the range. Accordingly, no portion of the longsolid's range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final

Policy, including the definition of ''significant'' that those court decisions held to be invalid.

Longsolid—Determination of Status

Our review of the best available scientific and commercial information indicates that the longsolid meets the definition of a threatened species. Therefore, we are listing the longsolid as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Round Hickorynut—Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we determined that the round hickorynut's abundance has been reduced across its range as demonstrated by both number of occupied management units and the number of populations where the species has historically occurred. Historically, the species occurred within 301 populations and 138 management units across 12 States (plus at least 10 populations and 8 management units within the Canadian Province of Ontario); currently, the species occurs in 69 populations and 36 management units across 9 States, which represents a 77 percent reduction of its historically occupied populations (although we note that the remaining populations are widely distributed as opposed to concentrated within its range). The species also continues to occur in Canada, although it is estimated to have declined by greater than 92 percent, as reported in 2013 (Committee on the Status of Species at Risk in Ontario 2013, p. 4). The conditions of the remaining 69 currently extant populations in the United States vary between being highly resilient, moderately resilient, or having low resiliency (see *Current Conditions,* above, and section 5.2 in the SSA report (Service 2019, pp. 43–47)).

Currently, 4 round hickorynut populations (6 percent) are highly resilient, 16 (23 percent) are moderately resilient, and 49 (71 percent) have low resiliency. Although downward trends are evident compared to historical information, 20 highly to moderately resilient populations in the United States continue to occupy 4 of the 5 major river basins where the species is historically known to occur. Current and ongoing threats from habitat degradation or loss (Factor A), and invasive, nonnative species (Factor E), contribute to the negative effects associated with the species' small population size (Factor E). The continued occupancy of these 20 populations (in addition to some survey information) implies that recent recruitment is occurring in some populations, and they maintain a level of resiliency, redundancy, and representation. Thus, after assessing the best available information, we conclude that the round hickorynut is not currently in danger of extinction throughout all of its range. Therefore, we proceed with determining whether the round hickorynut is likely to become an endangered species within the foreseeable future throughout all of its range.

As noted above, the threats acting on the species include habitat degradation or loss from a variety of sources and invasive, nonnative species, both of which contribute to the negative effects associated with the species' small population size. Our analysis revealed that these threats are likely to continue into the foreseeable future, or approximately 20 to 30 years. This timeframe accounts for reasonable predictions of threats continuing into the future based on our examination of empirical data in our files (*e.g.,* survey data, how threats are manifesting themselves on the landscape and the species, implementation of management plans and voluntary conservation actions), and also takes into consideration the biology of the species and the licensing schedules of dams within the species' range.

The best available information, including our consideration of comments we received on the September 29, 2020 (85 FR 61384), proposed rule, suggests that the threats currently acting upon the round hickorynut are expected to continue into the foreseeable future. The effects of water quality and habitat degradation, and invasive, nonnative species, are reasonably expected to worsen over time, including concurrent with increasing human population trends, thus further reducing the species' resiliency, redundancy, and representation across its range. Our analysis reveals the potential for either none or a single population (*i.e.,* the Grand River in Ohio) to persist as highly resilient (*i.e.,* continued reproduction with varied age classes present) in the foreseeable future, assuming threats remain or worsen on the landscape. Additionally, the majority of the remaining populations would exhibit low resiliency, while many (between 33 and 71 percent of the current low condition populations) would potentially become extinct or functionally extinct (*e.g.,* significant habitat degradation; no reproduction due to highly isolated, non-recruiting individuals). Our future analysis also reveals a high risk that the species would become extirpated in two of the five historically occupied river basins (*i.e.,* Cumberland River basin and Lower Mississippi River basin). Overall, the current threats acting on the species and its habitat are expected to continue, and there are no indications that these threats would be lessened or that declining population trends would be reverted. Thus, after assessing the best available information, we conclude that the round hickorynut is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Round Hickorynut—Status Throughout a Significant Portion of Its Range

See above, under *Longsolid—Status Throughout a Significant Portion of Its Range,* for a description of our evaluation methods and our policy application.

In undertaking the analysis for the round hickorynut, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify portions of the range where the species may be endangered.

We evaluated the range of the round hickorynut to determine if the species is in danger of extinction now in any portion of its range. The range of a species can theoretically be divided into portions in an infinite number of ways. We examined the species entire range in an attempt to focus this analysis on portions of the species' range that may meet the definition of an endangered species. For the round hickorynut, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now in that portion.

As similarly described above for the longsolid, the statutory difference between an endangered species and a threatened species is the timeframe in which the species becomes in danger of extinction; an endangered species is in danger of extinction now while a threatened species is not in danger of extinction now but is likely to become so in the foreseeable future. Thus, we considered the time horizon for the threats that are driving the round hickorynut to warrant listing as a threatened species throughout all of its range. We then considered whether these threats or their effects are occurring in any portion of the species' range such that the species is in danger

of extinction now in that portion of its range. We examined the following threats: habitat degradation or loss; invasive, nonnative species; negative effects associated with small population size; and the potential for cumulative effects. We also considered whether these threats may be exacerbated by small population size (or low condition). Overall, we found that threats are likely acting on individuals or populations, or even basins, similarly across the species' range. These threats are certain to occur, and in those basins with few populations that are predominantly in low condition, these populations are facing the same threats, and these threats can be of greater magnitude in some areas or of greater impact, given small population sizes.

Three of five basins where round hickorynut has historically occurred (Great Lakes, Cumberland River, and Lower Mississippi River basins) have been reduced to predominantly low condition populations. Specifically, the Great Lakes basin has been reduced from 25 populations to 5 low condition populations, 1 medium condition population, and 1 high condition population; the Cumberland River basin has been reduced from 23 populations to 2 low condition populations; and the Lower Mississippi River basin has been reduced from 9 populations to a single remaining low condition population. Although there are low condition populations in every basin in which the species occurs, because these three basins have seen their populations significantly reduced and a predominance of the Great Lakes basin populations and the remaining populations for the other two basins are currently in low condition, these circumstances—in combination with the other threats acting on the species throughout its range—may indicate that the species may be in danger of extinction now in these portions of the range.

As similarly described above for the longsolid, small, isolated populations often exhibit reduced levels of genetic variability, which diminishes the species' capacity to adapt and respond to environmental changes, thereby decreasing the probability of long-term persistence. Small populations may experience reduced reproductive vigor, for example, due to inbreeding depression. Isolated individuals may have difficulty reproducing. The problems associated with small population size and vulnerability to random demographic fluctuations or natural catastrophes are further magnified by synergistic interactions with other threats, such as those discussed above. Based on our review of information and the synergistic effects of threats exacerbated by a predominance of populations in low condition within the Great Lakes, Cumberland, and Lower Mississippi River basins (where populations have been significantly extirpated), we find that these three basins are portions of the round hickorynut's range with a potential difference in biological condition.

Because we have determined the Great Lakes, Cumberland, and Lower Mississippi River basins are portions of the range that may be in danger of extinction now, we next evaluate whether those portions may be significant (see additional discussion above for the longsolid). We first examined each of these area's contributions to the resiliency, redundancy, and representation of the species. Although these basins contain 10 of 69 populations (15 percent) identified in the SSA report, the Great Lakes basin consists of 1 population currently with moderate resiliency and 1 with high resiliency, and the remaining 5 populations demonstrate low resiliency; the remaining 3 populations in the Cumberland River basin and the Lower Mississippi River basin are all low condition populations. These low condition populations do not contribute significantly, either currently or in the foreseeable future, to the species' total resiliency at a biologically meaningful scale compared to other representative areas. Although the low condition populations in these basins are relatively small, the current and future redundancy suggests that threats would be unlikely to extirpate round hickorynut in the Great Lakes basin, but there is potential to lose the remaining three low condition populations under the current level of threats scenario (Scenario 1). Overall representation would be modified through loss of two currently occupied basins. We evaluated the best available information for the Great Lakes, Cumberland River, and Lower Mississippi River basins in this context, assessing each portion's significance in terms of these conservation concepts (*i.e.,* resiliency, representation, and redundancy), and determined that there is not substantial information to indicate that any of these areas may be biologically significant to the species.

Round hickorynut populations are widely distributed over nine States and five major river basins, and we considered geographic range as a surrogate for geographic variation and proxy for potential local adaptation and adaptive capacity. A river basin is any area of land where precipitation collects and drains off into a common outlet, such as into a river, bay, or other body of water. The river basin includes all the surface water from precipitation runoff and nearby streams that run downslope towards the shared outlet, as well as the groundwater underneath the earth's surface. River basins connect into other drainage basins at lower elevations in a hierarchical pattern, with smaller sub-drainage basins. Given there are no data indicating genetic or morphological differentiation between the five major river basins for the species, and these specific portions of the range do not provide high value or high quality habitat to the species as compared to the rest of the range, we conclude that these areas are not biologically significant to the round hickorynut. Further, the round hickorynut occurs in similar aquatic habitats across its range and does not use unique observable environmental or behavioral characteristics attributable to just the Great Lakes, Cumberland River, or Lower Mississippi River basin populations. Therefore, the species exhibits similar basin-scale use of habitat.

The Great Lakes, Cumberland River, and Lower Mississippi River basin portions occur in stream habitat comprised of substrate types similar to the other basins where the round hickorynut performs the important life-history functions of breeding, feeding, and sheltering, and occur in areas with water quality sufficient to sustain these essential life-history traits. These three basins do not act as refugia for the species or as an important spawning ground. In addition, the water quality is similar throughout the species' range with impaired water quality occurring in all basins. Since the round hickorynut occurs in similar aquatic habitats across its range, the Great Lakes, Cumberland River, and Lower Mississippi River basin portions provide similar habitat characteristics as the remainder of the species' range. Therefore, there are no unique habitat characteristics attributable to just these basins, and these portions serve a similar role in supporting the species' viability as compared to the rest of the range.

Overall, and in summary, we found three portions of the round hickorynut's range—the Great Lakes, Cumberland, and Lower Mississippi River basins—that may have a different status then the remaining portion of the round hickorynut's range. Our analysis indicated these three basins are not significant in terms of their contribution to the species' resiliency, redundancy,

and representation, nor were they found to be significant in terms of high-quality habitat or habitat that is otherwise important for the species' life history. As a result, while these portions may have a different biological status, we determined they are not significant portions of the species' range. Accordingly, no portion of the round hickorynut's range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the round hickorynut is likely to become in danger of extinction within the foreseeable future throughout all of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy, including the definition of ''significant'' that those court decisions held to be invalid.

Round Hickorynut—Determination of Status

Our review of the best available scientific and commercial information indicates that the round hickorynut meets the definition of a threatened species. Therefore, we are listing the round hickorynut as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline shortly after a species is listed. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our websites (*https://ecos.fws.gov/ecp/species/9880,* and *https://ecos.fws.gov/ecp/species/9879*), or from our Asheville Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of New York, Pennsylvania, Ohio, Indiana, Michigan, Kentucky, West Virginia, Virginia, North Carolina, Tennessee, Alabama, and Mississippi would be eligible for Federal funds to implement management actions that promote the protection or recovery of the longsolid or round hickorynut or both species. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Please let us know if you are interested in participating in recovery efforts for the longsolid or round hickorynut. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference, consultation, or both as described in the preceding paragraph may include management and any other landscape-altering activities on Federal lands administered by the following agencies:

(1) U.S. Army Corps of Engineers (channel dredging and maintenance; dam projects including flood control, navigation, hydropower, bridge projects, stream restoration, and Clean Water Act permitting).

(2) U.S. Department of Agriculture, including the Natural Resources Conservation Service and Farm Service Agency (technical and financial assistance for projects) and the Forest Service (aquatic habitat restoration, fire management plans, fire suppression, fuel reduction treatments, forest plans, mining permits).

(3) U.S. Department of Energy (renewable and alternative energy projects).

(4) Federal Energy Regulatory Commission (interstate pipeline construction and maintenance, dam relicensing, and hydrokinetics).

(5) U.S. Department of Transportation (highway and bridge construction and maintenance).

(6) U.S. Fish and Wildlife Service (issuance of section 10 permits for enhancement of survival, habitat conservation plans, and safe harbor agreements; National Wildlife Refuge planning and refuge activities; Partners for Fish and Wildlife program projects benefiting these species or other listed species; Wildlife and Sportfish Restoration program sportfish stocking).

(7) Environmental Protection Agency (water quality criteria, permitting).

(8) Tennessee Valley Authority (flood control, navigation, hydropower, and land management for the Tennessee River system).

(9) Office of Surface Mining Reclamation and Enforcement (land resource management plans, mining permits, oil and natural gas permits, abandoned mine land projects, and renewable energy development).

(10) National Park Service (aquatic habitat restoration, fire management plans, fire suppression, fuel reduction treatments, land management plans, mining permits).

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of the listed species. The discussion below regarding protective regulations under section 4(d) of the Act complies with our policy.

II. Final Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [s]he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d), we have developed a rule that is designed to address the longsolid's and round hickorynut's specific threats and conservation needs. Although the statute does not require us to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the longsolid and round hickorynut. As discussed above under Summary of Biological Status and Threats, we have concluded that the longsolid and round hickorynut are likely to become in danger of extinction within the foreseeable future primarily due to declines in water quality; loss of stream flow; fragmentation, alteration, and deterioration of instream habitats; and nonnative species. These threats, which are expected to be exacerbated by continued urbanization and the effects of climate change, were central to our assessment of the future viability of the longsolid and round hickorynut. The provisions of this 4(d) rule will promote conservation of the longsolid and round hickorynut by encouraging management of the landscape in ways that meet both land management considerations and the conservation needs of the longsolid and round hickorynut and are consistent with land management considerations. The provisions of this rule are one of many tools that we will use to promote the conservation of the longsolid and round hickorynut.

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

This obligation does not change in any way for a threatened species with a species-specific 4(d) rule. Actions that result in a determination by a Federal agency of ''not likely to adversely affect'' continue to require the Service's written concurrence and actions that are ''likely to adversely affect'' a species

require formal consultation and the formulation of a biological opinion.

Provisions of the 4(d) Rule

This 4(d) rule will provide for the conservation of the longsolid and round hickorynut by prohibiting the following activities, except as otherwise authorized or permitted: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. This protective regulation includes most of these prohibitions because the longsolid and round hickorynut are at risk of extinction in the foreseeable future and putting these prohibitions in place will help to prevent further declines, preserve the species' remaining populations, slow their rate of decline, and decrease synergistic, negative effects from other ongoing or future threats.

As discussed above under Summary of Biological Status and Threats, multiple factors are affecting the status of the longsolid and round hickorynut. A range of activities have the potential to affect these species, including declines in water quality, loss of stream flow, riparian and instream fragmentation, alteration and deterioration of instream habitats, and nonnative species. These threats, which are expected to be exacerbated by continued urbanization and the effects of climate change, were central to our assessment of the future viability of the longsolid and round hickorynut. Therefore, we prohibit actions resulting in the incidental take of longsolid and round hickorynut by altering or degrading the habitat. Regulating incidental take resulting from these activities will help preserve the species' remaining populations, slow their rate of decline, and decrease synergistic, negative effects from other stressors.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating incidental and intentional take of the longsolid and round hickorynut will help preserve and recover remaining populations of these species, including slowing their date of decline and decreasing negative effects from threats. Therefore, we prohibit intentional take of longsolid and round hickorynut, except for take resulting from those actions and activities specifically excepted by the 4(d) rule.

The 4(d) rule provides for the conservation of the species by allowing exceptions, including certain standard exceptions, to incidental take prohibitions caused by actions and activities that, while they may have some minimal level of disturbance to the longsolid and round hickorynut, are not expected to negatively impact the species' conservation and recovery efforts. The proposed exceptions to these prohibitions include incidental take associated with (1) conservation and restoration efforts by State wildlife agencies, (2) channel restoration projects, (3) bank restoration projects, and (4) forest management activities that implement State-approved BMPs.

The first exception is for incidental take associated with conservation and restoration efforts for listed species conducted by State wildlife agencies, and including, but not limited to, population monitoring, relocation, and collection of broodstock; tissue collection for genetic analysis; captive propagation; and subsequent stocking into currently occupied and unoccupied areas within the historical range of the species. We recognize our special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that we shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, in addition to the first exception for incidental take described above, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, and coordinates these activities with us, would be able to conduct activities designed to conserve the longsolid and round hickorynut that may result in otherwise prohibited take without additional authorization.

The second exception is for incidental take resulting from channel and bank restoration projects for creation of natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools composed of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands.

The third exception is for incidental take caused by bank stabilization projects that use bioengineering methods to replace pre-existing, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Following these bioengineering methods, stream banks may be stabilized using native species live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), native species live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or native species brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). Native species vegetation includes woody and herbaceous species appropriate for the region and habitat conditions. These methods will not include the sole use of quarried rock (rip-rap) or the use of rock baskets or gabion structures. Prior to channel restoration and bank stabilization actions, surveys conducted in coordination with the appropriate Service field office to determine presence of longsolid and round hickorynut must be performed, and if located, relocation prior to project implementation may be necessary, with post-implementation monitoring.

The fourth exception is for incidental take associated with forest management activities that implement State-approved BMPs. Forest landowners who properly implement these BMPs are helping conserve the longsolid and round hickorynut, and this 4(d) rule is an incentive for all landowners to properly implement BMPs to avoid any take implications.

We reiterate that these actions and activities may result in some minimal level of take of the longsolid and round hickorynut, but they are unlikely to negatively impact the species'

conservation and recovery efforts. To the contrary, we expect they would have a net beneficial effect on the species. Across the species' range, instream habitats have been degraded physically by sedimentation and by direct channel disturbance. The activities in the 4(d) rule are intended to improve habitat conditions for the species in the long term.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that we must cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve the longsolid and round hickorynut that may result in otherwise prohibited take without additional authorization.

Nothing in this 4(d) rule will change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the longsolid and round hickorynut. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service.

III. Critical Habitat for the Longsolid and Round Hickorynut

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original

sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in the section 4(d) rule. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of these species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

As described above under Summary of Biological Status and Threats, longsolid and round hickorynut mussels occur in river or stream reaches. Occasional or regular interaction among individuals in different reaches not interrupted by a barrier likely occurs, but in general, interaction is strongly influenced by habitat fragmentation and distance between occupied river or stream reaches. Once released from their fish host, freshwater mussels are benthic, generally sedentary aquatic organisms and closely associated with appropriate habitat patches within a river or stream.

We derive the specific physical or biological features essential for the longsolid and round hickorynut from studies of these species' (or appropriate surrogate species') habitat, ecology, and life history. The primary habitat elements that influence resiliency of the longsolid and round hickorynut include water quality, water quantity, substrate, habitat connectivity, and the presence of host fish species to ensure recruitment. These features are also described above as resource needs under Summary of Biological Status and Threats, and a full description is available in the SSA reports; the individuals' needs are summarized below in Table 1.

TABLE 1—REQUIREMENTS FOR EACH LIFE STAGE OF THE LONGSOLID AND ROUND HICKORYNUT MUSSELS

Life stage	Resources needed to complete life stage [1]	Source
Fertilized eggs—early spring	• Clear, flowing water • Sexually mature males upstream from sexually mature females • Appropriate spawning temperatures	Berg et al. 2008, p. 397; Haag 2012, pp. 38–39.
Glochidia—late spring to early summer	• Clear, flowing water • Enough flow to keep glochidia or conglutinates adrift and to attract drift-feeding host fish • Presence of host fish for attachment	Strayer 2008, p. 65; Haag 2012, pp. 41–42.
Juveniles—excystment from host fish to approx. 0.8 in (~20 mm) shell length.	• Clear, flowing water • Host fish dispersal • Appropriate interstitial chemistry; low salinity, low ammonia, low copper and other contaminants, high dissolved oxygen • Appropriate substrate (clean gravel/sand/cobble) for settlement	Dimock and Wright 1993, pp. 188–190; Sparks and Strayer 1998, p. 132; Augspurger et al. 2003, p. 2,574; Augspurger et al. 2007, p. 2,025; Strayer and Malcom 2012, pp. 1,787–1,788.
Adults—greater than 0.8 in (20 mm) shell length.	• Clear, flowing water • Appropriate substrate (stable gravel and coarse sand free from excessive silt) • Adequate food availability (phytoplankton and detritus) • High dissolved oxygen • Appropriate water temperature	Yeager et al. 1994, p. 221; Nichols and Garling 2000, p. 881; Chen et al. 2001, p. 214; Spooner and Vaughn 2008, p. 308.

[1] These resource needs are common among North American freshwater mussels; however, due to lack of species-specific research, parameters specific to longsolid and round hickorynut are unavailable.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the longsolid and round hickorynut from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in chapter 4 of the SSA reports (Service 2018, pp. 27–32; Service 2019, pp. 30–39), both of which are available on *https://www.regulations.gov* under Docket No. FWS–R4–ES–2020–0010. We have determined that the following physical or biological features are essential to the conservation of the longsolid and round hickorynut:

(1) Adequate flows, or a hydrologic flow regime (magnitude, timing, frequency, duration, rate of change, and overall seasonality of discharge over time), necessary to maintain benthic habitats where the species are found and to maintain stream connectivity, specifically providing for the exchange of nutrients and sediment for maintenance of the mussels' and fish host's habitat and food availability, maintenance of spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats. Adequate flows ensure delivery of oxygen, enable reproduction, deliver food to filter-feeding mussels, and reduce contaminants and fine sediments from interstitial spaces. Stream velocity is not static over time, and variations may be attributed to seasonal changes (with higher flows in winter/spring and lower flows in summer/fall), extreme weather events (*e.g.,* drought or floods), or anthropogenic influence (*e.g.,* flow regulation via impoundments).

(2) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as, stable riffle-run-pool habitats that provide flow refuges consisting of predominantly silt-free, stable sand, gravel, and cobble substrates).

(3) Water and sediment quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages, including (but not limited to): Dissolved oxygen (generally above 2 to 3 parts per million (ppm)), salinity (generally below 2 to 4 ppm), and temperature (generally below 86 °F (°F) (30 °Celsius (°C)). Additionally, water and sediment should be low in ammonia (generally below 0.5 ppm total ammonia-nitrogen) and heavy metal concentrations, and lack excessive total suspended solids and other pollutants (see Threats Analysis, above).

(4) The presence and abundance of fish hosts necessary for recruitment of the longsolid (currently unknown, likely includes minnows of the family Cyprinidae and banded sculpin (*Cottus carolinae*)) and the round hickorynut (*i.e.,* eastern sand darter (*Ammocrypta pellucida*), emerald darter (*Etheostoma baileyi*), greenside darter (*E. blennioides*), Iowa darter (*E. exile*), fantail darter (*E. flabellare*), Cumberland darter (*E. susanae*), spangled darter (*E. obama*), variegate darter (*E. variatum*), blackside darter (*Percina maculata*), frecklebelly darter (*P. stictogaster*), and banded sculpin).

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

The features essential to the conservation of the longsolid and round hickorynut may require special management considerations or protections to reduce the following threats: (1) Alteration of the natural flow regime (modifying the natural hydrograph and seasonal flows), including water withdrawals, resulting in flow reduction and available water quantity; (2) urbanization of the landscape, including (but not limited to) land conversion for urban and commercial use, infrastructure (pipelines, roads, bridges, utilities), and urban water uses (resource extraction activities, water supply reservoirs,

wastewater treatment, etc.); (3) significant alteration of water quality and nutrient pollution from a variety of activities, such as mining and agricultural activities; (4) impacts from invasive species; (5) land use activities that remove large areas of forested wetlands and riparian systems; (6) culvert and pipe installation that creates barriers to movement for the longsolid and round hickorynut, or their host fishes; (7) changes and shifts in seasonal precipitation patterns as a result of climate change; and (8) other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Management activities that could ameliorate these threats include, but are not limited to: Use of BMPs designed to reduce sedimentation, erosion, and bank destruction; protection of riparian corridors and woody vegetation; moderation of surface and ground water withdrawals to maintain natural flow regimes; improved stormwater management; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

In summary, we find that the occupied areas we are designating as critical habitat contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Special management considerations or protection may be required of the Federal action agency to eliminate, or to reduce to negligible levels, the threats affecting the physical and biological features of each unit.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not designating any areas outside the geographical area occupied by the longsolid or round hickorynut because we have not identified any unoccupied areas that meet the definition of critical habitat, and we have determined that occupied areas are sufficient to conserve these two species.

Methodology Used For Selection of Units

First, we included stronghold (high) or medium condition populations (resiliency) remaining from historical conditions. These populations show recruitment or varied age class structure, and could be used for recovery actions to re-establish populations within basins through propagation activities or augment other populations through direct translocations within their basins.

Second, we evaluated spatial representation and redundancy across the species' ranges, to include last remaining consistently observable population(s) in major river basins and the last remaining population(s) in States if necessary, as States are crucial partners in monitoring and recovery efforts.

Third, we examined the overall contribution of medium condition populations and threats to those populations. Adjacency and connectivity to stronghold and medium populations was considered, and we did not include populations that have a potentially low likelihood of recovery due to limited abundances or populations currently under a high level of threats.

Finally, we evaluated overlap of longsolid and round hickorynut occurrences, as well as other listed aquatic species and designated critical habitat, to see if there are ongoing conservation and monitoring efforts that can be capitalized on for efficiency. Rangewide recovery considerations, such as maintaining existing genetic diversity and striving for representation of all major portions of the species' current ranges, were considered in formulating these critical habitat designations. For example, in the Cumberland River basin, there is only one remaining population of the longsolid (mainstem Cumberland River) and only two populations remaining of the round hickorynut (Buck Creek and Rockcastle River). In addition, in the Mississippi River basin, only one population of the round hickorynut remains (Big Black River). The distribution of the longsolid and round hickorynut in these basins is substantially reduced when compared to historical data that indicate these species were formerly much more widespread within these drainages. Therefore, these rivers and streams were included to maintain basin representation.

The critical habitat designation does not include all rivers and streams currently occupied by the species, nor all rivers and streams known to have been occupied by the species historically. Instead, it includes only the occupied rivers and streams within the current range that we determined have the physical or biological features that are essential to the conservation of these species and meet the definition of critical habitat. These rivers and streams contain populations large and dense enough and most likely to be self-sustaining over time (despite fluctuations in local conditions), and also have retained the physical or biological features that will allow for the maintenance and expansion of existing populations. These units also represent populations that are stable and distributed over a wide geographic area. We are not designating any areas outside the geographical area currently occupied by either the longsolid or round hickorynut because we determined that occupied areas are sufficient to conserve the two species. Accordingly, we did not find any unoccupied areas to be essential to the conservation of these species.

Sources of data for these critical habitat designations include multiple databases maintained by universities, information from State agencies throughout the species' ranges, and numerous survey reports on streams throughout the species' ranges (see SSA reports (Service 2018, entire; Service 2019, entire)). We have also reviewed available information that pertains to the habitat requirements of these species. Sources of information on habitat requirements include studies conducted at occupied sites and published in peer-reviewed articles, agency reports, and data collected during monitoring efforts (Service 2018, entire; Service 2019, entire).

In summary, for areas within the geographic area occupied by these species at the time of listing, we delineated critical habitat unit boundaries using a precise set of criteria. Specifically, we identified river and stream reaches with observations from 2000 to present, given the variable data associated with timing and frequency of mussel surveys conducted throughout the species' ranges. We determined it is reasonable to find these areas occupied due to the longevity of the longsolid, the potential for incomplete survey detections for the round hickorynut, highly variable recent survey information across both species' ranges, and available State heritage databases and information support for the likelihood of both species' continued presence in these areas within this timeframe. Specific habitat areas were delineated based on Natural

Heritage Element Occurrences, and unpublished survey data provided by States, universities, and nongovernmental organizations. These areas provide habitat for longsolid and round hickorynut populations and are large enough to be self-sustaining over time, despite fluctuations in local conditions. The areas within the critical habitat units represent continuous river and stream reaches of free-flowing habitat patches capable of sustaining host fishes and allowing for seasonal transport of glochidia, which are essential for reproduction and dispersal of longsolid and round hickorynut. We consider portions of the following rivers and streams to be occupied by the species at the time of listing, and meet the definition of critical habitat:

(1) Longsolid—French Creek, Allegheny River, Shenango River, Middle Island Creek, Little Kanawha River, Elk River, Kanawha River, Licking River, Green River, Cumberland River, Clinch River, and Paint Rock River (see Final Critical Habitat Designation, below).

(2) Round hickorynut—Shenango River, Grand River, Tippecanoe River, Middle Island Creek, Little Kanawha River, Elk River, Kanawha River, Licking River, Rockcastle River, Buck Creek, Green River, Paint Rock River, Duck River, and Big Black River (see Final Critical Habitat Designation, below).

Critical Habitat Maps

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the longsolid and round hickorynut. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action will affect the physical or biological features in the adjacent critical habitat.

We are designating as critical habitat stream reaches that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of these species. Twelve units for the longsolid and 14 units for the round hickorynut are designated based on the presence of the physical or biological features that support the longsolid's or round hickorynut's life-history processes. All of the units for both species contain all of the identified physical or biological features and support multiple life-history processes.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010.

Final Critical Habitat Designation

We are designating a total of 1,115 river mi (1,794 km) in 12 units as occupied critical habitat for the longsolid and a total of 921 river mi (1,482 km) in 14 units as occupied critical habitat for the round hickorynut. All or portions of some of these units overlap, and all 26 units are occupied by one or both species. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the longsolid and round hickorynut. The 12 areas designated as critical habitat for the longsolid are: French Creek, Allegheny River, Shenango River, Middle Island Creek, Little Kanawha River, Elk River, Kanawha River, Licking River, Green River, Cumberland River, Clinch River, and Paint Rock River. The 14 areas designated as critical habitat for the round hickorynut are: Shenango River, Grand River, Tippecanoe River, Middle Island Creek, Little Kanawha River, Elk River, Kanawha River, Licking River, Rockcastle River, Buck Creek, Green River, Paint Rock River, Duck River, and Big Black River. Tables 2 and 3 show the critical habitat units and the approximate river miles of each unit.

TABLE 2—CRITICAL HABITAT UNITS FOR THE LONGSOLID. ALL UNITS ARE OCCUPIED BY THE SPECIES

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit (State)	Adjacent riparian land ownership by type	Approximate river miles (kilometers)
LS 1. French Creek (Pennsylvania)	Public (Federal, State);	14 (22.1)
	Private	106 (170.6)
		Total = 120 (191.5)
LS 2. Allegheny River (Pennsylvania)	Public (Federal, State);	84 (135.8)
	Private	15 (24.1)
		Total = 99 (159.3)
LS 3. Shenango River (Pennsylvania)	Public (Federal, State);	7 (11.3)
	Private	15 (24.3)
		Total = 22 (35.5)
LS 4. Middle Island Creek (West Virginia)	Public (Local);	0.13 (0.2)
	Private	14 (23.5)
		Total = 14 (23.7)
LS 5. Little Kanawha River (West Virginia)	Public (Federal, State);	0.53 (0.9)
	Private	122 (197.2)
		Total = 123 (198)
LS 6. Elk River (West Virginia)	Public (Federal, State, Local);	7 (12.7)
	Private	93 (150.3)
		Total = 101 (163)
LS 7. Kanawha River (West Virginia)	Public (Federal, State, Local);	2 (4.6)
	Private	18 (29.3)
		Total = 21 (33.9)
LS 8. Licking River (Kentucky)	Public (Federal, State, Local);	19 (31.7)

TABLE 2—CRITICAL HABITAT UNITS FOR THE LONGSOLID. ALL UNITS ARE OCCUPIED BY THE SPECIES—Continued

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit (State)	Adjacent riparian land ownership by type	Approximate river miles (kilometers)
	Private	161 (259.7)
		Total = 181 (291.5)
LS 9. Green River (Kentucky)	Public (Federal, State, Local);	51 (82.4)
	Private	105 (169.2)
		Total = 156 (251.6)
LS 10. Cumberland River (Tennessee)	Public (Federal)	Total = 48 (77.5)
LS 11. Clinch River (Virginia and Tennessee)	Public (Federal, State);	17 (27.3)
	Private	160 (258.8)
		Total = 177 (286.1)
LS 12. Paint Rock River (Alabama)	Public (Federal, State);	56 (90.4)
	Private	2 (4.1)
		Total = 58 (94.5)
Public		305 (491)
Private		810 (1,304)
Total		1,115 (1,794)

Note: River miles may not sum due to rounding.

TABLE 3—CRITICAL HABITAT UNITS FOR THE ROUND HICKORYNUT. ALL UNITS ARE OCCUPIED BY THE SPECIES

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Adjacent riparian land ownership by type	Approximate river miles (kilometers)
RH 1. Shenango River (Pennsylvania)	Public (Federal, State);	7 (11.1)
	Private	15 (24.3)
		Total = 22 (35.5)
RH 2. Grand River (Ohio)	Public (State, Local);	33 (53)
	Private	59 (95.2)
		Total = 92 (148.2)
RH 3. Tippecanoe River (Indiana)	Public (State, Easement);	9 (14.5)
	Private	66 (105.6)
		Total = 75 (120.8)
RH 4. Middle Island Creek (West Virginia)	Public (Federal, State);	0.2 (0.4)
	Private	74.8 (120.4)
		Total = 75 (120.8)
RH 5. Little Kanawha River (West Virginia)	Public (Federal, State, Local);	0.7 (1.2)
	Private	109 (175.4)
		Total = 110 (176.6)
RH 6. Elk River (West Virginia)	Public (Federal, State, Local);	7 (12.7)
	Private	93 (150.3)
		Total = 101 (163)
RH 7. Kanawha River (West Virginia)	Public (Federal, State, Local);	4 (7.2)
	Private	33 (53.2)
		Total = 37.5 (60.4)
RH 8. Licking River (Kentucky)	Public (Federal, State, Local);	18 (30)
	Private	131 (211.8)
		Total = 150 (241.9)
RH 9. Rockcastle River (Kentucky)	Public (Federal);	15 (24.2)
	Private	0.3 (0.4)
		Total = 15.3 (24.6)
RH 10. Buck Creek (Kentucky)	Public (State, Local);	3 (5.5)
	Private	33 (52.6)
		Total = 36 (58.1)
RH 11. Green River (Kentucky)	Public (Federal, State);	37 (59.4)
	Private	61 (98.4)
		Total = 98 (157.7)
RH 12. Paint Rock River (Alabama)	Public (Federal, State);	46 (73.4)
	Private	2 (4.1)
		Total = 48 (77.5)
RH 13. Duck River (Tennessee)	Public (State, Local);	32 (51.1)
	Private	27 (43.7)
		Total = 59 (94.8)
RH 14. Big Black River (Mississippi)	Private	Total = 4 (7)

TABLE 3—CRITICAL HABITAT UNITS FOR THE ROUND HICKORYNUT. ALL UNITS ARE OCCUPIED BY THE SPECIES—Continued

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Adjacent riparian land ownership by type	Approximate river miles (kilometers)
Public		212 (341)
Private		709 (1,141)
Total		921 (1,482)

Note: River miles may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the longsolid and round hickorynut, below. There are a total of 12 units for the longsolid and 14 units for round hickorynut, 8 of which overlap in part or whole for both species, and all of which contain all of the physical and biological features essential to the conservation of both species. Also, the majority of units overlap in part or whole with existing critical habitat designated for other federally endangered species (*i.e.,* diamond darter (*Crystallaria cincotta*), Short's bladderpod (*Physaria globosa*), purple bean (*Villosa perpurpurea*), rough rabbitsfoot (*Quadrula cylindrica strigillata*), Cumberlandian combshell (*Epioblasma brevidens*), oyster mussel (*Epioblasma capsaeformis*), slabside pearlymussel (*Pleuronaia* (=*Lexingtonia*) *dolabelloides*), and fluted kidneyshell (*Ptychobranchus subtentus*)) or federally threatened species (*i.e.,* rabbitsfoot (*Quadrula cylindrica cylindrica*), yellowfin madtom (*Noturus flavipinnis*), and slender chub (*Erimystax* (=*Hybopsis*) *cahni*)), as specified below.

LS 1: French Creek

Unit LS 1 consists of 120 stream mi (191.5 km) of French Creek in Crawford, Erie, Mercer, and Venango Counties, Pennsylvania, from Union City Dam west of Union City, Erie County, downstream to its confluence with the Allegheny River near the City of Franklin, Venango County. Riparian lands that border the unit include approximately 106 stream mi (170.6 km; 76 percent) in private ownership and 14 stream mi (22.1 km; 24 percent) in public (Federal or State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes agriculture, several State-managed game lands, the communities of Cambridge Springs and Venango, and the cities of Meadville and Franklin. Union City Dam is operated by the U.S. Army Corps of Engineers. Unit LS 1 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. The entire 120 stream mi (191.5 km) of this unit overlap with designated critical habitat for the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within this unit include the degradation of habitat and water quality from impoundments, siltation and pollution due to resource extraction, agriculture, timbering practices, and human development; flow reduction and water quality degradation due to water withdrawals and wastewater treatment plants; and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include monitoring water quality degradation within the species' range resulting from row crop agriculture and oil and gas development, and efforts to prevent the spread of invasive, nonnative species, specifically the round goby (see Special Management Considerations or Protection, above).

LS 2: Allegheny River

Unit LS 2 consists of 99 river mi (159.3 km) of the Allegheny River in Warren, Crawford, Forest, Venango, and Clarion Counties, Pennsylvania, from Kinzua Dam east of Warren, Warren County, downstream to the Pennsylvania Route 58 crossing at Foxburg, Clarion County, Pennsylvania. Riparian lands that border the unit include approximately 15 river mi (24.1 km; 14 percent) in private ownership and 84 river mi (135.8 km; 86 percent) in public (Federal or State government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and State-managed game lands. The public land ownership for this unit is a combination of Allegheny National Forest lands and State lands, and the Kinzua Dam is operated by the U.S. Army Corps of Engineers. Unit LS 2 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 35 river mi (57 km) of this unit with designated critical habitat for the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit LS 2 include the degradation of habitat and water quality from impoundments, channelization, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Kinzua Dam to mimic the natural hydrograph, improvements to water quality to reverse degradation resulting from row crop agriculture and oil and gas development, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 3: Shenango River

Unit LS 3 is the same as Unit RH 1, described below for the round hickorynut. Unit LS 3 consists of 22 river mi (35.5 km) of the Shenango River in Crawford County, Pennsylvania, from Pymatuning Dam downstream to the point of inundation by Shenango River Lake near Big Bend, Mercer County, Pennsylvania. Riparian lands that border the unit include approximately 15 river mi (24.3 km; 32 percent) in private ownership and 7 river mi (11.3 km; 68 percent) in public (Federal or State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes the City of Greenville and its associated industry, and the unincorporated communities of Jamestown and New Harrisburg. Pymatuning Dam is owned by the State of Pennsylvania. Unit LS 3 is occupied by the species and contains all of the physical or biological features essential

to the conservation of the species. There is overlap of approximately 14.5 river mi (23.4 km) of this unit with designated critical habitat for the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit LS 3 include the degradation of habitat and water quality from impoundments, domestic and industrial pollution due to human development, resource extraction, water withdrawals, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Pytmatuning Dam to mimic the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 4: Middle Island Creek

Unit LS 4 partially overlaps with Unit RH 4 for the round hickorynut, described below. Unit LS 4 consists of 14 stream mi (23.7 km) of Middle Island Creek in Doddridge and Tyler Counties, West Virginia, from the mouth of Meathouse Fork south of Smithburg, Doddridge County, downstream to its confluence with Arnold Creek at the Tyler/Doddridge County line. Riparian lands that border the unit include approximately 14 stream mi (23.5 km; 99 percent) in private ownership and 0.13 river mi (0.2 km; less than 1 percent) in public (local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry and the communities of Smithburg, Avondale, and West Union. Unit LS 4 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit LS 4 include degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include actions to alleviate the threats of water quality and habitat degradation from hydrofracking wastewater discharges and impoundments downstream on the Ohio River, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 5: Little Kanawha River

Unit LS 5 partially overlaps with Unit RH 5 for the round hickorynut, described below. Unit LS 5 consists of 123 river mi (198 km) of the Little Kanawha River in Calhoun, Gilmer, Ritchie, and Wood Counties, West Virginia, from Burnsville Dam (which is in neighboring Braxton County) downstream to its confluence with the Ohio River in Parkersburg, Wood County, West Virginia. Riparian lands that border the unit include approximately 122 river mi (197.2 km; 99 percent) in private ownership and 0.53 river mi (0.9 km; less than 1 percent) in public (Federal or State government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. Burnsville Dam is operated by the U.S. Army Corps of Engineers. Unit LS 5 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit LS 5 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatments plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Burnsville Dam to mimic the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 6: Elk River

Unit LS 6 is the same as Unit RH 6, described below for the round hickorynut. Unit LS 6 consists of 101 river mi (163 km) of the Elk River in Braxton, Clay, and Kanawha Counties, West Virginia, from Sutton Dam in Braxton County downstream to its confluence with the Kanawha River at Charleston, Kanawha County, West Virginia. Riparian lands that border the unit include approximately 93 river mi (150.3 km; 92 percent) in private ownership and 7 river mi (12.7 km; 8 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC–8 level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. Sutton Dam is operated by the U.S. Army Corps of Engineers. Unit LS 6 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 28 river mi (44.6 km) of this unit with designated critical habitat for the federally endangered diamond darter (78 FR 52364; August 22, 2013).

Threats identified within Unit LS 6 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Sutton Dam to mimic the natural hydrograph and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 7: Kanawha River

Unit LS 7 partially overlaps with Unit RH 7 for the round hickorynut, described below. Unit LS 7 consists of 21 river mi (33.9 km) of the Kanawha River in Fayette and Kanawha Counties, West Virginia, from Kanawha Falls in Fayette County downstream to its confluence with Cabin Creek at Chelyan, Kanawha County, West Virginia. Riparian lands that border the unit include approximately 18 river mi (29.3 km; 90 percent) in private ownership and 2 river mi (4.6 km; 10 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. London and Marmet locks and dams within this unit are operated by the U.S. Army Corps of Engineers. Unit LS 7 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit LS 7 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include riparian vegetation re-establishment in addition to restoration efforts along shorelines to minimize sediment and contaminant inputs, and efforts to

prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 8: Licking River

Unit LS 8 partially overlaps with Unit RH 8 for the round hickorynut, described below. Unit LS 8 consists of 181 river mi (291.5 km) of the Licking River in Bath, Campbell, Fleming, Harrison, Kenton, Morgan, Nicholas, Pendleton, Robertson, and Rowan Counties, Kentucky, from Cave Run Dam in Bath/Rowan Counties downstream to its confluence with the Ohio River at Newport, Campbell/Kenton County, Kentucky. Riparian lands that border the unit include approximately 161 river mi (259.7 km; 90 percent) in private ownership and 19 river mi (31.7 km; 10 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture industry, and numerous cities and municipalities. The Cave Run Dam is operated by the U.S. Army Corps of Engineers. Unit LS 8 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit LS 8 include the degradation of habitat and water quality from impoundments and associated cold water discharges, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Cave Run Dam to mimic the natural hydrograph and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 9: Green River

Unit LS 9 partially overlaps with Unit RH 11 for the round hickorynut, described below. Unit LS 9 consists of 156 river mi (251.6 km) of the Green River in Butler/Warren, Edmonson, Green, Hart, and Taylor Counties, Kentucky, from Green River Lake Dam south of Campbellsville in Taylor County downstream to its confluence with the Barren River at Woodbury, Warren/Butler County, Kentucky. Riparian lands that border the unit include approximately 105 river mi (169.2 km; 67 percent) in private ownership and 51 river mi (82.4 km; 33 percent) in public (Federal, State, and local government) ownership; Federal lands include a portion of Mammoth Cave National Park. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities, and Green River Lake Dam is operated by the U.S. Army Corps of Engineers. Unit LS 9 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. The entire approximately 156-river-mi (252-km) unit overlaps with designated critical habitat for the federally endangered diamond darter (78 FR 52364; August 22, 2013) and the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit LS 9 include the degradation of habitat and water quality from impoundments and associated cold water discharges, siltation and pollution due to improper timbering and agricultural practices, resource extraction, water withdrawals, and development, all of which affect channel stability; wastewater treatment plants; and the presence of invasive, nonnative species. Special management considerations or protection measures may be needed to reduce or alleviate habitat degradation such as channelization and channel instability. Additional special management considerations or protection measures may be needed to address thermal and flow regimes associated with tail water releases from the Green River Lake Dam, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 10: Cumberland River

Unit LS 10 consists of 48 river mi (77.5 km) of the Cumberland River in Smith, Trousdale, and Wilson Counties, Tennessee, from Cordell Hull Dam north of Carthage in Smith County downstream to reservoir influence of Old Hickory Reservoir at U.S. Route 231 north of Lebanon, Wilson County, Tennessee. Riparian lands that border the unit are all public (Federal) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and the municipalities of Carthage and Rome, Tennessee; both Cordell Hull and Old Hickory Dams upstream and downstream of this unit are operated by the U.S. Army Corps of Engineers. Unit LS 10 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 1 river mi (1.7 km) of this unit with designated critical habitat for the federally endangered Short's bladderpod (79 FR 50990; August 26, 2014).

Threats identified within Unit LS 10 include the degradation of habitat and water quality from upstream and downstream impoundments and associated cold water discharges, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include channel stability, thermal regimes, altered flow regimes associated with tail water releases from Cordell Hull Reservoir, actions to address channelization, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 11: Clinch River

Unit LS 11 consists of 177 river mi (286.1 km) of the Clinch River in Russell, Scott, Tazewell, and Wise Counties in Virginia, and Claiborne, Hancock, and Hawkins Counties in Tennessee. This unit extends from Secondary Highway 637 west of Pounding Mill in Tazewell County, Virginia, downstream to County Highway 25, Claiborne County, Tennessee, northwest of Thorn Hill. The Tennessee portion of this unit is also encompassed by the Tennessee Wildlife Resources Agency's Clinch River Sanctuary. Riparian lands that border the unit include approximately 160 river mi (258.8 km; 90 percent) in private ownership and 17 river mi (27.3 km; 10 percent) in public (Federal and State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. Unit LS 11 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 171 river mi (274.4 km) of this unit with designated critical habitat for the federally endangered purple bean, oyster mussel, rough rabbitsfoot, and Cumberlandian combshell (69 FR 53136; August 31, 2004); the federally endangered slabside pearlymussel and fluted kidneyshell (78 FR 59556; September 26, 2013); and with the federally threatened yellowfin madtom and slender chub (42 FR 45526; September 9, 1977).

Threats identified within Unit LS 11 include the degradation of habitat and water quality from downstream impoundment, mining discharges, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include management of the Norris Reservoir downstream to provide additional riverine habitat, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

LS 12: Paint Rock River

Unit LS 12 partially overlaps with Unit RH 12 for the round hickorynut, described below. Unit LS 12 consists of 58 river mi (94.5 km) of the Paint Rock River in Jackson and Madison/Marshall Counties, Alabama, from the confluence of Hurricane Creek and Estill Fork in Jackson County, Alabama, downstream to its confluence with the Tennessee River west of Hebron, Madison/Marshall County, Alabama. Riparian lands that border the unit include approximately 2 river mi (4.1 km; 3 percent) in private ownership and 56 river mi (90.4 km; 97 percent) in public (Federal and State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and several small municipalities (Princeton, Hollytree, Trenton, and Paint Rock). Unit LS 12 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 53 river mi (85 km) of this unit with designated critical habitat for the federally endangered slabside pearlymussel (78 FR 59556; September 26, 2013) and the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit LS 12 include the degradation of habitat and water quality from downstream impoundment, siltation and pollution due to improper agricultural and timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include management of Wheeler Reservoir downstream to provide additional riverine habitat, working with landowners to implement BMPs to reduce erosion and sedimentation associated with agricultural lands, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 1: Shenango River

Unit RH 1 is the same as Unit LS 3 for the longsolid, described above. It consists of 22 river mi (35.5 km) of the Shenango River in Crawford County, Pennsylvania, from Pymatuning Dam downstream to the point of inundation by Shenango River Lake near Big Bend, Mercer County, Pennsylvania. Riparian lands that border the unit include approximately 15 river mi (24.3 km; 32 percent) in private ownership and 7 river mi (11.1 km; 68 percent) in public (Federal or State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes the City of Greenville and its associated industry, and the unincorporated communities of Jamestown and New Harrisburg. Pymatuning Dam is owned by the State of Pennsylvania. Unit RH 1 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 14.5 river mi (23.4 km) of this unit with designated critical habitat for the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit RH 1 include the degradation of habitat and water quality from impoundments, domestic and industrial pollution due to human development, resource extraction, water withdrawals, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Pytmatuning Dam to mimic the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 2: Grand River

Unit RH 2 consists of 92 river mi (148.2 km) of the Grand River in Ashtabula, Lake, and Trumbull Counties, Ohio, from the Trumbull/Geauga County line south of Lake County, Ohio State Route 88, downstream to the mouth of the Grand River at its confluence with Lake Erie. Riparian lands that border the unit include approximately 59 river mi (95.2 km; 64 percent) in private ownership and 33 river mi (53 km; 36 percent) in public (State and local government) ownership. The Grand River is a State Wild and Scenic River, with a ''Wild River'' designation for approximately 23 river mi (37 km) from the Harpersfield Covered Bridge downstream to the Norfolk and Western Railroad Trestle in Lake County, and ''Scenic River'' designation for approximately 33 river mi (53 km) from the U.S. 322 Bridge in Ashtabula County downstream to the Harpersfield Covered Bridge. General lands use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and several municipalities (West Farmington, Windsor, Rock Creek, and Perry). Harpersfield Dam is operated by the U.S. Army Corps of Engineers. Unit RH 2 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit RH 2 include degradation of habitat and water quality from impoundments, domestic and industrial pollution due to human development, resource extraction, water withdrawals, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from the Harpersfield Dam to mimic the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 3: Tippecanoe River

Unit RH 3 consists of 75 river mi (120.8 km) of the Tippecanoe River in Fulton, Marshall, Pulaski, and Starke Counties, Indiana, from the railroad crossing west of the communities of Tippecanoe, Marshall County, downstream to the Pulaski/White County line, southwest of the community of Star City, Indiana. Riparian lands that border the unit include approximately 66 river mi (105.6 km; 89 percent) in private ownership and 9 river mi (14.5 km; 11 percent) in public ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes agriculture and the communities of Tippecanoe, Pershing, and Ora. Unit RH 3 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 19 river mi (29.9 km) of this unit with designated critical habitat for the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit RH 3 include the degradation of habitat and

water quality from impoundments, domestic and industrial pollution due to human development, resource extraction, water withdrawals, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying operations of downstream impoundments to provide additional riverine habitats, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 4: Middle Island Creek

Unit RH 4 partially overlaps with Unit LS 4 for the longsolid, described above. Unit RH 4 consists of 75 stream mi (120.8 km) of the Middle Island Creek in Doddridge, Pleasants, and Tyler Counties, West Virginia, from the Tyler/Doddridge County line northeast of Deep Valley downstream to the confluence with the Ohio River, at St. Mary's, Pleasants County, West Virginia. Riparian lands that border the unit include approximately 74.8 stream mi (120.4 km; 99 percent) in private ownership and 0.2 stream mi (0.4 km; less than 1 percent) in public (Federal and State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes the communities of Smithburg, Avondale, West Union, Alma, and Centerville. Unit RH 4 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit RH 4 include the degradation of habitat and water quality from siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include monitoring hydrofracking wastewater discharges and impoundments downstream on the Ohio River, and implementing efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 5: Little Kanawha River

Unit RH 5 partially overlaps with Unit LS 5 for the longsolid, also described above. Unit RH 5 consists of 110 river mi (176.6 km) of the Little Kanawha River in Calhoun, Gilmer, Ritchie, and Wood Counties, West Virginia, from Burnsville Dam (which is in neighboring Braxton County) downstream to West Virginia Route 47 at Parkersburg, Wood County, West Virginia. Riparian lands that border the unit include approximately 109 river mi (175.4 km; 99 percent) in private ownership and 0.7 river mi (1.2 km; 1 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. Burnsville Dam is operated by the U.S. Army Corps of Engineers. Unit RH 5 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit RH 5 include the degradation of habitat from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Burnsville Dam to mimics the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 6: Elk River

Unit RH 6 is the same as Unit LS 6 for the longsolid, described above. Unit RH 6 consists of 101 river mi (163 km) of the Elk River in Braxton, Clay, and Kanawha Counties, West Virginia, from the Sutton Dam in Braxton County downstream to its confluence with the Kanawha River at Charleston, Kanawha County, West Virginia. Riparian lands that border the unit include approximately 93 river mi (150.3 km; 92 percent) in private ownership and 7 river mi (12.7 km; 8 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. Sutton Dam is operated by the U.S. Army Corps of Engineers. Unit RH 6 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 28 river mi (44.6 km) of this unit with the designated critical habitat for the federally endangered diamond darter (78 FR 52364; August 22, 2013).

Threats identified within Unit RH 6 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Sutton Dam to mimic the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 7: Kanawha River

Unit RH 7 partially overlaps with Unit LS 7 for the longsolid, described above. Unit RH 7 consists of 37.5 river mi (60.4 km) of the Kanawha River in Fayette and Kanawha Counties, West Virginia, from Kanawha Falls in Fayette County downstream to its confluence with the Elk River at Charleston, Kanawha County, West Virginia. Riparian lands that border the unit include approximately 33 river mi (53.2 km; 90 percent) in private ownership and 4 river mi (7.2 km; 10 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities. London and Marmet locks and dams within this unit are operated by the U.S. Army Corps of Engineers. Unit RH 7 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit RH 7 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include riparian vegetation re-establishment in addition to restoration efforts along shorelines to minimize sediment and contaminant inputs, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 8: Licking River

Unit RH 8 partially overlaps with Unit LS 8 for the longsolid, described above. Unit RH 8 consists of 150 mi (241.9 km) of the Licking River in Bath, Campbell, Fleming, Harrison, Kenton, Morgan,

Nicholas, Pendleton, Robertson, and Rowan Counties, Kentucky, from Cave Run Dam in Bath/Rowan Counties downstream to the Railroad crossing at the Campbell/Kenton/Pendleton County line at De Mossville, northwest of Butler, Pendleton County, Kentucky. Riparian lands that border the unit include approximately 131 river mi (211.8 km; 87 percent) in private ownership and 18 river mi (30 km; 13 percent) in public (Federal, State, and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture industry, and numerous cities and municipalities. Cave Run Dam is operated by the U.S. Army Corps of Engineers. Unit RH 8 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit RH 8 include the degradation of habitat and water quality from impoundments and associated cold water discharges, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include modifying dam releases from Cave Run Dam to mimic the natural hydrograph, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 9: Rockcastle River

Unit RH 9 consists of 15.3 river mi (24.6 km) of the Rockcastle River in Laurel, Pulaski, and Rockcastle Counties, Kentucky, from Kentucky Route 1956 at Billows downstream to Kentucky Route 192, near its confluence with Cane Creek along the Laurel/Pulaski County line, northwest of Baldrock, Laurel County, Kentucky. Riparian lands that border the unit include approximately 0.3 river mi (0.4 km; less than 1 percent) in private ownership and 15 river mi (24.2 km; 99 percent) in public (Federal) ownership. Federal ownership is the Daniel Boone National Forest. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit is predominantly forestry. Unit RH 9 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 15 river mi (23.7 km) of this unit with designated critical habitat for the federally endangered fluted kidneyshell (78 FR 59556; September 26, 2013).

Threats identified within Unit RH 9 include the degradation of habitat and water quality from siltation and pollution due to improper timbering practices and resource extraction, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include management of Lake Cumberland, located downstream, to provide more riverine habitat upstream, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 10: Buck Creek

Unit RH 10 consists of 36 stream mi (58.1 km) of Buck Creek in Pulaski County, Kentucky, from its confluence with Glade Fork Creek northeast of Goochtown, downstream to its confluence with Whetstone Creek, northeast of Dykes, Pulaski County, Kentucky. Riparian lands that border the unit include approximately 33 stream mi (52.6 km; 92 percent) in private ownership and 3 stream mi (5.5 km; 8 percent) in public (State and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and several small communities. Unit RH 10 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 35 stream mi (56.7 km) with designated critical habitat for the federally endangered Cumberlandian combshell and oyster mussel (69 FR 53136; August 31, 2004), and the federally endangered fluted kidneyshell (78 FR 59556; September 26, 2013).

Threats identified within Unit RH 10 include the degradation of habitat and water quality from instream gravel mining, forest clearing activities, illegal off-road vehicle use, nonpoint source pollution from agriculture, and development activities, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include management of Lake Cumberland, located downstream, to provide more riverine habitat upstream, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 11: Green River

Unit RH 11 partially overlaps with Unit LS 9 for the longsolid, described above. Unit RH 11 consists of 98 river mi (157.7 km) of the Green River in Butler/Warren, Edmonson, Green, and Hart Counties, Kentucky, from the mouth of Lynn Camp Creek east of Linwood in Hart County downstream to its confluence with the Barren River at Woodbury, Warren/Butler Counties, Kentucky. Riparian lands that border the unit include approximately 61 river mi (98.4 km; 62 percent) in private ownership and 37 river mi (59.4 km; 38 percent) in public (Federal and State) ownership; Federal lands include a portion of Mammoth Cave National Park. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, industry, and numerous cities and municipalities, and Green River Lake Dam (located upstream of this unit) is operated by the U.S. Army Corps of Engineers. Unit RH 11 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. The entire 98-river-mi (157.7-km) unit overlaps with designated critical habitat for the federally endangered diamond darter (78 FR 52364; August 22, 2013) and the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit RH 11 include the degradation of habitat and water quality from Green River Lake Dam and associated cold water discharges, siltation and pollution due to improper timbering and agricultural practices, resource extraction, water withdrawals, and development, all of which affect channel stability; wastewater treatment plants; and the presence of invasive, nonnative species. Special management considerations or protection measures may be needed to reduce or alleviate habitat degradation such as channelization and channel instability. Additional special management considerations or protection measures may be needed to address thermal and flow regimes associated with tail water releases from the Green River Lake Dam, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 12: Paint Rock River

Unit RH 12 partially overlaps with Unit LS 12 for the longsolid, described above. Unit RH 12 consists of 48 river mi (77.5 km) of the Paint Rock River in Jackson and Madison/Marshall

Counties, Alabama, from the confluence of Hurricane Creek and Estill Fork in Jackson County, Alabama, downstream to U.S. Route 431, south of New Hope, Madison/Marshall Counties, Alabama. Riparian lands that border the unit include approximately 2 river mi (4.1 km; 2 percent) in private ownership and 46 river mi (73.4 km; 98 percent) in public (Federal and State) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and several small municipalities (Princeton, Hollytree, Trenton, and Paint Rock). Unit RH 12 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. The entire approximately 48-river-mi (77.5-km) unit overlaps with designated critical habitat for the federally endangered slabside pearlymussel (78 FR 59556; September 26, 2013), and the federally threatened rabbitsfoot mussel (80 FR 24692; April 30, 2015).

Threats identified within Unit RH 12 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, resource extraction, water withdrawals, development, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include management of Wheeler Reservoir downstream to provide additional riverine habitat, working with landowners to implement BMPs to reduce erosion and sedimentation associated with agricultural lands, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 13: Duck River

Unit RH 13 consists of 59 river mi (94.8 km) of the Duck River in Bedford, Marshall, and Maury Counties, Tennessee, from its confluence with Sinking Creek in Bedford County, downstream to the mouth of Goose Creek, east of Columbia, Maury County, Tennessee. Riparian lands that border the unit include approximately 27 river mi (43.7 km; 47 percent) in private ownership and 32 river mi (51.1 km; 53 percent) in public (State and local government) ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forestry, agriculture, and several municipalities (Milltown, Leftwich, and Philadelphia). Normandy Dam is operated by the Tennessee Valley Authority. Unit RH 13 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species. There is overlap of approximately 55 river mi (88.9 km) of this unit with designated critical habitat for the federally endangered slabside pearlymussel and fluted kidneyshell (78 FR 59556; September 26, 2013), and the federally endangered Cumberlandian combshell and oyster mussel (69 FR 53136; August 31, 2004).

Threats identified within Unit RH 13 include the degradation of habitat and water quality from impoundments, siltation and pollution due to improper timbering practices, agricultural activities (livestock), row crop agriculture and channelization, resource extraction, water withdrawals, and wastewater treatment plants, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include seasonally adjusted flow regimes associated with tail water releases from Normandy Dam, working with landowners to implement BMPs to reduce erosion and sedimentation associated with agricultural lands, planting adequate riparian buffers to minimize agriculture impacts, and implementing efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

RH 14: Big Black River

Unit RH 14 consists of 4 river mi (7 km) of the Big Black River in Montgomery County, Mississippi, from its confluence with Poplar Creek in Montgomery County, downstream to its confluence with Lewis Creek, Mississippi. Riparian lands that border the unit are all (100 percent) in private ownership. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit is predominantly agricultural activities. Unit RH 14 is occupied by the species and contains all of the physical or biological features essential to the conservation of the species.

Threats identified within Unit RH 14 include degradation of habitat and water quality from impoundments, siltation and pollution due to improper agricultural activities, row crop agriculture and channelization, and water withdrawals, and the presence of invasive, nonnative species. Special management considerations or protection measures to reduce or alleviate the threats may include working with landowners to implement BMPs to reduce erosion and sedimentation associated with agricultural lands and water quality degradation, and efforts to prevent the spread of invasive, nonnative species (see Special Management Considerations or Protection, above).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent

alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but Congress also enacted some exceptions in 2018 to the requirement to reinitiate consultation on certain land management plans on the basis of a new species listing or new designation of critical habitat that may be affected by the subject Federal action. See 2018 Consolidated Appropriations Act, Public Law 115–141, Div, O, 132 Stat. 1059 (2018).

Overall, and as stated above under Final Critical Habitat Designation, the majority of units overlap in part or whole with existing critical habitat designated for other federally endangered aquatic species (*i.e.,* diamond darter, Short's bladderpod, purple bean, rough rabbitsfoot, Cumberlandian combshell, oyster mussel, slabside pearlymussel, and fluted kidneyshell) or federally threatened aquatic species (*i.e.,* rabbitsfoot, yellowfin madtom, and slender chub). The conservation measures we would recommend for the longsolid and round hickorynut are likely to be the same or very similar to those we already recommend for these other listed aquatic species.

Application of the ''Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to actions that would: (1) Alter the geomorphology of their stream and river habitats (*e.g.,* instream excavation or dredging, impoundment, channelization, sand and gravel mining, clearing riparian vegetation, and discharge of fill materials); (2) significantly alter the existing flow regime where these species occur (*e.g.,* impoundment, urban development, water diversion, water withdrawal, water draw-down, and hydropower generation); (3) significantly alter water chemistry or water quality (*e.g.,* hydropower discharges, or the release of chemicals, biological pollutants, or heated effluents into surface water or connected groundwater at a point source or by dispersed release (nonpoint source)); and (4) significantly alter stream bed material composition and quality by increasing sediment deposition or filamentous algal growth (*e.g.,* construction projects, gravel and sand mining, oil and gas development, coal mining, livestock grazing, timber harvest, and other watershed and floodplain disturbances that release sediments or nutrients into the water). Consulting agencies and such activities could include, but are not limited to:

(1) U.S. Army Corps of Engineers (channel dredging and maintenance; dam projects including flood control, navigation, hydropower, and water supply; and Clean Water Act permitting including bridge projects and stream restoration activities).

(2) U.S. Department of Agriculture, including the Natural Resources Conservation Service and Farm Service Agency (technical and financial assistance for projects) and the Forest Service (aquatic habitat restoration, fire management plans, fire suppression, fuel reduction treatments, forest plans, and mining permits).

(3) U.S. Department of Energy (renewable and alternative energy projects).

(4) Federal Energy Regulatory Commission (interstate pipeline construction and maintenance, dam relicensing, and hydrokinetics).

(5) U.S. Department of Transportation (highway and bridge construction and maintenance).

(6) U.S. Fish and Wildlife Service (issuance of section 10 permits for enhancement of survival, habitat conservation plans, and safe harbor agreements; Partners for Fish and Wildlife program projects benefiting these species or other listed species; and Wildlife and Sportfish Restoration program sportfish stocking).

(7) Environmental Protection Agency (water quality criteria and permitting).

(8) Tennessee Valley Authority (flood control, navigation, hydropower, and land management for the Tennessee River system).

(9) Office of Surface Mining Reclamation and Enforcement (land resource management plans, mining permits, oil and natural gas permits, abandoned mine land projects, and renewable energy development).

(10) National Park Service (land management plans and permitting).

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the

Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no DoD lands with a completed INRMP within the critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 FR 7226 (Feb. 11, 2016) (2016 Policy)—both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable.

The Secretary may exclude any particular area if she determines that the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In this final rule, we are not excluding any areas from critical habitat.

Exclusions Based on Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our economic analysis of the critical habitat designation and related factors (Service 2020, entire). The analysis, dated March 19, 2020, was made available for public review from September 29, 2020, through December 28, 2020 (Industrial Economics, Inc. 2020, entire). The economic analysis addressed probable economic impacts of critical habitat designation for the longsolid and round hickorynut. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the longsolid and round hickorynut is summarized below and available in the screening analysis for the longsolid and round hickorynut (Industrial Economics, Inc. 2020, entire), available at *https://www.regulations.gov*.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess, to the extent practicable, the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the designation of critical habitat for the longsolid and round hickorynut, first we identified, in the IEM dated February 13, 2020 (Service 2020, entire), probable incremental economic impacts associated with the following categories of activities: instream excavation or dredging; impoundments; channelization; sand and gravel mining; clearing riparian vegetation; discharge of fill materials; urban development; water diversion; water withdrawal; water draw-down; hydropower generation and discharges; release of chemicals, biological pollutants, or heated effluents into surface water or connected ground water at a point source or by dispersed release (nonpoint); construction projects; oil and gas development; coal mining; livestock grazing; timber harvest; and other watershed or floodplain activities that release sediments or nutrients into the water. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement.

Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, the designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the longsolid or round hickorynut are present, Federal agencies are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. Consultations to avoid the destruction or adverse modification of critical habitat will be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the longsolid's and round hickorynut's critical habitat. Because we are designating critical habitat for the longsolid and round hickorynut concurrently with listing the species, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species' being listed and those which will result solely from the designation of critical habitat; this is particularly difficult where there is no unoccupied critical habitat and, thus, there will be consultations for all areas based on the species' presence in those areas. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the longsolid or round hickorynut would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the

incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this designation of critical habitat.

The final critical habitat designation for the longsolid includes 12 units, all of which are occupied by the species. Ownership of riparian lands adjacent to the units includes 810 river mi (1,304 km; 74 percent) in private ownership and 305 river mi (491 km; 26 percent) in public (Federal, State, or local government) ownership. The final critical habitat designation for the round hickorynut includes 14 units, all of which are occupied by the species. Ownership of riparian lands adjacent to the units includes 709 river mi (1,141 km; 77 percent) in private ownership and 212 river mi (341 km; 23 percent) in public (Federal, State, or local government) ownership.

Total incremental costs of critical habitat designation for the longsolid and round hickorynut are anticipated to be approximately $327,000 (2020 dollars) per year for the next 10 years. The costs are reflective of the critical habitat area (*i.e.,* 1,115 river mi (1,794 km) for the longsolid and 921 river mi (1,482 km) for the round hickorynut (some of which overlap each other)), the presence of the species (*i.e.,* occupied) in these areas, and the presence of other federally listed species and designated critical habitats. Since consultation is already required in these areas as a result of the presence of other listed species and critical habitats and will be required as a result of the listing of the longsolid and round hickorynut, the economic costs of the critical habitat designation will likely be primarily limited to additional administrative efforts to consider adverse modification for these two species in section 7 consultations. In total, 159 section 7 consultation actions (approximately 3 formal consultations, 114 informal consultations, and 38 technical assistance efforts) are anticipated to occur annually in designated critical habitat areas. Critical habitat may also trigger additional regulatory changes. For example, the designation may cause other Federal, State, or local permitting or regulatory agencies to expand or change standards or requirements. Regulatory uncertainty generated by critical habitat may also have impacts. For example, landowners or buyers may perceive that the rule restricts land or water use activities in some way and, therefore, value the use of the land less than they would have absent critical habitat.

We solicited data and comments from the public regarding the economic analysis, as well as all aspects of the September 29, 2020 (85 FR 61384), proposed rule. We did not receive any additional information on economic impacts during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of the Act's section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

As discussed above, we considered the economic impacts of the critical habitat designation, the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the longsolid and round hickorynut based on economic impacts.

A copy of the IEM and screening analysis with supporting documents may be obtained by contacting the Asheville Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**) or by downloading from the internet at *https://www.regulations.gov.*

Exclusions Based on Impacts on National Security and Homeland Security

In preparing this rule, we determined that there are no lands within the designated critical habitat for the longsolid or round hickorynut that are owned or managed by the DoD or Department of Homeland Security, and, therefore, we anticipate no impact on national security or homeland security. We did not receive any additional information during the public comment period for the proposed designation regarding impacts of the designation on national security or homeland security that would support excluding any specific areas from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19, as well as the 2016 Policy.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security as discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

We are not excluding any areas from critical habitat. In preparing this final rule, we have determined that there are currently no HCPs or other management plans for the longsolid and round hickorynut, and the designation does not include any Tribal lands or trust resources. We anticipate no impact on Tribal lands, partnerships, or HCPs from this final critical habitat designation. We did not receive any additional information during the public comment period for the proposed rule regarding other relevant impacts to support excluding any specific areas from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19, as well as the 2016 Policy. Accordingly, the Secretary is not exercising her discretion to exclude any areas from this designation based on other relevant impacts.

Summary of Comments and Recommendations

In the proposed rule published on September 29, 2020 (85 FR 61384), we requested that all interested parties submit written comments on the proposal by December 28, 2020. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the USA Today legal notice section on September 30, 2020. Although we invited requests for a public hearing in the proposed rule, we did not receive any requests for a public hearing. All substantive information received during the comment period has either been incorporated directly into this final determination or is addressed below.

Peer Reviewer Comments

As discussed in Peer Review above, we received comments from three specialists for the longsolid (which informed the SSA report and this final rule), and no responses for the round hickorynut. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in the longsolid's SSA report. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final

SSA report. Peer reviewer comments were incorporated into the SSA report and this final rule as appropriate.

State Agency Comments

We received comments from agencies in six States: Michigan, Ohio, Pennsylvania, West Virginia, North Carolina, and Mississippi.

(1) Comment: The Michigan Department of Natural Resources (DNR) requested that we not list the longsolid as an endangered species in the State of Michigan, and that we postpone listing the round hickorynut as an endangered species until additional information concerning their distribution and status is available. Additionally, the Michigan DNR requested we partner with them to conduct additional surveys in Michigan to evaluate the current population status of the round hickorynut due to information gaps for this species in Michigan.

Our Response: The longsolid does not occur in Michigan, nor are there any historical records for the State; therefore, we did not propose to list, and are not listing in this rule, the longsolid within the State of Michigan. We agree that there is limited information available for round hickorynut in Michigan; however, we must make a decision based the best available scientific and commercial information. Accordingly, our analysis of the best available data indicates that the species meets the definition of a threatened species under the Act (see Determination of Status for the Longsolid and Round Hickorynut, above). We support the State conducting additional surveys due to its status as a ''State trust species,'' and we will continue to coordinate with Michigan DNR to ensure that the best available information is also used for any future conservation actions.

(2) Comment: The State of West Virginia recommended that the Kanawha River be included in the discussion of transportation threats regarding barge traffic given it is navigable and subject to barge traffic activity.

Our Response: The Kanawha River is incorporated by reference (*i.e.,* the listed populations in this section of the proposed rule include Taylor (1983b, p. 5)), which is a mussel survey of the Kanawha River. Our intent was that the threat discussion of transportation include all major river basins (HUC 2 level), which includes the Kanawha River, where the longsolid is extant.

(3) Comment: The State of West Virginia recommended that Unit RH 4 (Middle Island Creek) include Meathouse Fork, which is a major tributary of Middle Island Creek. The State indicated that West Virginia DNR surveys have found greater numbers of round hickorynut in Meathouse Fork than in the whole of the Elk River.

Our Response: Meathouse Fork, although occupied by the round hickorynut, was not proposed as critical habitat and is not designated as critical habitat in this rule. We have determined that the ''core'' population in Middle Island Creek is sufficient to maintain resiliency in the watershed, as it is considered a stronghold population (which was part of the criteria for critical habitat selection). At this time, the Meathouse Fork population exhibits low resiliency and is subject to a high level of threats, such as contaminant spills, as discussed under Threats Analysis, above. We determined it does not contain the physical or biological features essential for the conservation of the species and, therefore, does not meet the definition of critical habitat.

(4) Comment: The State of Ohio stated that listing these species will increase their costs for complying with the Act and the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), mainly through increased species surveys, the costs associated with formal consultations (the production of biological assessments), and possible costs associated with project delays due to the length of time to conduct formal consultation versus informal consultation. The State indicated that due to listing the round hickorynut, it will be necessary to conduct two additional survey efforts and two possible formal consultations per year on average. The State asserts these formal consultations will add approximately $100,000–$200,000 per year in project costs, potentially increasing the State's compliance costs by 4 percent per year.

Our Response: The Act requires the Secretary to base listing determinations solely on the best scientific and commercial data available; thus, we cannot factor in possible economic costs into a decision to list a species. However, we acknowledge that listing either species could result in additional costs to the State to comply with the Act, and potentially other laws, given the protections that are afforded listed species. Separately, we are required to consider economic costs for designating critical habitat. As such, the economic analysis for the longsolid and round hickorynut focuses on the incremental impact of the critical habitat designation. The economic analysis conducted for the critical habitat designation uses the rate of past consultations conducted on similar listed aquatic species that occur within the critical habitat areas to forecast the rate of future section 7 consultations that may occur for the longsolid and round hickorynut (IEc 2020, entire; Service 2020, entire). Critical habitat designation is not anticipated to result in additional conservation efforts being included as part of section 7 consultations beyond what would have already been required absent critical habitat designation.

(5) Comment: The State of Ohio commented that although listing round hickorynut is logical, they are concerned and disagree with designating critical habitat in the Grand River through the shipping channel. Further, they stated that the shipping channel portion of the Grand River is regularly dredged to provide access to Lake Erie, and the dredging has resulted in stream channel modifications for marinas and docks.

Our Response: We agree that the Grand River has experienced human-caused modifications over time. However, the Grand River population of round hickorynut is considered one of only two stronghold management units that remain, and the best available information indicates that the shipping channel portion of the river is occupied. Further, because the round hickorynut appears to have adapted to conditions at river outflows and along shorelines of impoundments (*e.g.,* Lake St. Clair), we find it is important at this time that the lower Grand River maintains some level of connectivity with other Lake Erie tributaries, such as the Black River in Ohio, and the Belle, Black, and Pine Rivers in Michigan.

The Grand River Unit (RH 2) is the only critical habitat unit designated for the round hickorynut in the Great Lakes basin. This area was once fully connected to Lake Erie, which allowed connectivity with other river tributary systems. The Grand River population, occurring within this unit, is important because it currently has high resiliency, it contains the only documented recruiting population in the Great Lakes basin, and the round hickorynut occurs throughout the river. Accordingly, we determined this unit contains features that are essential to the conservation of the species and that may require special management considerations or protection and, therefore, that it meets the definition of critical habitat.

(6) Comment: The State of Mississippi (Mississippi Forestry Association) requested that we take into consideration the State's BMP compliance rate for certified forest lands when evaluating information for the

round hickorynut, specifically for SMZs.

The comment states that BMPs are nonregulated, voluntary guidelines for silviculture activities that, when properly applied, will protect water quality from non-point source pollutants while maintaining site productivity. Further, the comment noted that the 2019 BMP Implementation Survey (implemented on a 3-year cycle by the Mississippi Forestry Commission) revealed that 95.3 percent of the applicable BMPs were implemented. The Statewide compliance of the survey was determined to be 95 percent at the 95 percent confidence level. The comment asserts that the SMZs benefit the mussels by protecting water quality through filtering nutrients and trapping sediments, regulating water temperature, and acting as a protective barrier around the body of water to limit activity near the channel.

Our Response: We did take into consideration the Mississippi BMP compliance rate in SMZs. However, only one population of round hickorynut occurs within Mississippi, and it is currently in low condition. The Mississippi BMPs are nonregulated, voluntary guidelines for silviculture activities. We recognize the high compliance rates of BMPs on State-certified forest lands and we have incorporated an exception under the section 4(d) rule for silvicultural activities that implement state-approved BMPs.

(7) Comment: The State of Mississippi (Mississippi Forestry Association) stated that they interpret the critical habitat designation to include the river channel, and they requested clarification that the lands adjacent to the stream bank are not included in the critical habitat designation.

Our Response: The State of Mississippi's interpretation is correct. Lands adjacent to the stream bank are not included in the critical habitat designation, although certain activities on lands adjacent to occupied streams can influence the resource needs of the listed species that occurs within the river (*e.g.,* increased sediments from activities on adjacent lands could reduce water quality).

Public Comments—Economics

(8) Comment: One commenter stated that the benefits of excluding the proposed areas in Kentucky from the critical habitat designations due to economic impact far outweigh the benefits of their inclusion. With over 2,000 river miles across 9 States, and an extensive list of industries and activities impacted by the proposed critical habitat designations, the commenter asserted that the anticipated $327,000 in annual costs outlined in the economic analysis does not fully capture the economic hardship placed on the surrounding communities.

Our Response: These comments do not identify specific data sources or assumptions used in the economic analysis of critical habitat designation, nor did the commenter provide new information that could be used to revise our economic analysis. We find our economic analysis presents a reasonable estimate of the incremental impact (the cost beyond what would be incurred without the designation of critical habitat for longsolid and round hickorynut). Our economic analysis focuses on the incremental impact of the critical habitat designation because the statutory purposes of the economic analysis are to inform the mandatory consideration of the economic impact of the designation of critical habitat, as well as to inform the discretionary section 4(b)(2) exclusion analysis, and to determine compliance with relevant statutes and Executive Orders.

(9) Comment: Multiple commenters expressed concern about impacts of the proposed rule on tourism and recreation; however, many commenters focused on impacts associated with the proposed listing rule as compared to impacts associated with the proposed 4(d) rule or critical habitat designation. These commenters described the importance of tourism to the local economies, particularly in the following Kentucky counties: Rockcastle, Laurel (county seat is London), and Taylor. Some commenters stated that they oppose any action that would limit the current or future levels of fishing, boating, hiking, or other recreational activities, including impacts to the lands adjoining the affected rivers. One commenter stated that the proposed rule would negatively impact the economy of this area to the point of halting the growth and development of a community.

Our Response: The Act requires the Secretary to base listing determinations solely on the best scientific and commercial data available; thus, we cannot factor possible economic costs to tourism or other industries into a decision to list a species. Although we acknowledge that listing either species could result in additional costs given the protections afforded to listed species, we do not anticipate these protections as affecting current or future levels of fishing, boating, hiking, or other recreational activities. Separately, we are required to consider economic costs for designating critical habitat. Our economic analysis of critical habitat designation does not anticipate that the designation will result in additional conservation efforts that would not already occur due to the listing of longsolid and round hickorynut or presence of other listed species in critical habitat areas. As such, the critical habitat designation for the longsolid and round hickorynut is not anticipated to result in additional restrictions or requirements for recreation and tourism activities, beyond those already anticipated to occur absent of this critical habitat designation.

(10) Comment: Several commenters expressed concern that the proposed rule would adversely affect local farmers and livestock producers; many commenters were focused on impacts associated with listing the species. Commenters expressed concern that the proposed rule would cause a loss of farming revenue, which would have broad adverse effects on their communities. One commenter expressed concern that the proposed rule may halt agricultural operations.

Our Response: It is our statutory requirement to ensure that listing decisions are based solely on biological considerations and not economic impacts; thus, costs from listing the longsolid or the round hickorynut cannot be factored into the listing decisions. Because the primary purpose of the economic analysis is to facilitate the mandatory consideration of the economic impact of the designation of critical habitat, to inform the discretionary section 4(b)(2) exclusion analysis, and to determine compliance with relevant statutes and Executive Orders, the economic analysis focused on the incremental impact of the critical habitat designation. The economic analysis of the designation of critical habitat for the longsolid and round hickorynut follows this incremental approach. See also our responses to *Comments (8)* and *(9),* above.

We recognize in the economic analysis that critical habitat designation may cause landowners to perceive that private lands (including farming, agricultural, or livestock operations) will be subject to use restrictions or litigation from third parties, resulting in costs. However, we are unable to quantify the degree to which the public's perception of possible restrictions on the use of private land designated as critical habitat may affect private property values. Further, we recognize that a number of factors may already result in perception-related effects on these private lands, including

the listing of the species and the presence of other listed species and critical habitats in these areas, which may temper any additional perception-related effects of this critical habitat designation.

(11) Comment: One commenter expressed concern that the economic analysis does not sufficiently address the potential benefits of the designation of critical habitat. Specifically, the commenter requests that we take into consideration the economic benefits of protecting habitat for these mussels, including ecosystem services, the protection of clean water, the reduced cost of water treatment for drinking water supplies, as well as public health benefits.

Our Response: The primary intended benefit of critical habitat designation for the longsolid and round hickorynut is to support the species' long-term conservation. Generally speaking, critical habitat designation could also generate ancillary benefits such as improved drinking water quality or public health benefits. However, as described in section 3 of the economic analysis (Industrial Economics, Inc. 2020, pp. 7–9), incremental land or water management changes are unlikely to result from the designation of critical habitat for the longsolid and round hickorynut. Similarly, no additional project modifications to avoid adverse modification of critical habitat for the longsolid or round hickorynut mussels are anticipated. Therefore, in this instance, critical habitat designation is unlikely to incrementally affect the types of ancillary benefits described by the commenter.

Public Comments—Forestry

(12) Comment: One commenter asserted that the information in the proposed rule and the SSA report would lead the casual reader to think that ''forest clearing'' is the same as ''silviculture,'' and that these two activities are the leading threats to the species, which is not the case.

Our Response: We agree that forest clearing and silviculture are not synonymous and note that the latter is not a primary threat to the longsolid or round hickorynut. For clarity, ''forest clearing'' is the removal of forested habitats through tree removal to facilitate a different land use, thereby altering ecosystem function. Silvicultural practices control the growth, composition, structure, and quality of forests at the stand-level to meet values and needs, specifically timber production; however, they do not alter land use. The SSA reports have been revised to clarify this distinction. Please see more discussion and revised language regarding silviculture under *Forest Conversion* in Threats Analysis, above.

(13) Comment: Multiple commenters asserted that forestry BMPs are implemented at high rates nationally and in some States where one or both species occur, and thus requested an exception in the 4(d) rule for forestry activities.

Our Response: We recognize that silvicultural operations are widely implemented in accordance with State-approved best management practices (BMPs; as reviewed by Cristan et al. 2016, entire), and the adherence to these BMPs broadly protects water quality, particularly related to sedimentation (as reviewed by Cristan et al. 2016, entire; Warrington et al. 2017, entire; and Schilling et al. 2021, entire). We added that statement under *Forest Conversion* in Threats Analysis, above. In addition, we agree that the best available science indicates that proper implementation of forestry BMPs reduces negative effects on water quality outcomes compared to historical silvicultural practices or those that do not apply or properly implement BMPs. Given BMPs generally are implemented at high rates, we added an exception to incidental take in the section 4(d) rule resulting from forestry activities that follow state approved forest management BMPs (see II. Final Rule Issued Under Section 4(d) of the Act, above).

(14) Comment: One commenter stated that forest certification programs provide assurance that BMPs are implemented in the ranges of both species and requested the addition of an exception in the 4(d) rule for State-certified forestry programs.

Our Response: We acknowledge and support the continued implementation of the forest certification programs and their State-approved BMPs. Given that we added an exception to incidental take in the section 4(d) rule resulting from forestry activities that follow state approved forest management BMPs and all State-certified forestry programs implement these BMPs at high rates, an additional exception specifically targeting State-certified forestry programs would be redundant. We also note that most longsolid and round hickorynut populations occurring on forest lands are within U.S. National Forests (*e.g.,* Allegheny, Daniel Boone, George Washington and Jefferson, and Wayne National Forests), which are subject to section 7 consultation even with the incidental take exception resulting from forestry and silviculture activities.

(15) Comment: One commenter stated that take resulting from silviculture activities should not be included in a 4(d) rule for the longsolid because of the limited scope of this species' potential nexus with silviculture activities; another commenter encouraged the Service to recognize the positive role of responsible forest management and to articulate this in the final rule. As such, the commenter recommended adding an exception to the 4(d) rule for silvicultural practices and forest management activities that implement State-approved BMPs.

Our Response: To the extent silvicultural practices are implemented in a manner that follows State-approved BMPs, we agree with the commenter that there is limited potential for the longsolid to be exposed to silvicultural activities. We recognize responsible forest management that implements State-approved BMPs as a land use activity that can promote stable riparian vegetation and aquatic habitats. The 4(d) rule is intended to provide exceptions for proactive conservation efforts, such as population and habitat restoration and protection. Therefore, in the 4(d) rule for longsolid and round hickorynut, we have added an exception for incidental take resulting from forestry activities that follow State-approved forest management BMPs.

Public Comments—Miscellaneous

(16) Comment: Several commenters claimed that the proposed critical habitat designations are insufficient. Generally, the commenters contend that the current occupied habitat does not provide enough space for the populations to recover and that unoccupied habitat should be included in the critical habitat designation in anticipation of the species' restoration or population expansion. One commenter requested designation of unoccupied habitat in the Cumberland, Ohio, and Tennessee River basins for both species, while a different commenter also included the Great Lakes and Lower Mississippi River basins specifically for the round hickorynut.

Our Response: Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific

and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the specific features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features.

We determine whether unoccupied areas are essential for the conservation of the species by considering the life-history, status, and conservation needs of the species. This determination is further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation.

We are not proposing to designate as critical habitat any areas outside the geographical area currently occupied by the species because we determined that occupied areas are sufficient to conserve the longsolid and round hickorynut. For the longsolid, in total, we are designating approximately 1,115 river mi (1,794 river km) within 12 units of critical habitat; and for the round hickorynut, in total, we are designating approximately 921 river mi (1,482 river km) within 14 units of critical habitat. The critical habitat designation focuses on current strongholds and those populations with sufficient resiliency in determining the features that are essential for the conservation of the species (see Criteria Used to Identify Critical Habitat, above). These rivers and streams (identified as critical habitat for the longsolid and round hickorynut) contain populations that are large and dense enough, that are most likely to be self-sustaining over time (despite fluctuations in local conditions), and that also have retained the physical or biological features that will allow for the maintenance and expansion of existing populations. These units also represent populations that are stable and distributed over a wide geographic area. We recognize that habitat is dynamic, and species may move from one area to another over time. Thus, critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed eventually for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and following recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will

be directly regulated by this rulemaking, we certify that this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the comment period on the September 29, 2020, proposed rule (85 FR 61384) that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Facilities that provide energy supply, distribution, or use occur within some units of the critical habitat designations (*e.g.,* dams, pipelines) and may potentially be affected. We determined that consultations, technical assistance, and requests for species lists may be necessary in some instances. However, in our economic analysis, we did not find that these critical habitat designations would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat for the longsolid and round hickorynut imposes no obligations on State or local governments. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the longsolid and round hickorynut in a takings implications assessment. The Act does not authorize us to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for the longsolid and round hickorynut does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of these critical habitat designations with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, this final rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designations may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or

biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this final rule identifies the physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. 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.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analyses under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations and species-specific protective regulations promulgated concurrently with a decision to list or reclassify a species as threatened. The courts have upheld this position (*e.g., Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995) (critical habitat); *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service.,* 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) (concurrent 4(d) rule)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized federally recognized Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the final critical habitat for the longsolid and round hickorynut, so no Tribal lands would be affected by the designations.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Asheville Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the U.S. Fish and Wildlife Service's Species Assessment Team and the Service's Asheville Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by adding entries for ''Hickorynut, round'' and ''Longsolid'' to the List of Endangered and Threatened Wildlife in alphabetical order under CLAMS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
Clams				
*	*	*	*	*
Hickorynut, round	*Obovaria subrotunda*	Wherever found	T	88 FR [Insert **Federal Register** page where the document begins], March 9, 2023; 50 CFR 17.45(d); [4d] 50 CFR 17.95(f).[CH]

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	* * *
Longsolid	*Fusconaia subrotunda*	Wherever found	T	88 FR [Insert **Federal Register** page where the document begins], March 9, 2023; 50 CFR 17.45(d); [4d] 50 CFR 17.95(f).[CH]
*	*	*	*	* * *

■ 3. Amend § 17.45 by adding paragraphs (c) and (d) to read as set forth below:

§ 17.45 Special rules—snails and clams.

* * * * *

(c) [Reserved]

(d) Longsolid (*Fusconaia subrotunda*) and round hickorynut (*Obovaria subrotunda*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the longsolid and round hickorynut. Except as provided under paragraph (d)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to these species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to these species, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.

(iii) Take, as set forth at § 17.31(b).

(iv) Take incidental to an otherwise lawful activity caused by:

(A) Conservation and restoration efforts for listed species conducted by State wildlife agencies, including, but not limited to, population monitoring, relocation, and collection of broodstock; tissue collection for genetic analysis; captive propagation; and subsequent stocking into currently occupied and unoccupied areas within the historical range of the species.

(B) Channel and bank restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools composed of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands.

(C) Bank stabilization projects that use bioengineering methods to replace pre-existing, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Following these bioengineering methods, stream banks may be stabilized using native species live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), native species live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or native species brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). Native species vegetation includes woody and herbaceous species appropriate for the region and habitat conditions. These methods will not include the sole use of quarried rock (rip-rap) or the use of rock baskets or gabion structures. Prior to channel restoration and bank stabilization actions, surveys conducted in coordination with the appropriate Service field office to determine presence of longsolid and round hickorynut must be performed, and if located, relocation prior to project implementation may be necessary, with post-implementation monitoring. To qualify under this exemption, channel restoration and bank stabilization actions must satisfy all Federal, State, and local permitting requirements.

(D) Forest management activities that implement State-approved best management practices.

(v) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

■ 4. Amend § 17.95(f) by adding, immediately following the entry for ''Carolina Heelsplitter (*Lasmigona decorata*),'' entries for ''Round Hickorynut (*Obovaria subrotunda*)'' and ''Longsolid (*Fusconaia subrotunda*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and Snails.*

* * * * *

Round Hickorynut (*Obovaria subrotunda*)

(1) Critical habitat units for the round hickorynut are depicted on the maps in this entry for Jackson, Madison, and Marshall Counties, Alabama; Fulton, Marshall, Pulaski, and Starke Counties, Indiana; Bath, Butler, Campbell, Edmonson, Fleming, Green, Harrison, Hart, Kenton, Laurel, Morgan, Nicholas, Pendleton, Pulaski, Rockcastle, Robertson, Rowan, and Warren Counties, Kentucky; Montgomery County, Mississippi; Bedford, Marshall, and Maury Counties, Tennessee; Ashtabula, Lake, and Trumbull Counties, Ohio; Crawford and Mercer Counties, Pennsylvania; and Braxton, Calhoun, Clay, Doddridge, Fayette, Gilmer, Kanawha, Pleasants, Ritchie, Tyler, and Wood Counties, West Virginia.

(2) Within these areas, the physical or biological features essential to the conservation of the round hickorynut consist of the following components:

(i) Adequate flows, or a hydrologic flow regime (magnitude, timing, frequency, duration, rate of change, and overall seasonality of discharge over time), necessary to maintain benthic habitats where the species is found and to maintain stream connectivity, specifically providing for the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat and food availability, maintenance of spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats. Adequate flows ensure delivery of oxygen, enable reproduction, deliver food to filter-feeding mussels, and

reduce contaminants and fine sediments from interstitial spaces. Stream velocity is not static over time, and variations may be attributed to seasonal changes (with higher flows in winter/spring and lower flows in summer/fall), extreme weather events (*e.g.,* drought or floods), or anthropogenic influence (*e.g.,* flow regulation via impoundments).

(ii) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as, stable riffle-run-pool habitats that provide flow refuges consisting of predominantly silt-free, stable sand, gravel, and cobble substrates).

(iii) Water and sediment quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages, including (but not limited to): Dissolved oxygen (generally above 2 to 3 parts per million (ppm)), salinity (generally below 2 to 4 ppm), and temperature (generally below 86 °F (°F) (30 °Celsius (°C)). Additionally, water and sediment should be low in ammonia (generally below 0.5 ppm total ammonia-nitrogen) and heavy metal concentrations, and lack excessive total suspended solids and other pollutants.

(iv) The presence and abundance of fish hosts necessary for recruitment of the round hickorynut (*i.e.,* eastern sand darter (*Ammocrypta pellucida*), emerald darter (*Etheostoma baileyi*), greenside darter (*E. blennioides*), Iowa darter (*E. exile*), fantail darter (*E. flabellare*), Cumberland darter (*E. susanae*), spangled darter (*E. obama*), variegate darter (*E. variatum*), blackside darter (*Percina maculata*), frecklebelly darter (*P. stictogaster*), and banded sculpin (*Cottus carolinae*)).

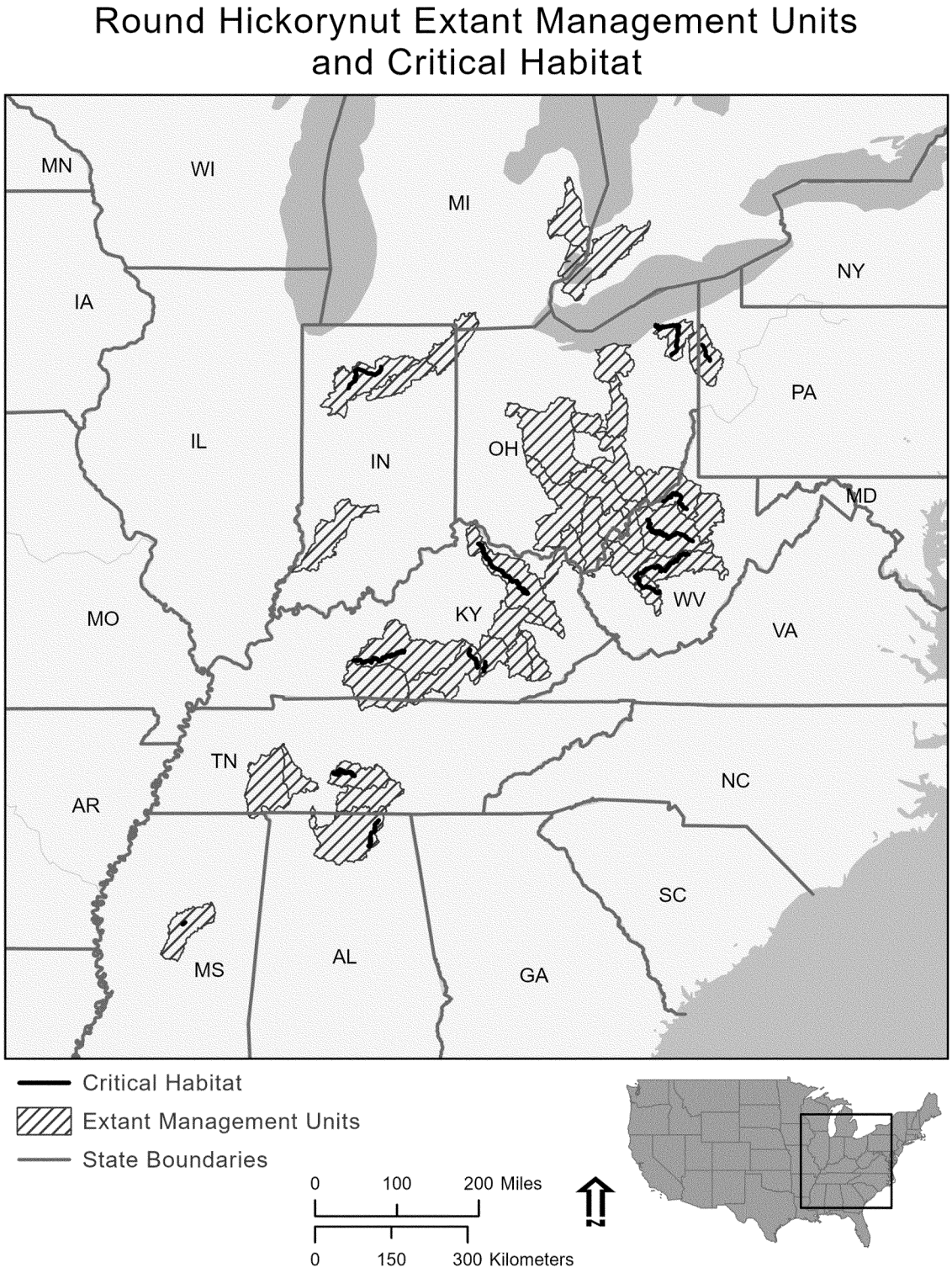
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on April 10, 2023.

(4) Data layers defining map units were created by overlaying Natural Heritage Element Occurrence data and U.S. Geological Survey hydrologic data for stream reaches. The hydrologic data used in the critical habitat maps were extracted from the U.S. Geological Survey 1:1M scale nationwide hydrologic layer (*https://www.usgs.gov/core-science-systems/ngp/national-hydrography*) with a projection of EPSG:4269—NAD83 Geographic. Natural Heritage program and State mussel database species presence data from Pennsylvania, Ohio, Indiana, West Virginia, Kentucky, Tennessee, Alabama, and Mississippi were used to select specific river and stream segments for inclusion in the critical habitat layer. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map for the round hickorynut follows:

Figure 1 to Round Hickorynut (*Obovaria subrotunda*) paragraph (5)

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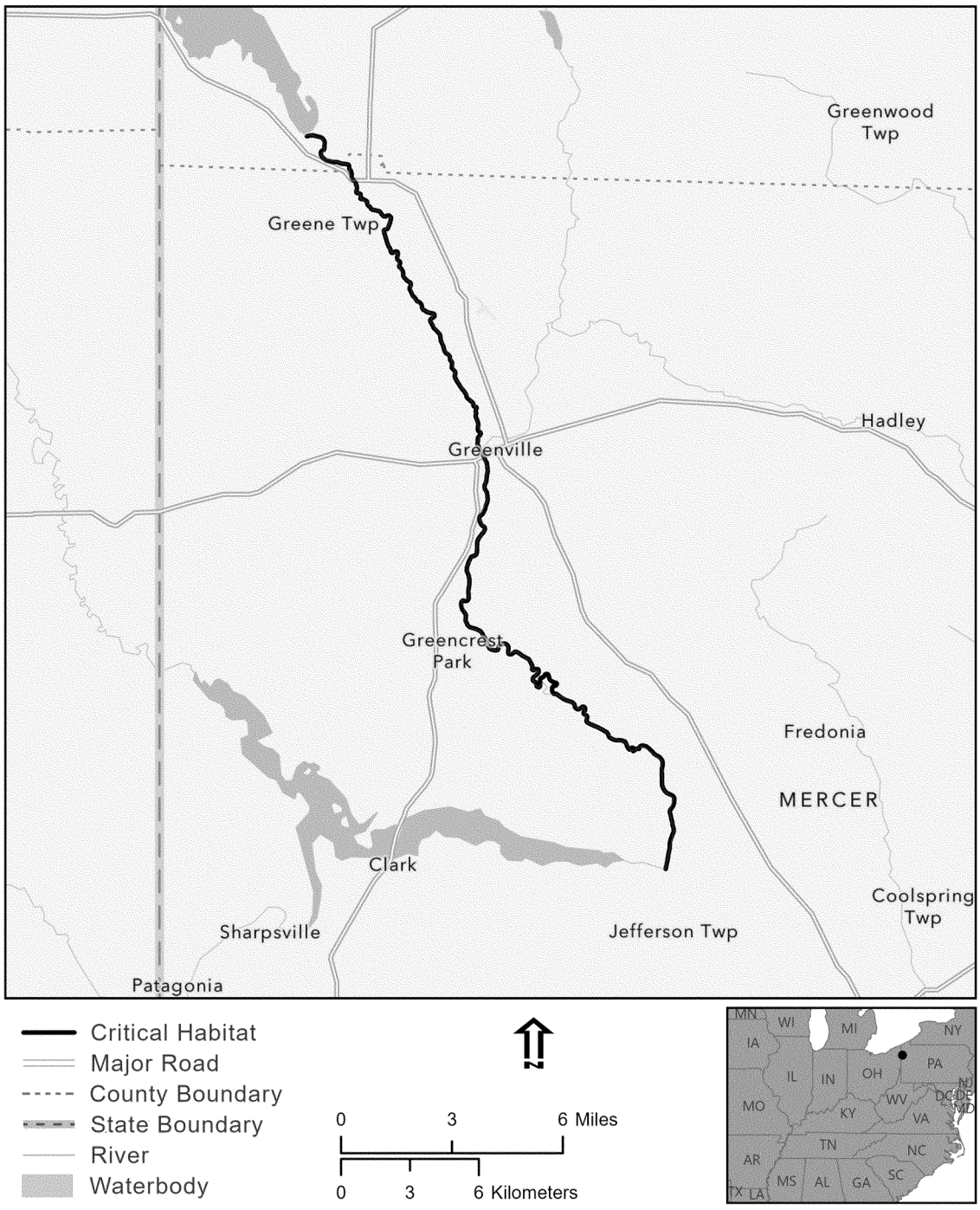


(6) Unit RH 1: Shenango River; Crawford and Mercer Counties, Pennsylvania.

(i) Unit RH 1 consists of 22 river miles (mi) (35.5 kilometers (km)) of the Shenango River in Crawford County, Pennsylvania, from Pymatuning Dam downstream to the point of inundation by Shenango River Lake near Big Bend, Mercer County, Pennsylvania. Approximately 15 river mi (24.3 km; 68 percent) of riparian lands that border the unit are private ownership, and 7 river mi (11.1 km; 32 percent) are public (Federal or State) ownership. This unit is immediately downstream from Pymatuning Dam, which is owned by the State of Pennsylvania.

(ii) Map of Unit RH 1 follows:

Figure 2 to Round Hickorynut (*Obovaria subrotunda*) paragraph (6)(ii)

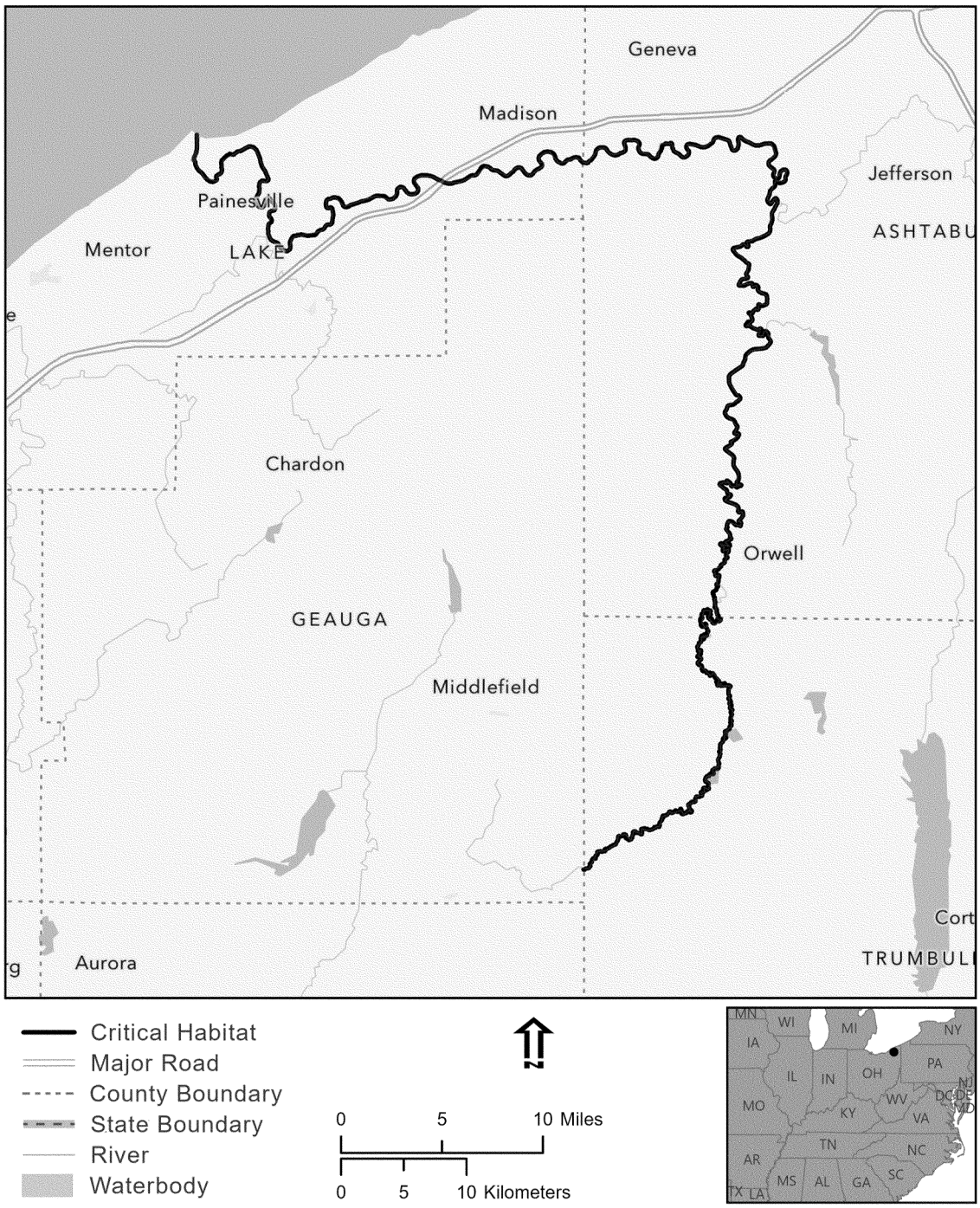


(7) Unit RH 2: Grand River; Ashtabula, Lake, and Trumbull Counties, Ohio.

(i) Unit RH 2 consists of 92 river mi (148.2 km) of the Grand River in Ashtabula, Lake, and Trumbull Counties, Ohio. Approximately 59 river mi (95.2 km; 64 percent) of riparian lands that border the unit are private ownership, and 33 river mi (53 km; 36 percent) are public (State or local) ownership. The Grand River is a State Wild and Scenic River. The Wild River designation includes approximately 23 river mi (37 km) from the Harpersfield Covered Bridge downstream to the Norfolk and Western Railroad Trestle in Lake County, and approximately 33 mi (53 km) from the U.S. Route 322 Bridge in Ashtabula County downstream to the Harpersfield Covered Bridge. Harpersfield Dam within this unit is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit RH 2 follows:

Figure 3 to Round Hickorynut (*Obovaria subrotunda*) paragraph (7)(ii)

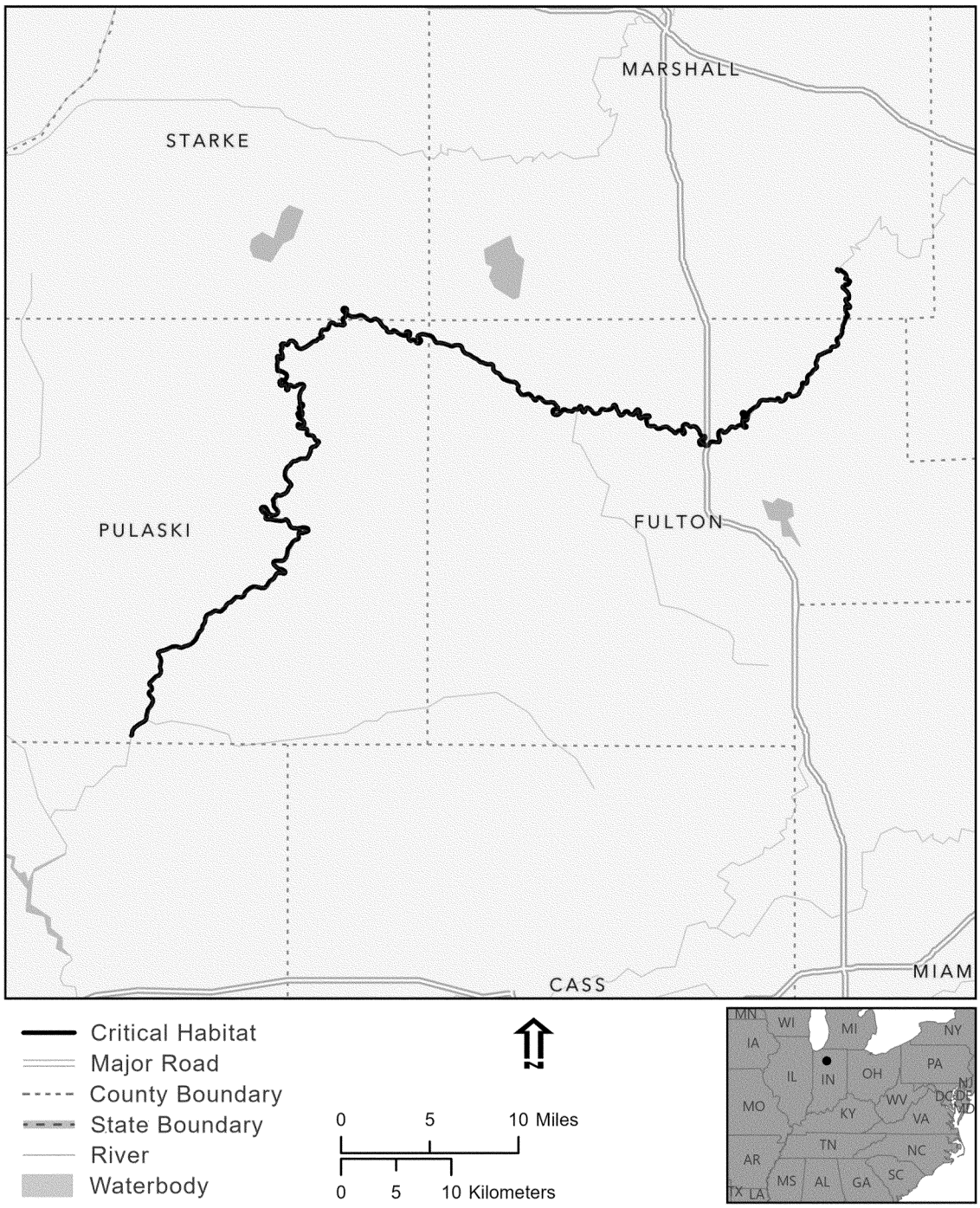


(8) Unit RH 3: Tippecanoe River; Fulton, Marshall, Pulaski, and Starke Counties, Indiana.

(i) Unit RH 3 consists of 75 river mi (120.8 km) of the Tippecanoe River in Fulton, Marshall, Pulaski, and Starke Counties, Indiana. Approximately 66 river mi (105.6 km; 89 percent) of riparian lands that border the unit are private ownership, and 9 river mi (14.5 km; 11 percent) are public (State or easement) ownership.

(ii) Map of Unit RH 3 follows:

Figure 4 to Round Hickorynut (*Obovaria subrotunda*) paragraph (8)(ii)

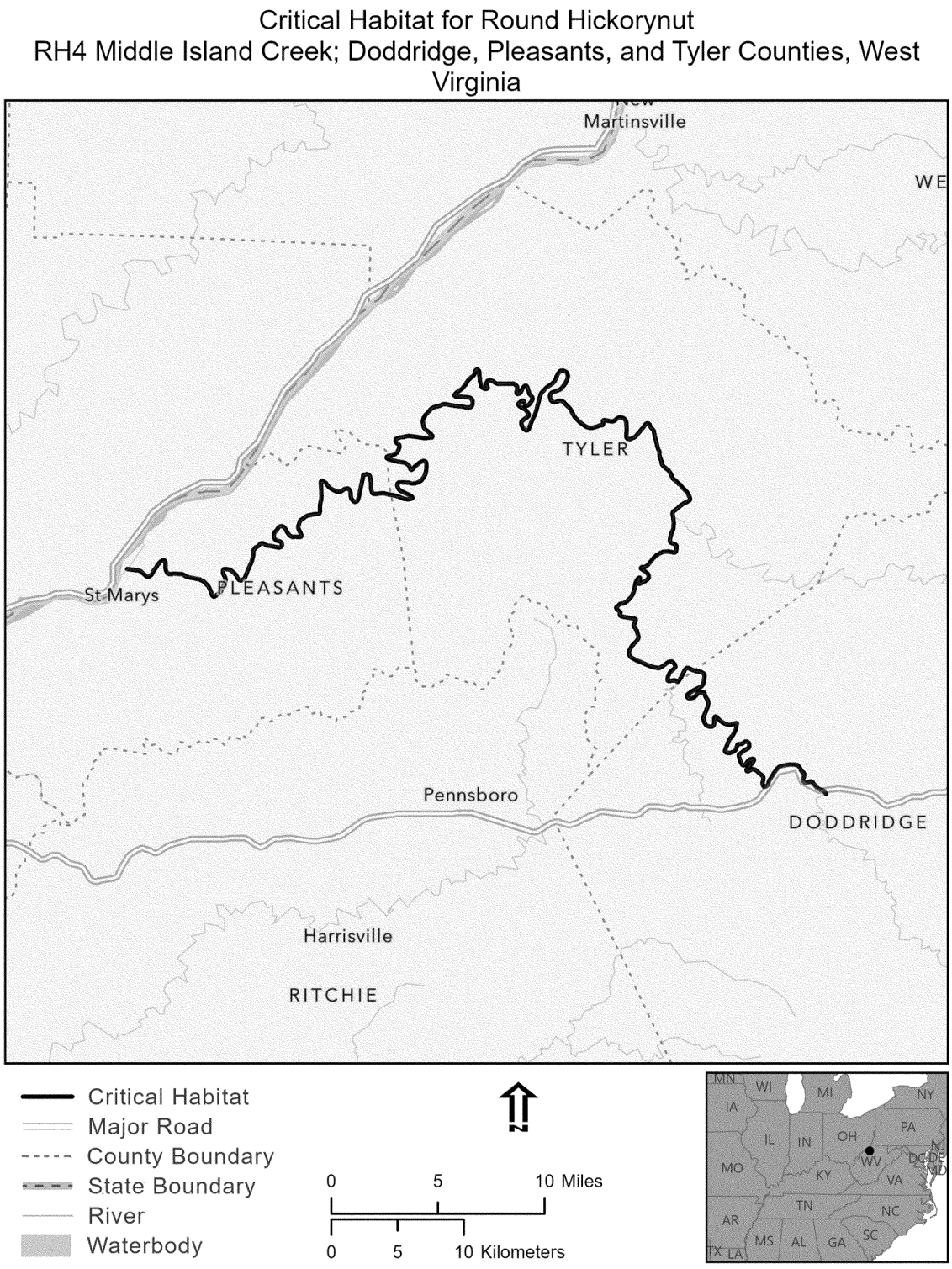


(9) Unit RH 4: Middle Island Creek; Doddridge, Pleasants, and Tyler Counties, West Virginia.

(i) Unit RH 4 consists of 75 stream mi (120.8 km) of Middle Island Creek in Doddridge, Pleasants, and Tyler Counties, West Virginia. Approximately 74.8 stream mi (120.4 km; 99 percent) of riparian lands that border the unit are private ownership, and 0.2 stream mi (0.4 km; less than 1 percent) is public ownership.

(ii) Map of Unit RH 4 follows:

Figure 5 to Round Hickorynut (*Obovaria subrotunda*) paragraph (9)(ii)

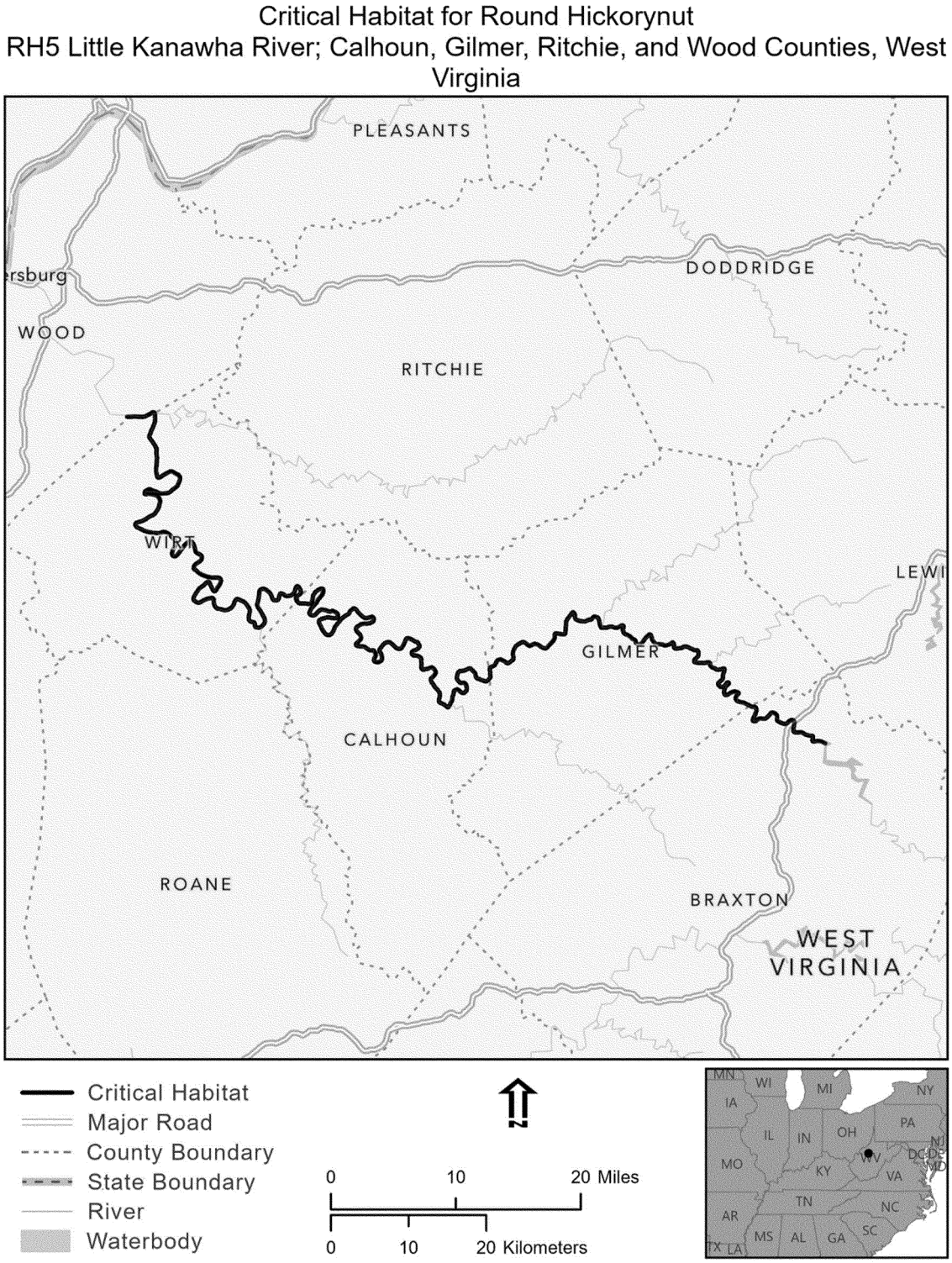


(10) Unit RH 5: Little Kanawha River; Calhoun, Gilmer, Ritchie, and Wood Counties, West Virginia.

(i) Unit RH 5 consists of 110 stream mi (176.6 km) of the Little Kanawha River in Calhoun, Gilmer, Ritchie, and Wood Counties, West Virginia. Approximately 109 river mi (175.4 km; 99 percent) of riparian lands that border the unit are private ownership, and 0.7 river mi (1.2 km; 1 percent) are public (Federal, State, or local) ownership. This unit is directly below Burnsville Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit RH 5 follows:

Figure 6 to Round Hickorynut (*Obovaria subrotunda*) paragraph (10)(ii)

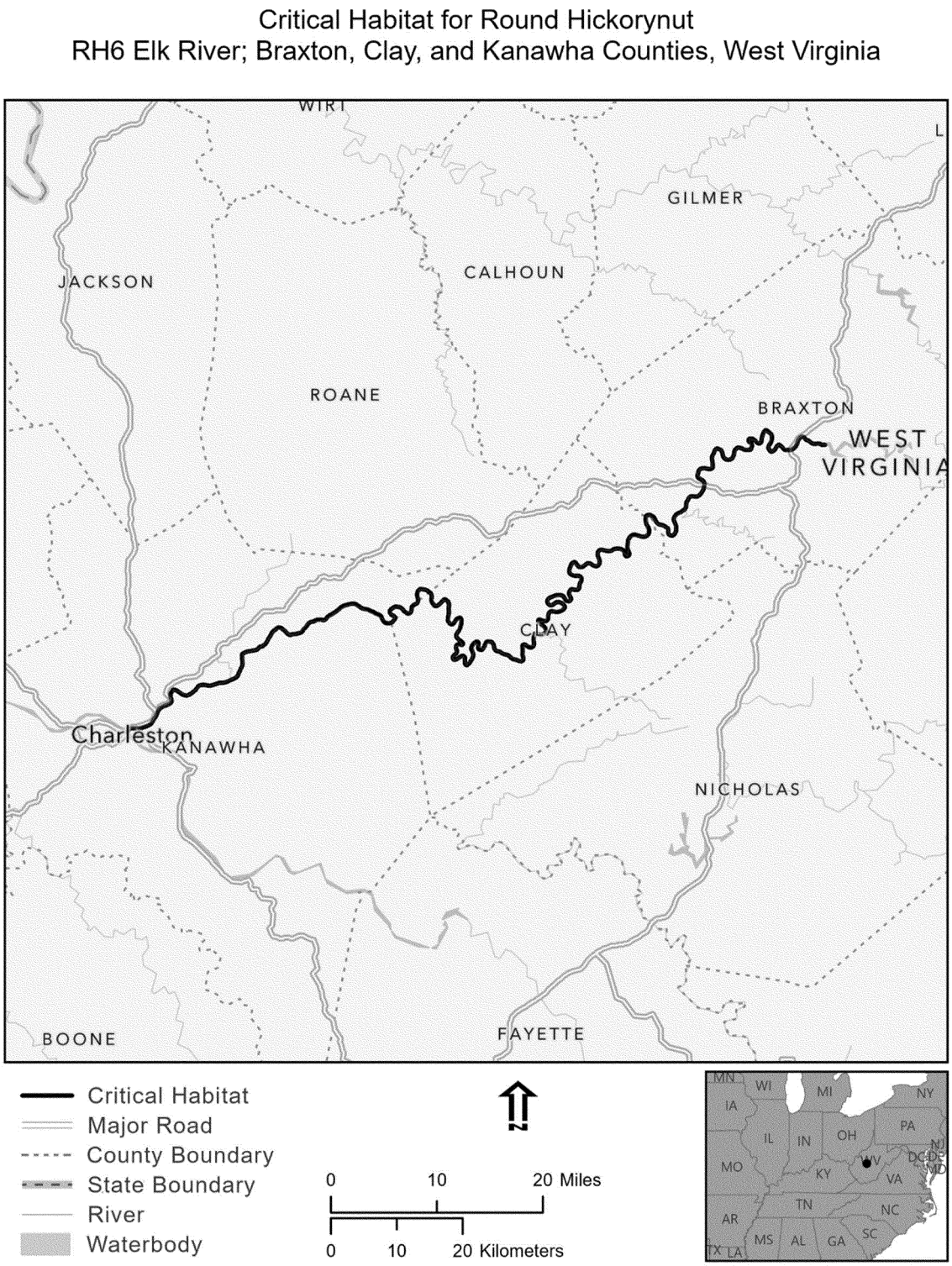


(11) Unit RH 6: Elk River; Braxton, Clay, and Kanawha Counties, West Virginia.

(i) Unit RH 6 consists of 101 river mi (163 km) of the Elk River in Braxton, Clay, and Kanawha Counties, West Virginia. Approximately 93 river mi (150.3 km; 92 percent) of riparian lands that border the unit are private ownership, and 7 river mi (12.7 km; 8 percent) are public (Federal, State, or local) ownership. This unit is immediately below Sutton Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit RH 6 follows:

Figure 7 to Round Hickorynut (*Obovaria subrotunda*) paragraph (11)(ii)

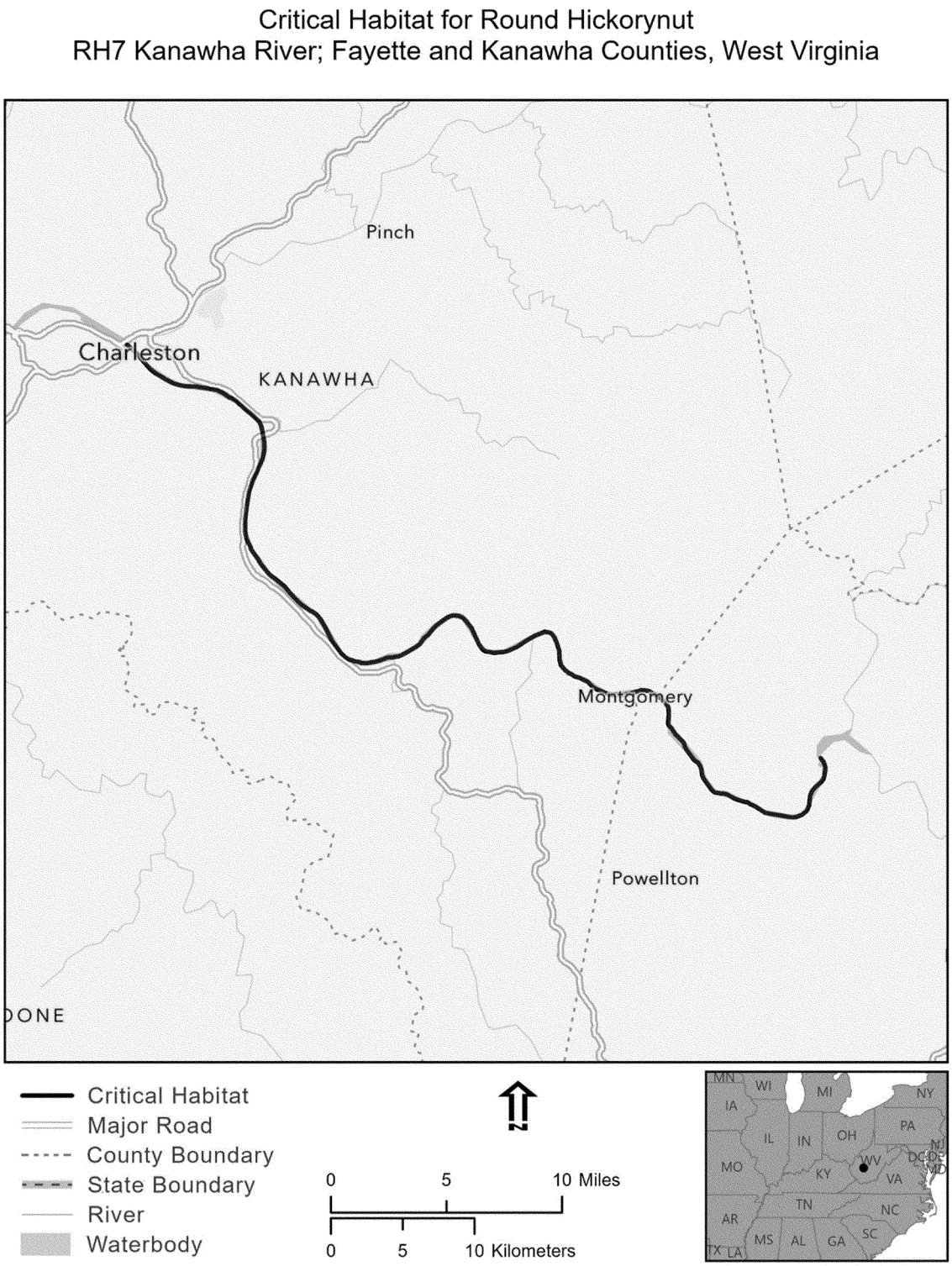


(12) Unit RH 7: Kanawha River; Fayette and Kanawha Counties, West Virginia.

(i) Unit RH 7 consists of 37.5 river mi (60.4 km) of the Kanawha River in Fayette and Kanawha Counties, West Virginia. Approximately 33 river mi (53.2 km; 90 percent) of riparian lands that border the unit are private ownership, and 4 river mi (7.2 km; 10 percent) are public (Federal, State, or local) ownership. London and Marmet locks and dams within this unit are operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit RH 7 follows:

Figure 8 to Round Hickorynut (*Obovaria subrotunda*) paragraph (12)(ii)

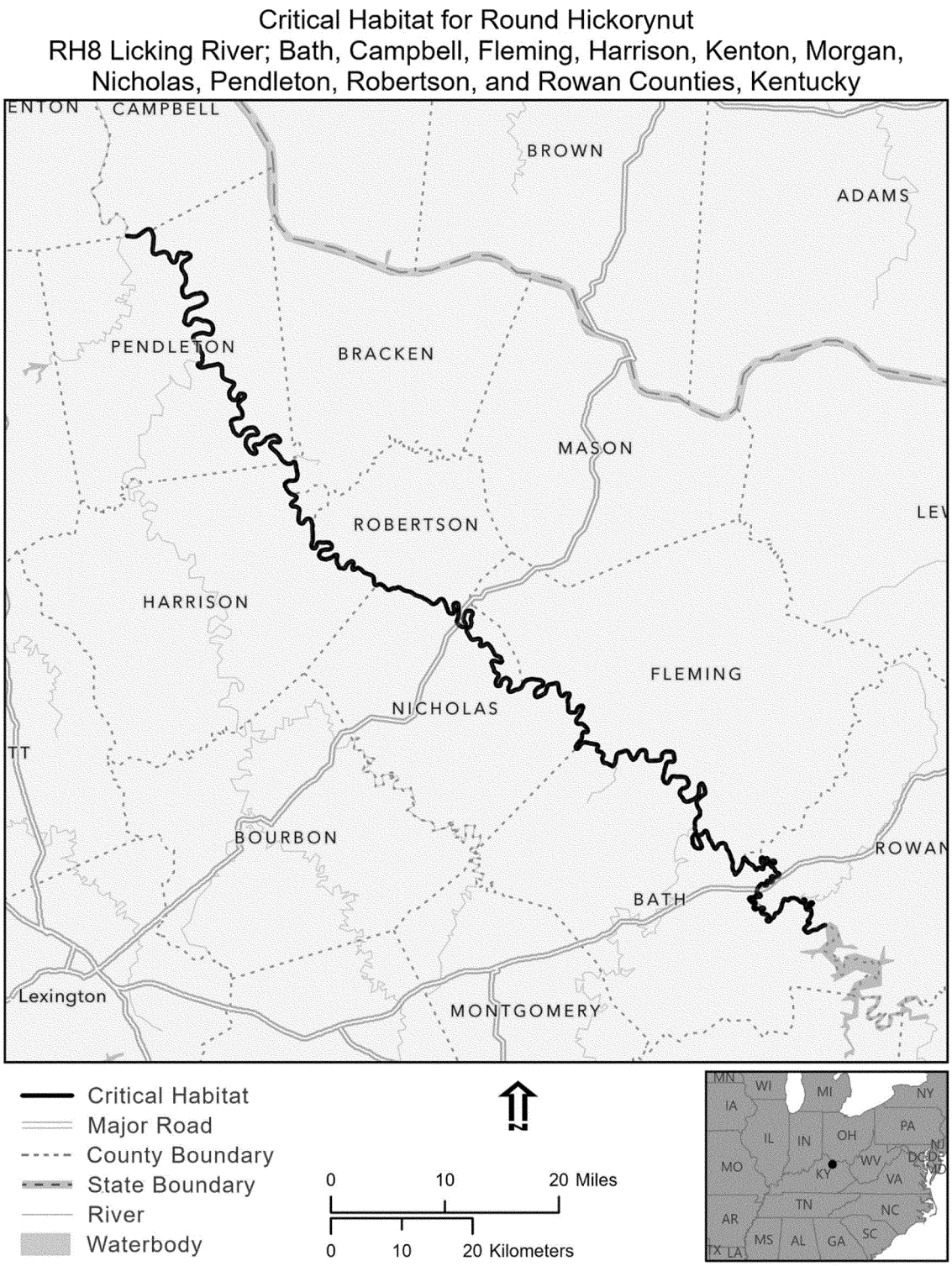


(13) Unit RH 8: Licking River; Bath, Campbell, Fleming, Harrison, Kenton, Morgan, Nicholas, Pendleton, Robertson, and Rowan Counties, Kentucky.

(i) Unit RH 8 consists of 150 river mi (241.9 km) of the Licking River in Bath, Campbell, Fleming, Harrison, Kenton, Morgan, Nicholas, Pendleton, Robertson, and Rowan Counties, Kentucky. Approximately 131 river mi (211.8 km; 87 percent) of riparian lands that border the unit are private ownership, and 18 river mi (30 km; 13 percent) are public (Federal, State, or local) ownership. This unit is directly below Cave Run Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit RH 8 follows:

Figure 9 to Round Hickorynut (*Obovaria subrotunda*) paragraph (13)(ii)

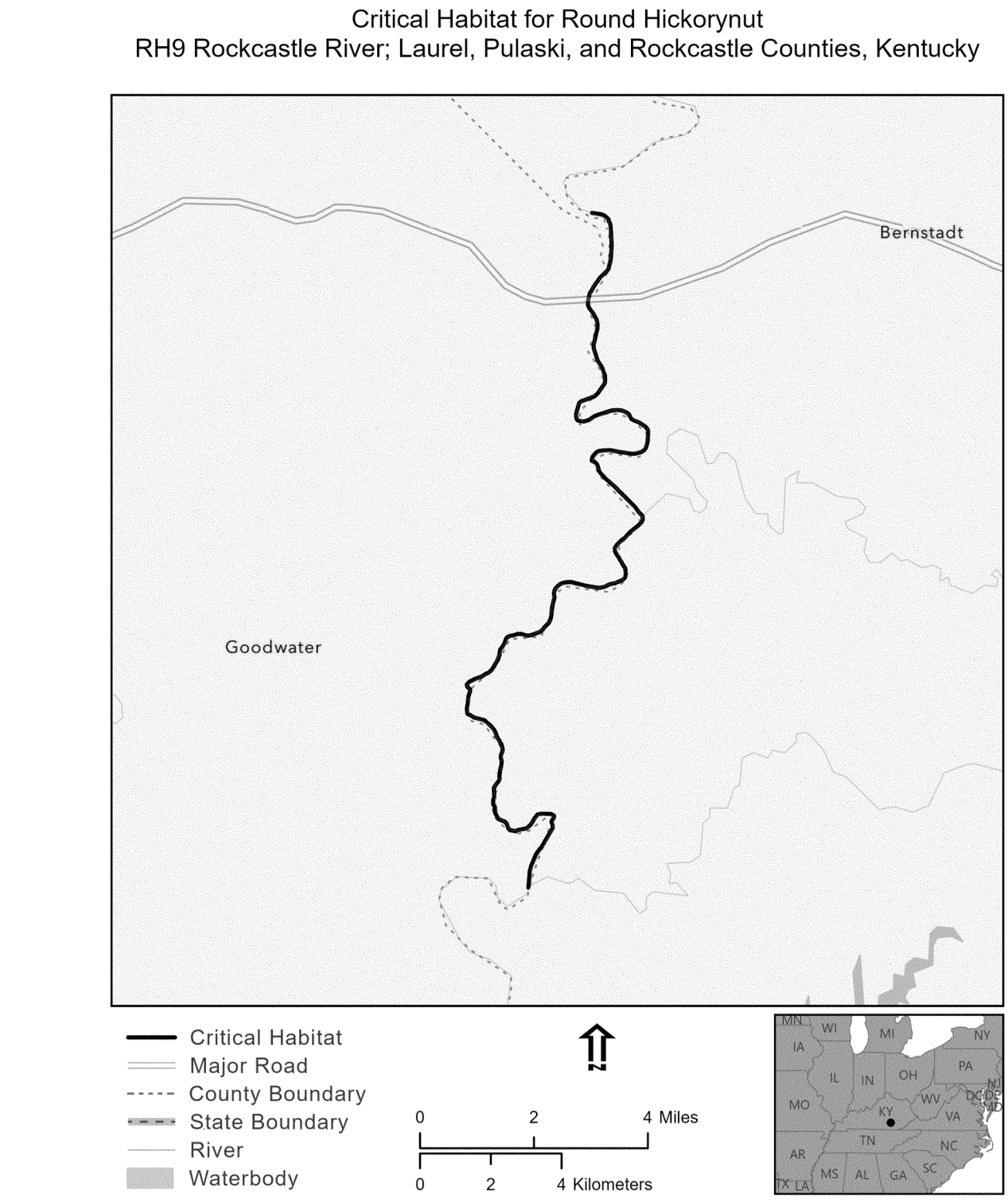


(14) Unit RH 9: Rockcastle River; Laurel, Pulaski, and Rockcastle Counties, Kentucky.

(i) Unit RH 9 consists of 15.3 river mi (24.6 km) of the Rockcastle River in Laurel, Pulaski, and Rockcastle Counties, Kentucky. Approximately 0.3 river mi (0.4 km; 1 percent) of riparian lands that border the unit is private ownership, and 15 river mi (24.2 km; 99 percent) are public (Federal; Daniel Boone National Forest) ownership.

(ii) Map of Unit RH 9 follows:

Figure 10 to Round Hickorynut (*Obovaria subrotunda*) paragraph (14)(ii)

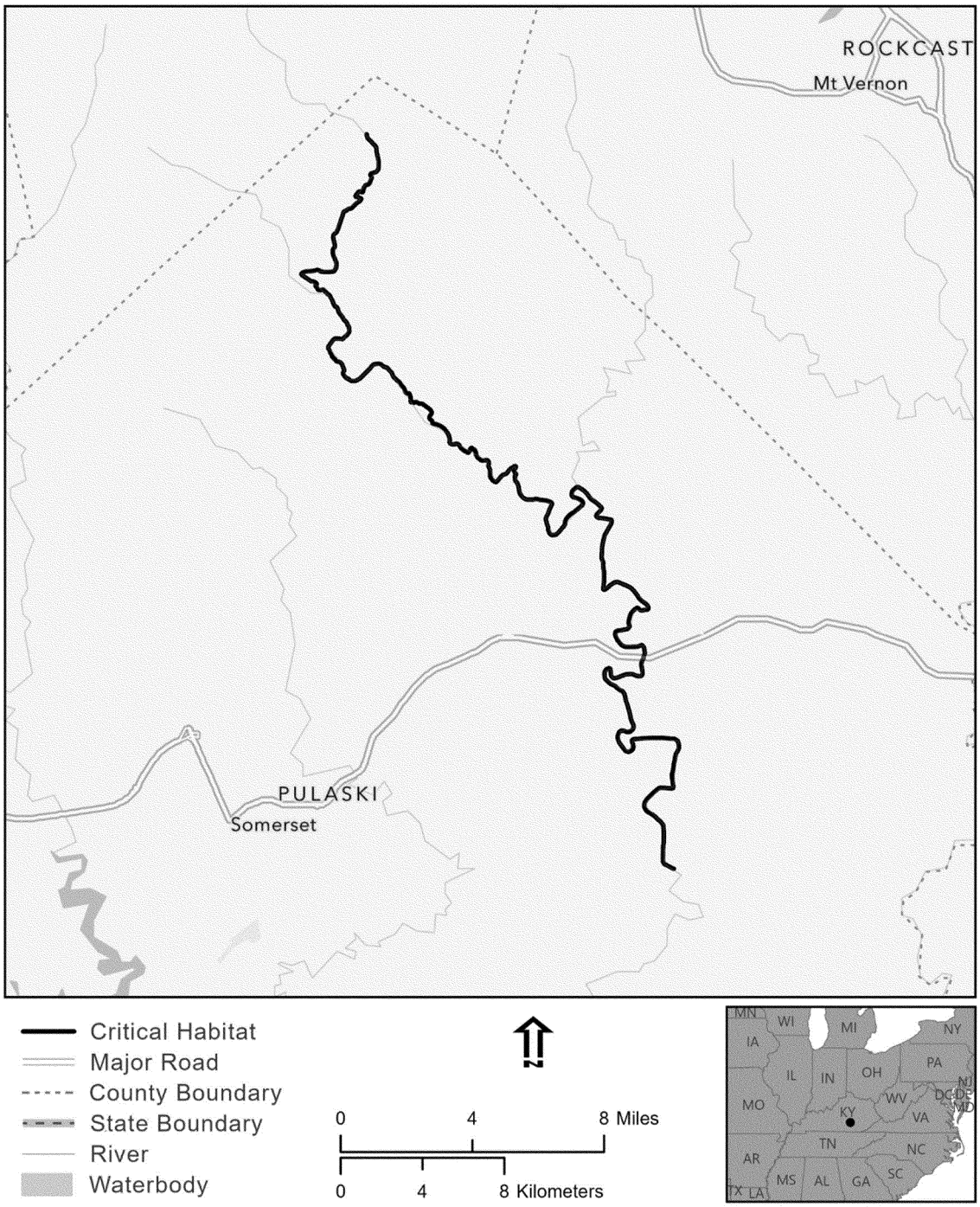


(15) Unit RH 10: Buck Creek; Pulaski County, Kentucky.

(i) Unit RH 10 consists of 36 stream mi (58.1 km) of Buck Creek in Pulaski County, Kentucky. Approximately 33 stream mi (52.6 km; 92 percent) of riparian lands that border the unit are private ownership, and 3 stream mi (5.5 km; 8 percent) are public (State or local) ownership.

(ii) Map of Unit RH 10 follows:

Figure 11 to Round Hickorynut (*Obovaria subrotunda*) paragraph (15)(ii)

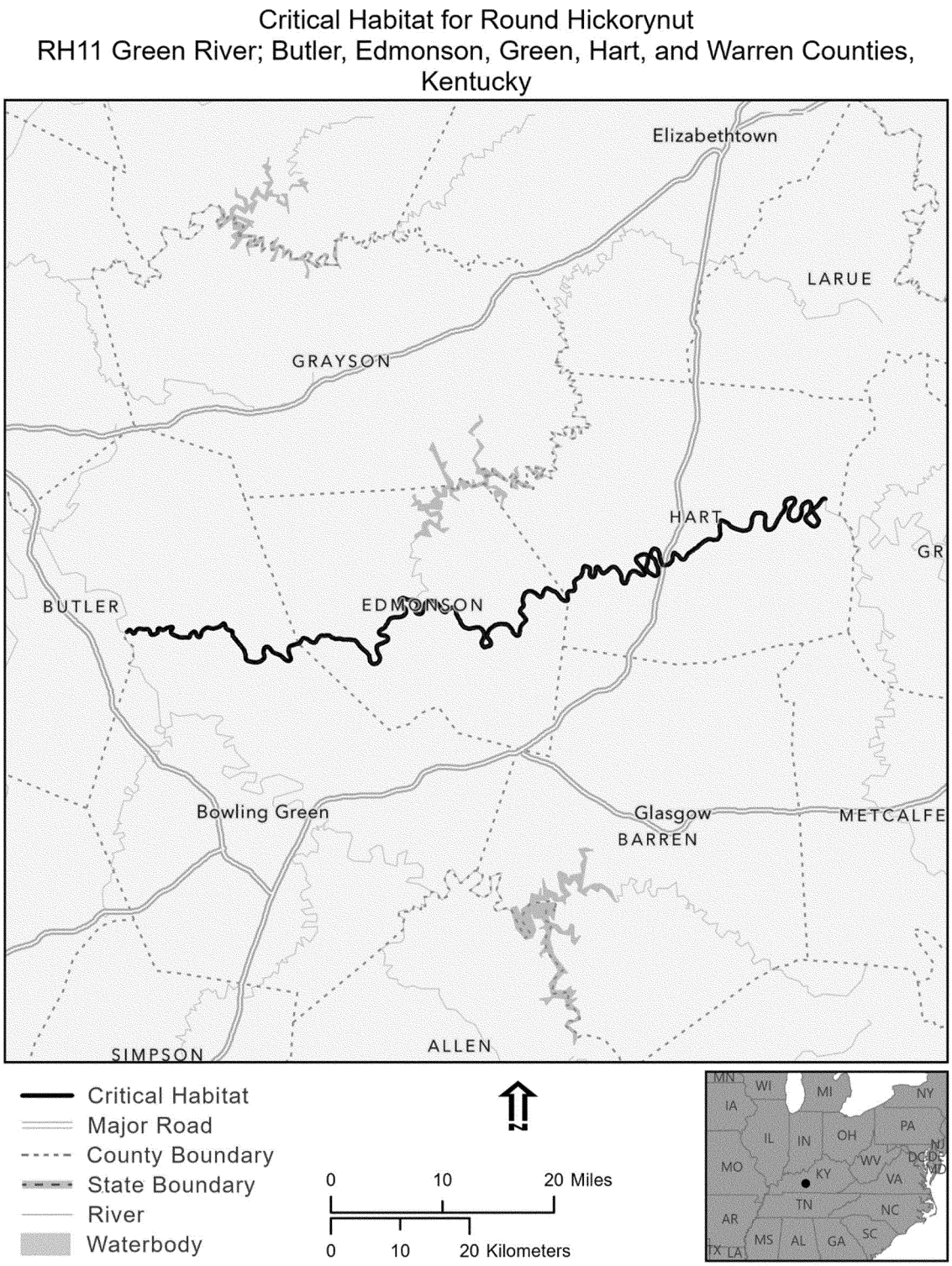


(16) Unit RH 11: Green River; Hart, Edmonson, Green, Butler, and Warren Counties, Kentucky.

(i) Unit RH 11 consists of 98 river mi (157.7 km) of the Green River in Butler, Edmonson, Green, Hart, and Warren Counties, Kentucky. Approximately 61 river mi (98.4 km; 62 percent) of riparian lands that border the unit are private ownership, and 37 river mi (59.4 km; 38 percent) are public (Federal or State) ownership, including portions of Mammoth Cave National Park. This unit is located directly below Green River Lake Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit RH 11 follows:

Figure 12 to Round Hickorynut (*Obovaria subrotunda*) paragraph (16)(ii)

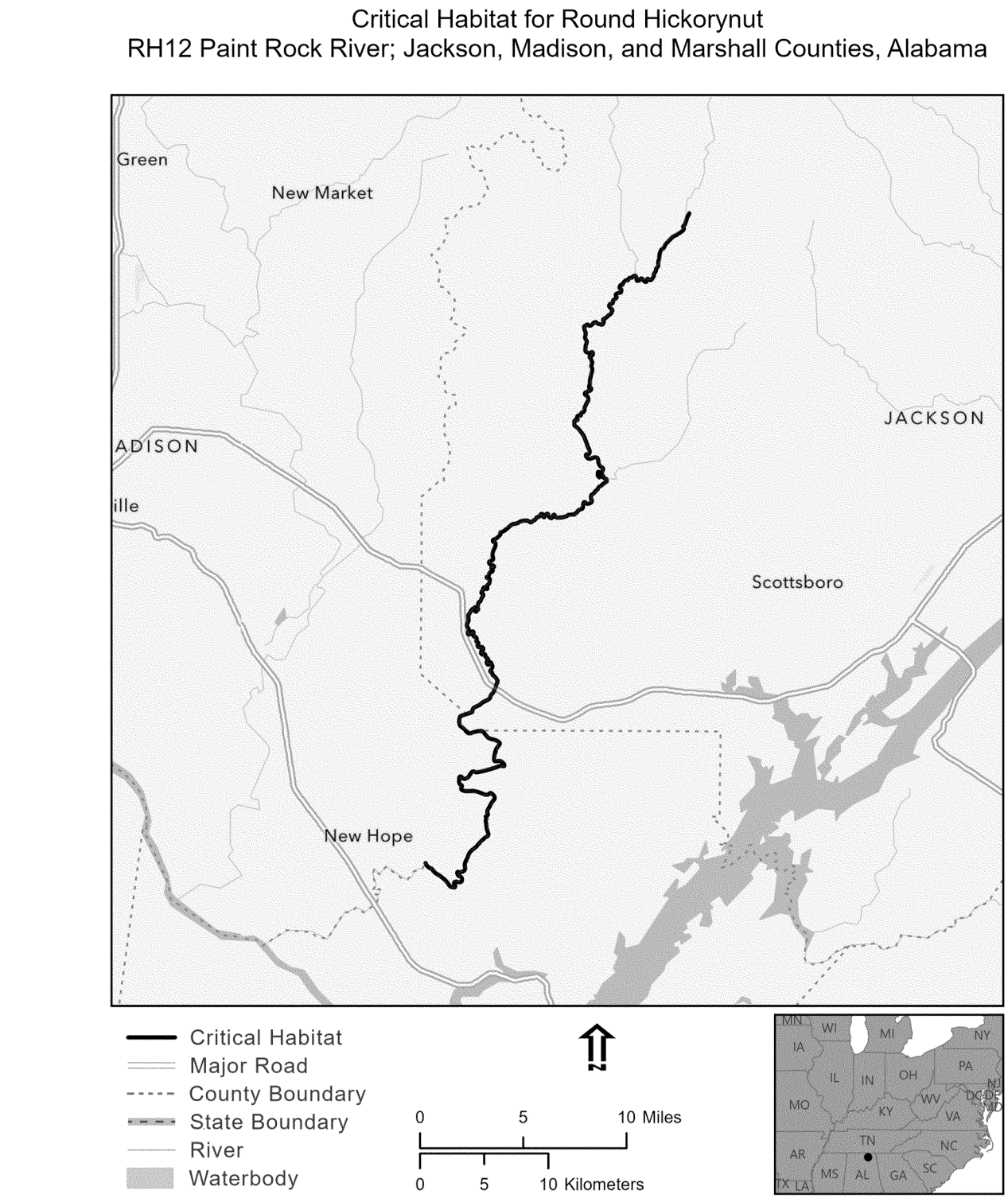


(17) Unit RH 12: Paint Rock River; Jackson, Madison, and Marshall Counties, Alabama.

(i) Unit RH 12 consists of 48 river mi (77.5 km) of the Paint Rock River in Jackson, Madison, and Marshall Counties, Alabama. Approximately 2 river mi (4.1 km; 2 percent) of riparian lands that border the unit are private ownership, and 46 river mi (73.4 km; 98 percent) are public (Federal or State) ownership.

(ii) Map of Unit RH 12 follows:

Figure 13 to Round Hickorynut (*Obovaria subrotunda*) paragraph (17)(ii)



(18) Unit RH 13: Duck River; Bedford, Marshall, and Maury Counties, Tennessee.

(i) Unit RH 13 consists of 59 river mi (94.8 km) of the Duck River in Bedford, Marshall, and Maury Counties, Tennessee. Approximately 27 river mi (43.7 km; 47 percent) of riparian lands that border the unit are private ownership, and 32 river mi (51.1 km; 53 percent) are public (State or local) ownership.

(ii) Map of Unit RH 13 follows:

Figure 14 to Round Hickorynut (*Obovaria subrotunda*) paragraph (18)(ii)

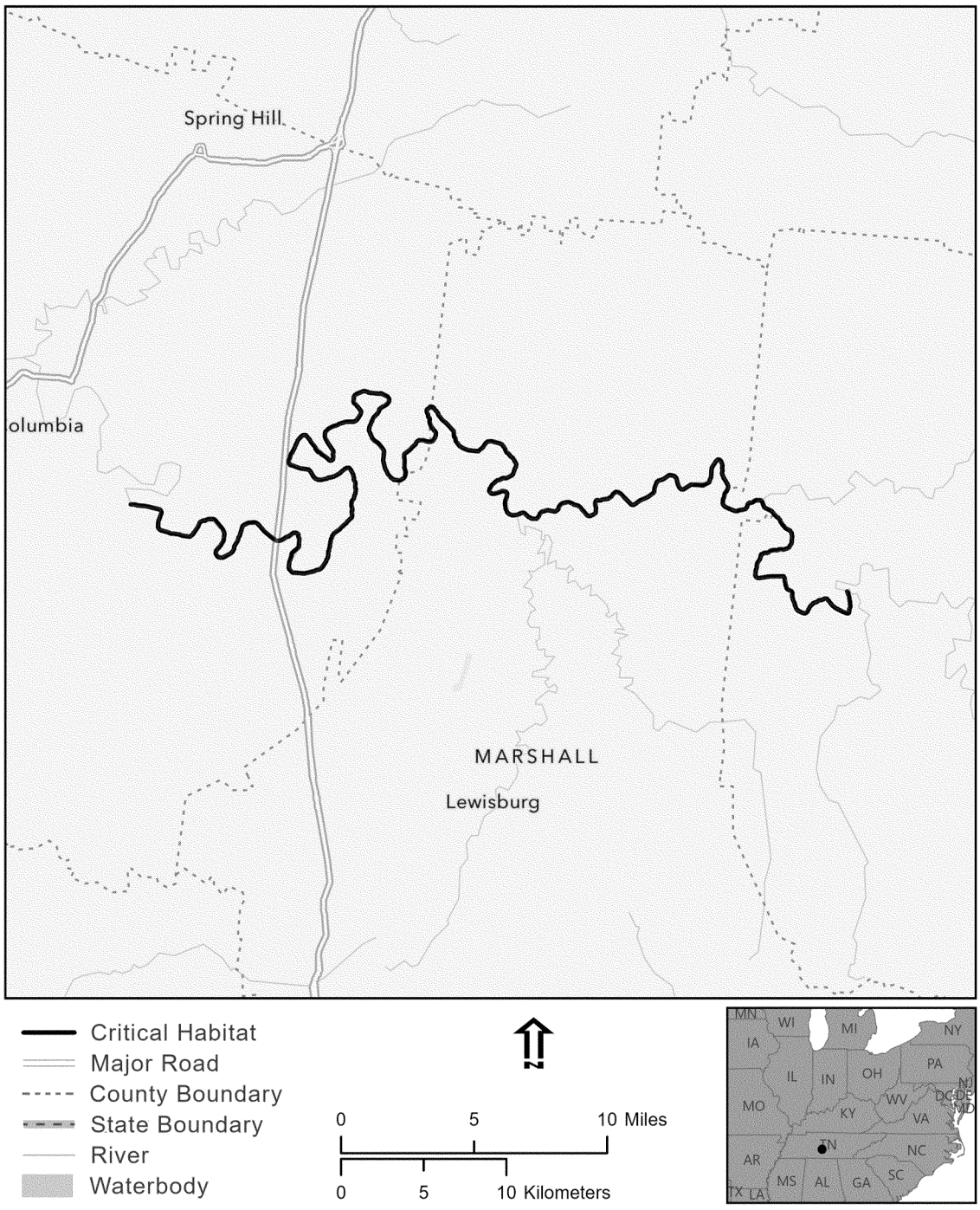
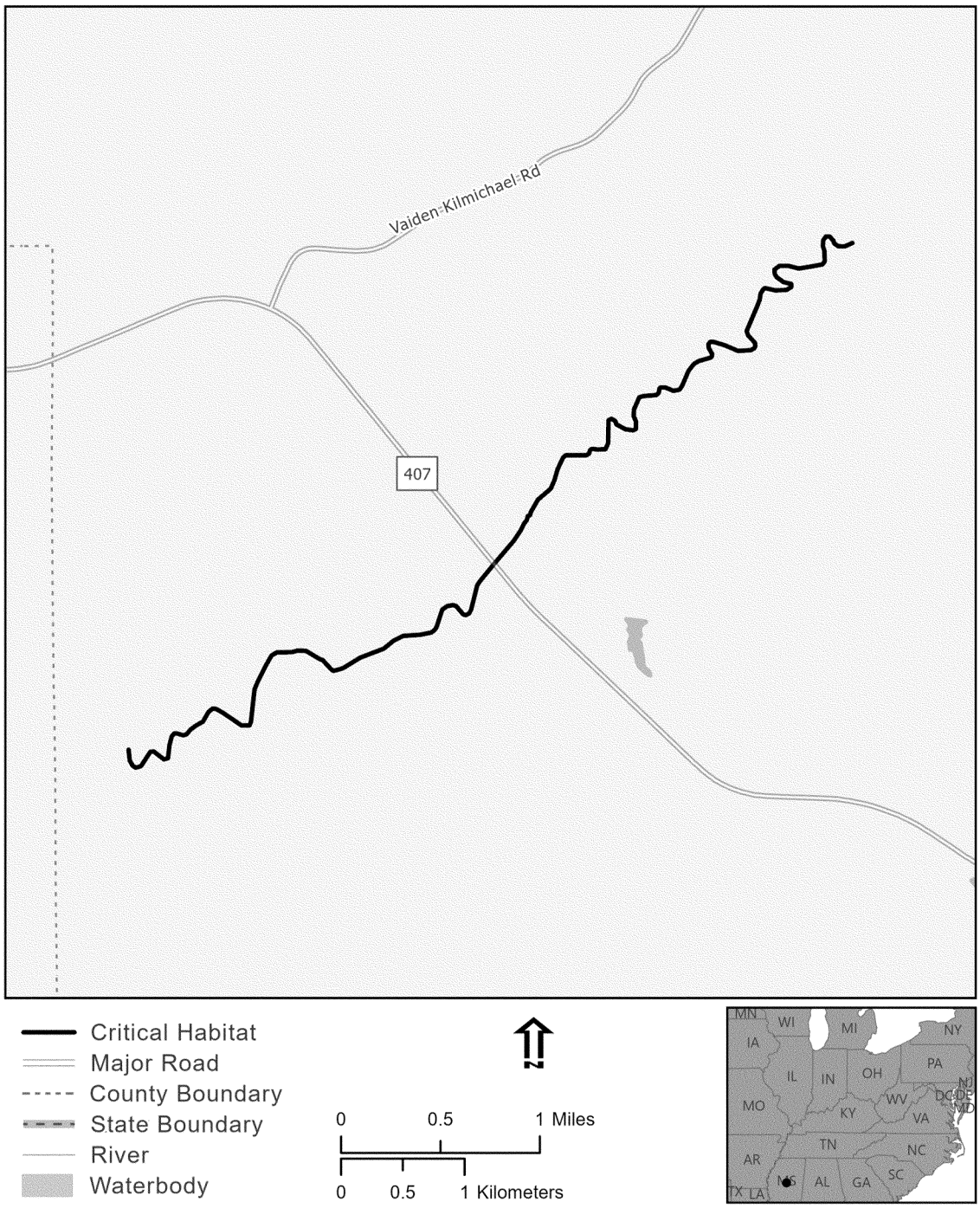


Figure 15 to Round Hickorynut (*Obovaria subrotunda*) paragraph (19)(ii)

(19) Unit RH 14: Big Black River; Montgomery County, Mississippi.

(i) Unit RH 14 consists of 4 river mi (7 km) of the Big Black River in Montgomery County, Mississippi. All of riparian lands that border the unit are private ownership.

(ii) Map of Unit RH 14 follows:



Longsolid (*Fusconaia subrotunda*)

(1) Critical habitat units for the longsolid are depicted on the maps in this entry for Jackson, Madison, and Marshall Counties, Alabama; Bath, Butler, Campbell, Edmonson, Fleming, Green, Harrison, Hart, Kenton, Morgan, Nicholas, Pendleton, Robertson, Rowan, Taylor, and Warren Counties, Kentucky; Clarion, Crawford, Erie, Forest, Mercer, Venango, and Warren Counties, Pennsylvania; Claiborne, Hancock, Hawkins, Smith, Trousdale, and Wilson Counties, Tennessee; Russell, Scott, Tazewell, and Wise Counties, Virginia; and Braxton, Calhoun, Clay, Doddridge, Fayette, Gilmer, Kanawha, Ritchie, Tyler, and Wood Counties, West Virginia.

(2) Within these areas, the physical or biological features essential to the conservation of the longsolid consist of the following components:

(i) Adequate flows, or a hydrologic flow regime (magnitude, timing, frequency, duration, rate of change, and overall seasonality of discharge over time), necessary to maintain benthic habitats where the species is found and

to maintain stream connectivity, specifically providing for the exchange of nutrients and sediment for maintenance of the mussel's and fish host's habitat and food availability, maintenance of spawning habitat for native fishes, and the ability for newly transformed juveniles to settle and become established in their habitats. Adequate flows ensure delivery of oxygen, enable reproduction, deliver food to filter-feeding mussels, and reduce contaminants and fine sediments from interstitial spaces. Stream velocity is not static over time, and variations may be attributed to seasonal changes (with higher flows in winter/spring and lower flows in summer/fall), extreme weather events (*e.g.,* drought or floods), or anthropogenic influence (*e.g.,* flow regulation via impoundments).

(ii) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support a diversity of freshwater mussel and native fish (such as, stable riffle-run-pool habitats that provide flow refuges consisting of predominantly silt-free, stable sand, gravel, and cobble substrates).

(iii) Water and sediment quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages, including (but not limited to): Dissolved oxygen (generally above 2 to 3 parts per million (ppm)), salinity (generally below 2 to 4 ppm), and temperature (generally below 86 °Fahrenheit (°F) (30 °Celsius (°C)). Additionally, water and sediment should be low in ammonia (generally below 0.5 ppm total ammonia-nitrogen) and heavy metal concentrations, and lack excessive total suspended solids and other pollutants.

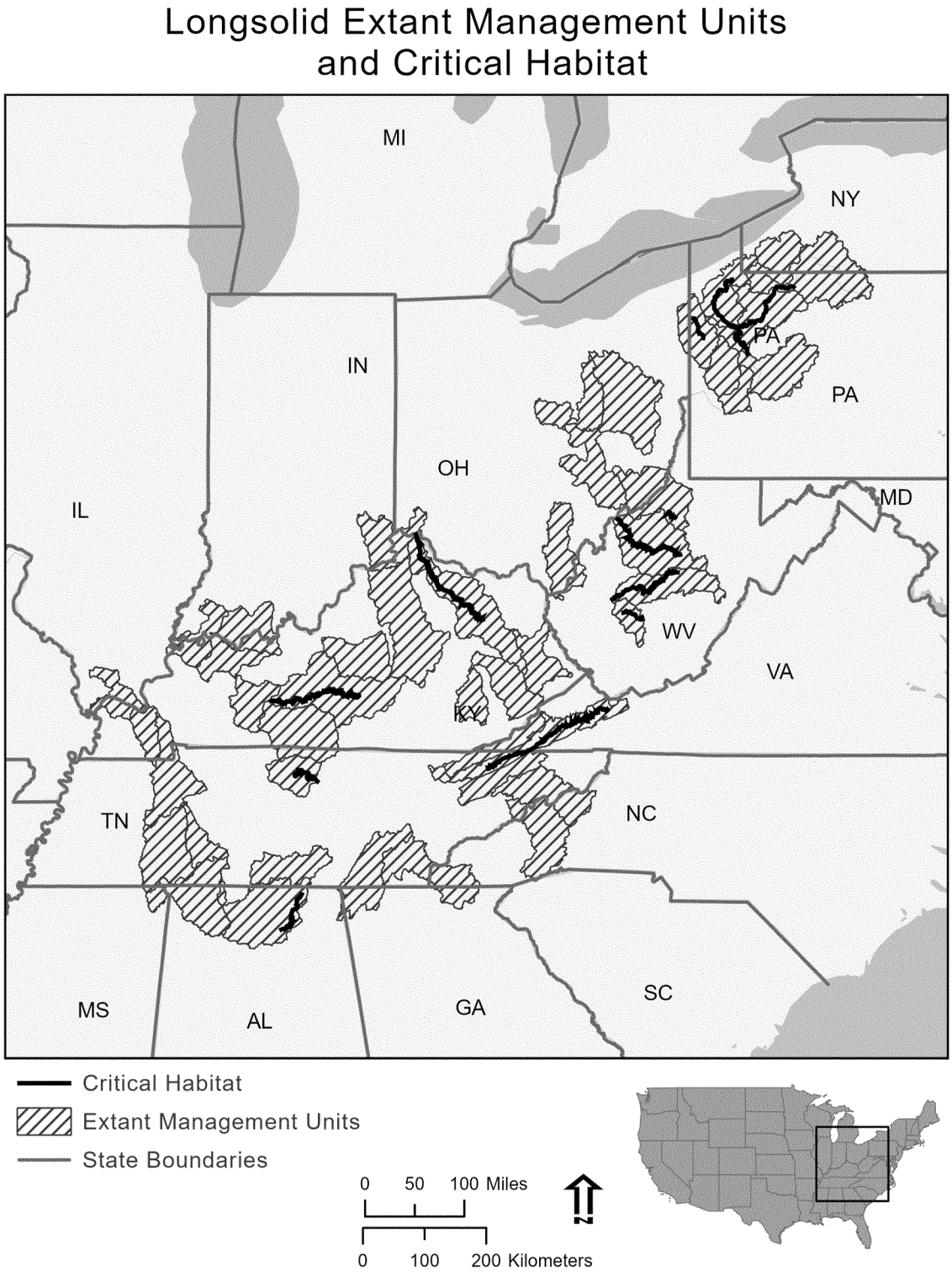
(iv) The presence and abundance of fish hosts necessary for recruitment of the longsolid (currently unknown, likely includes the minnows of the family Cyprinidae and banded sculpin (*Cottus carolinae*)).

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on April 10, 2023.

(4) Data layers defining map units were created by overlaying Natural Heritage Element Occurrence data and U.S. Geological Survey hydrologic data for stream reaches. The hydrologic data used in the critical habitat maps were extracted from the U.S. Geological Survey 1:1M scale nationwide hydrologic layer (*https://www.usgs.gov/core-science-systems/ngp/national-hydrography*) with a projection of EPSG:4269—NAD83 Geographic. Natural Heritage program and State mussel database species presence data from Pennsylvania, West Virginia, Virginia, Kentucky, Tennessee, and Alabama were used to select specific river and stream segments for inclusion in the critical habitat layer. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0010, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map for the longsolid follows:

Figure 1 to Longsolid (*Fusconaia subrotunda*) paragraph (5)

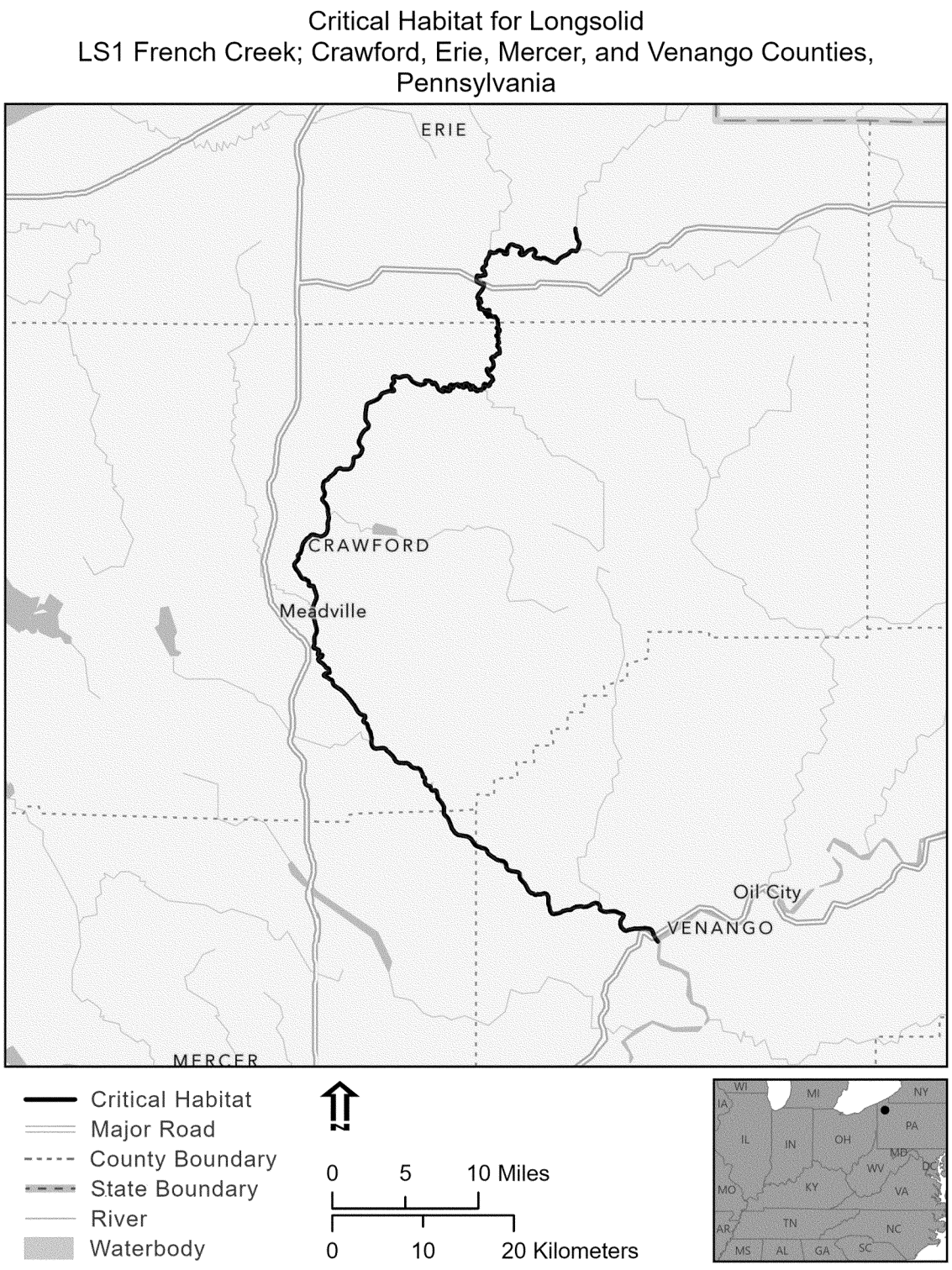


(6) Unit LS 1: French Creek; Crawford, Erie, Mercer, and Venango Counties, Pennsylvania.

(i) Unit LS 1 consists of 120 stream mi (191.5 km) of French Creek in Crawford, Erie, Mercer, and Venango Counties, Pennsylvania. Approximately 106 stream mi (170.6 km; 76 percent) of riparian lands that border the unit are private ownership, and 14 stream mi (22.1 km; 24 percent) are public (Federal or State) ownership. This unit begins immediately downstream of the Union City Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 1 follows:

Figure 2 to Longsolid (*Fusconaia subrotunda*) paragraph (6)(ii)

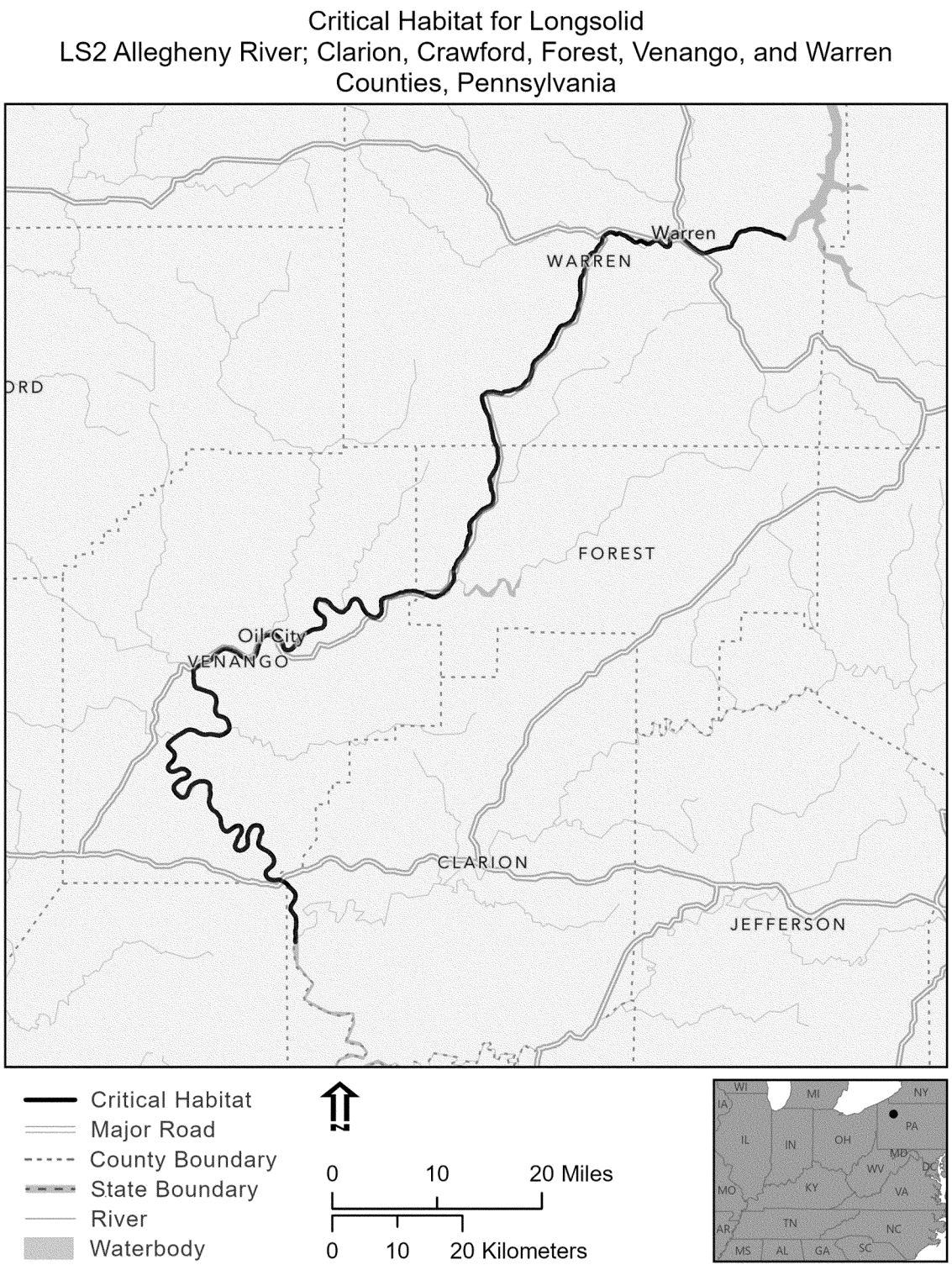


(7) Unit LS 2: Allegheny River; Clarion, Crawford, Forest, Venango, and Warren Counties, Pennsylvania.

(i) Unit LS 2 consists of 99 river mi (159.3 km) of the Allegheny River in Clarion, Crawford, Forest, Venango, and Warren Counties, Pennsylvania. Approximately 15 river mi (24.1 km; 14 percent) of riparian lands that border the unit are private ownership, and 84 river mi (135.8 km; 86 percent) are public (Federal or State; primarily Allegheny National Forest) ownership. This unit is immediately downstream of Kinzua Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 2 follows:

Figure 3 to Longsolid (*Fusconaia subrotunda*) paragraph (7)(ii)

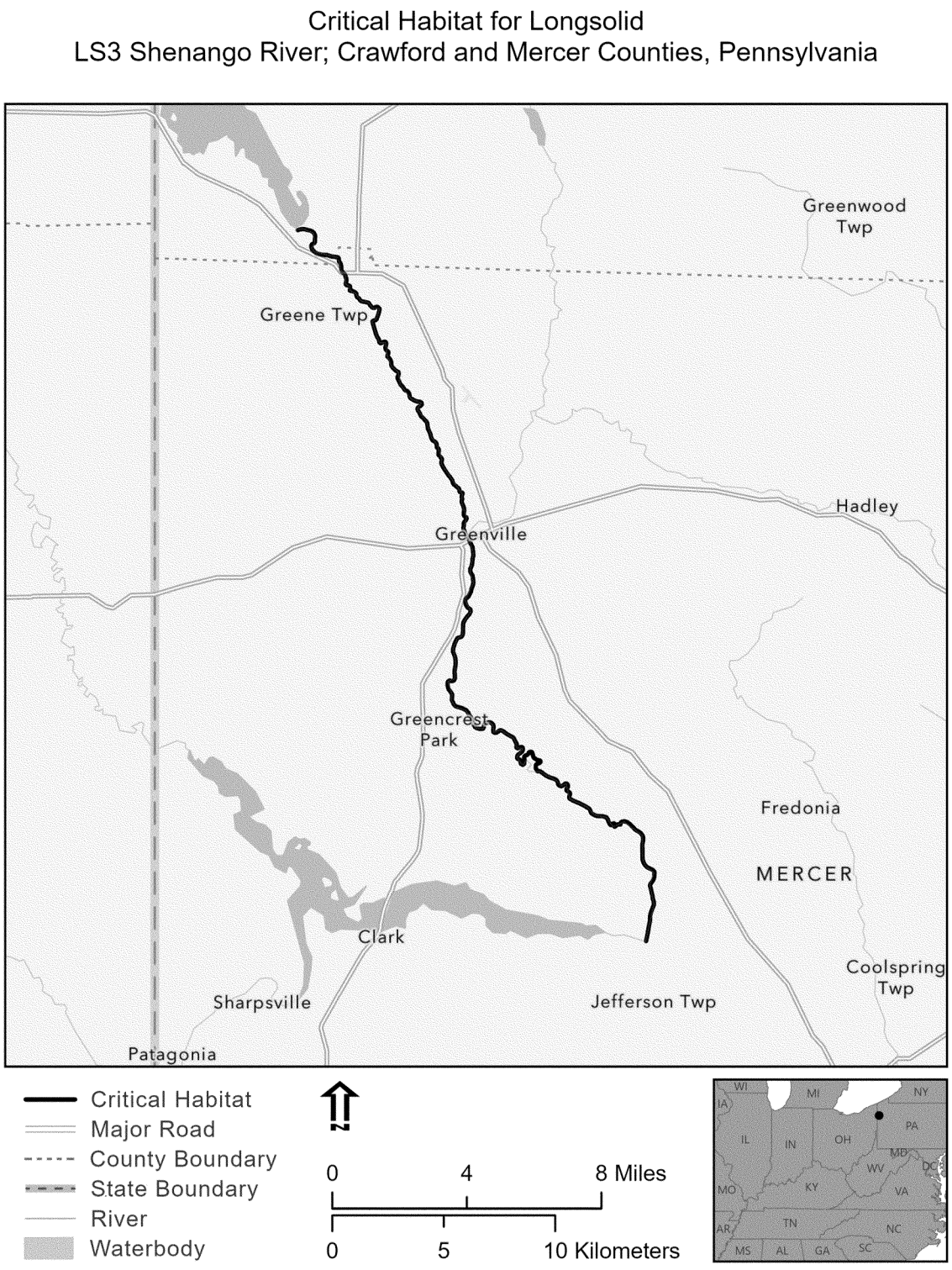


(8) Unit LS 3: Shenango River; Crawford and Mercer Counties, Pennsylvania.

(i) Unit LS 3 consists of 22 river miles (mi) (35.5 kilometers (km)) of the Shenango River in Crawford County, Pennsylvania, from Pymatuning Dam downstream to the point of inundation by Shenango River Lake near Big Bend, Mercer County, Pennsylvania. Approximately 15 river mi (24.3 km; 68 percent) of riparian lands that border the unit are private ownership, and 7 river mi (11.3 km; 32 percent) are public (Federal or State) ownership. This unit is immediately downstream from the Pymatuning Dam, which is owned by the State of Pennsylvania.

(ii) Map of Unit LS 3 follows:

Figure 4 to Longsolid (*Fusconaia subrotunda*) paragraph (8)(ii)

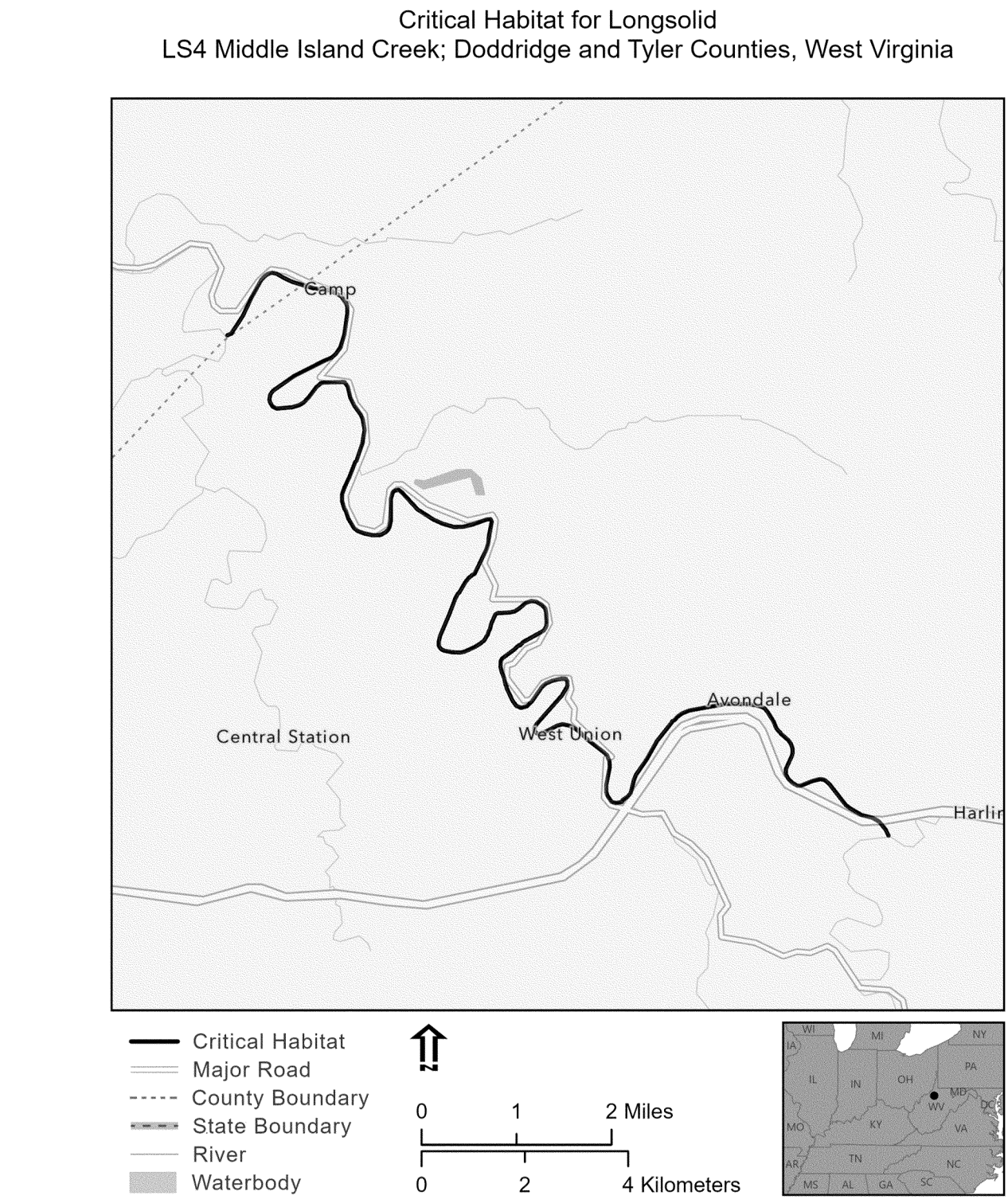


(9) Unit LS 4: Middle Island Creek; Doddridge and Tyler Counties, West Virginia.

(i) Unit LS 4 consists of 14 stream mi (23.7 km) of Middle Island Creek in Doddridge and Tyler Counties, West Virginia. Approximately 14 stream mi (23.5 km; 99 percent) of riparian lands that border the unit are private ownership, and 0.1 stream mi (0.2 km; less than 1 percent) are public (local) ownership.

(ii) Map of Unit LS 4 follows:

Figure 5 to Longsolid (*Fusconaia subrotunda*) paragraph (9)(ii)

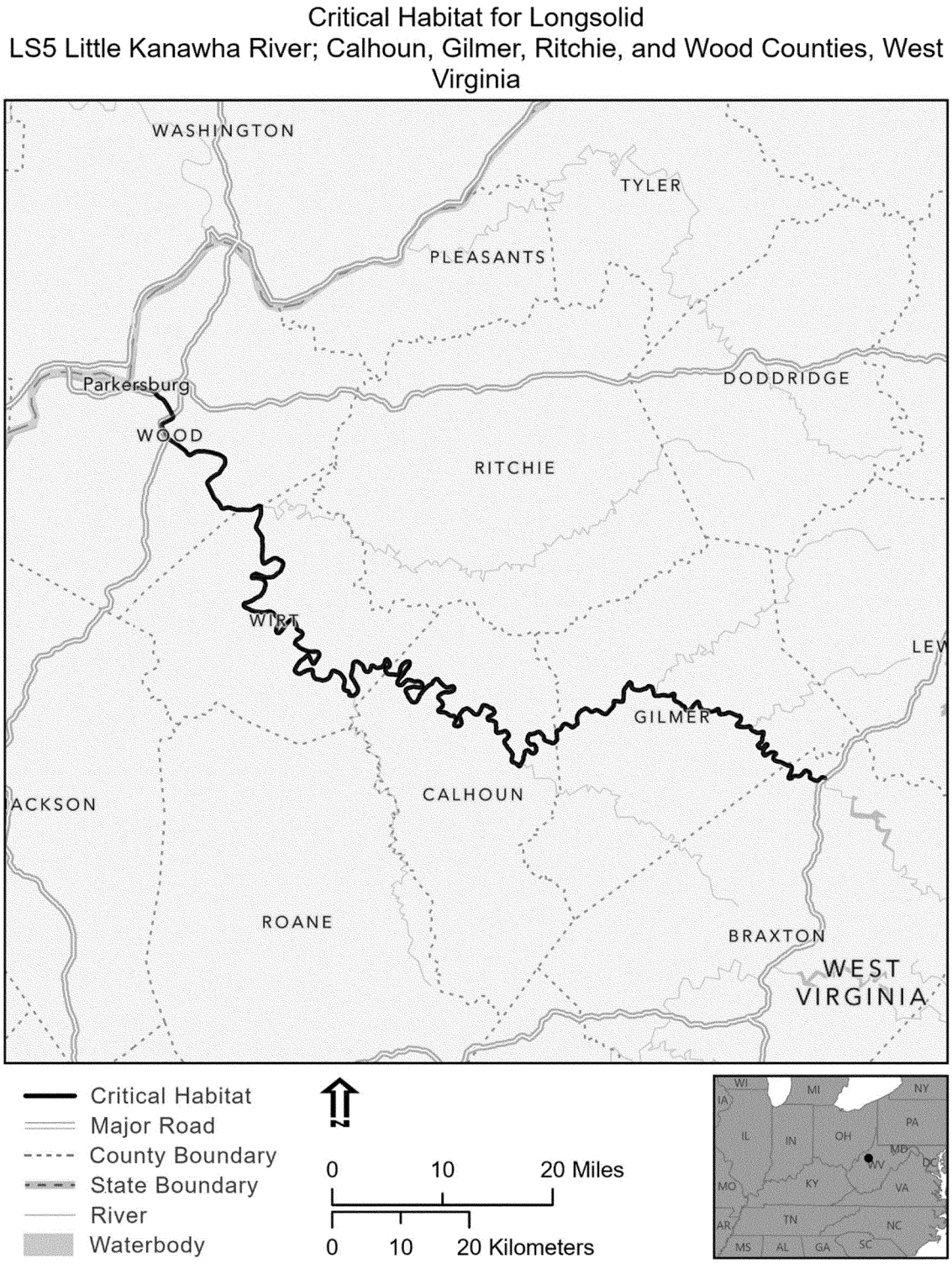


(10) Unit LS 5: Little Kanawha River; Calhoun, Gilmer, Ritchie, and Wood Counties, West Virginia.

(i) Unit LS 5 consists of 123 river mi (198 km) of the Little Kanawha River in Calhoun, Gilmer, Ritchie, and Wood Counties, West Virginia. Approximately 122 river mi (197.2 km; 99 percent) are private ownership, and 0.53 river mi (0.9 km; 1 percent) are public (Federal or State) ownership. This unit is directly below the Burnsville Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 5 follows:

Figure 6 to Longsolid (*Fusconaia subrotunda*) paragraph (10)(ii)

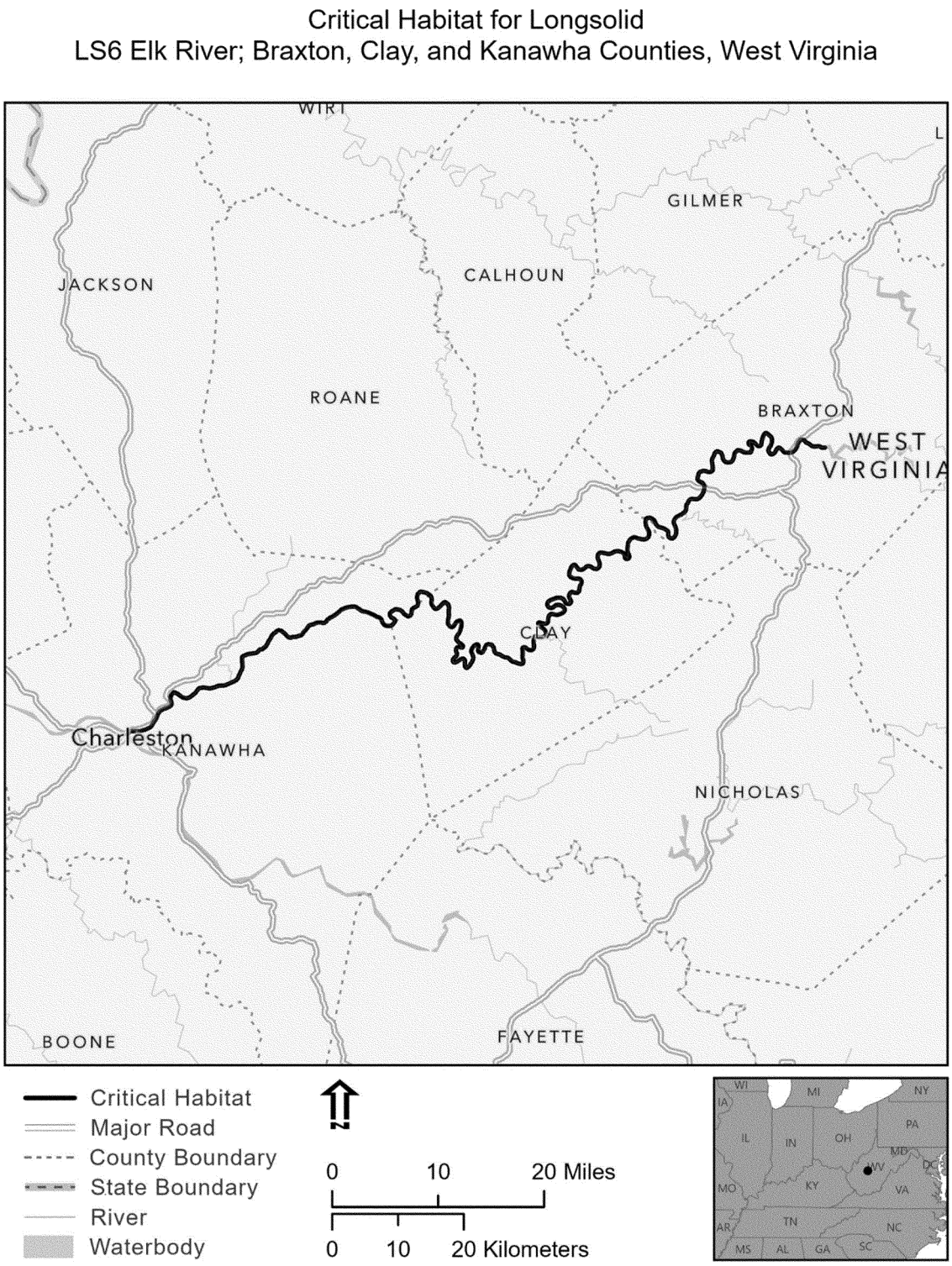


(11) Unit LS 6: Elk River; Braxton, Clay, and Kanawha Counties, West Virginia.

(i) Unit LS 6 consists of 101 river mi (163 km) of the Elk River in Braxton, Clay, and Kanawha Counties, West Virginia. Approximately 93 river mi (150.3 km; 92 percent) of riparian lands that border the unit are private ownership, and 7 river mi (12.7 km; 8 percent) are public (Federal, State, or local) ownership. This unit is directly below Sutton Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 6 follows:

Figure 7 to Longsolid (*Fusconaia subrotunda*) paragraph (11)(ii)

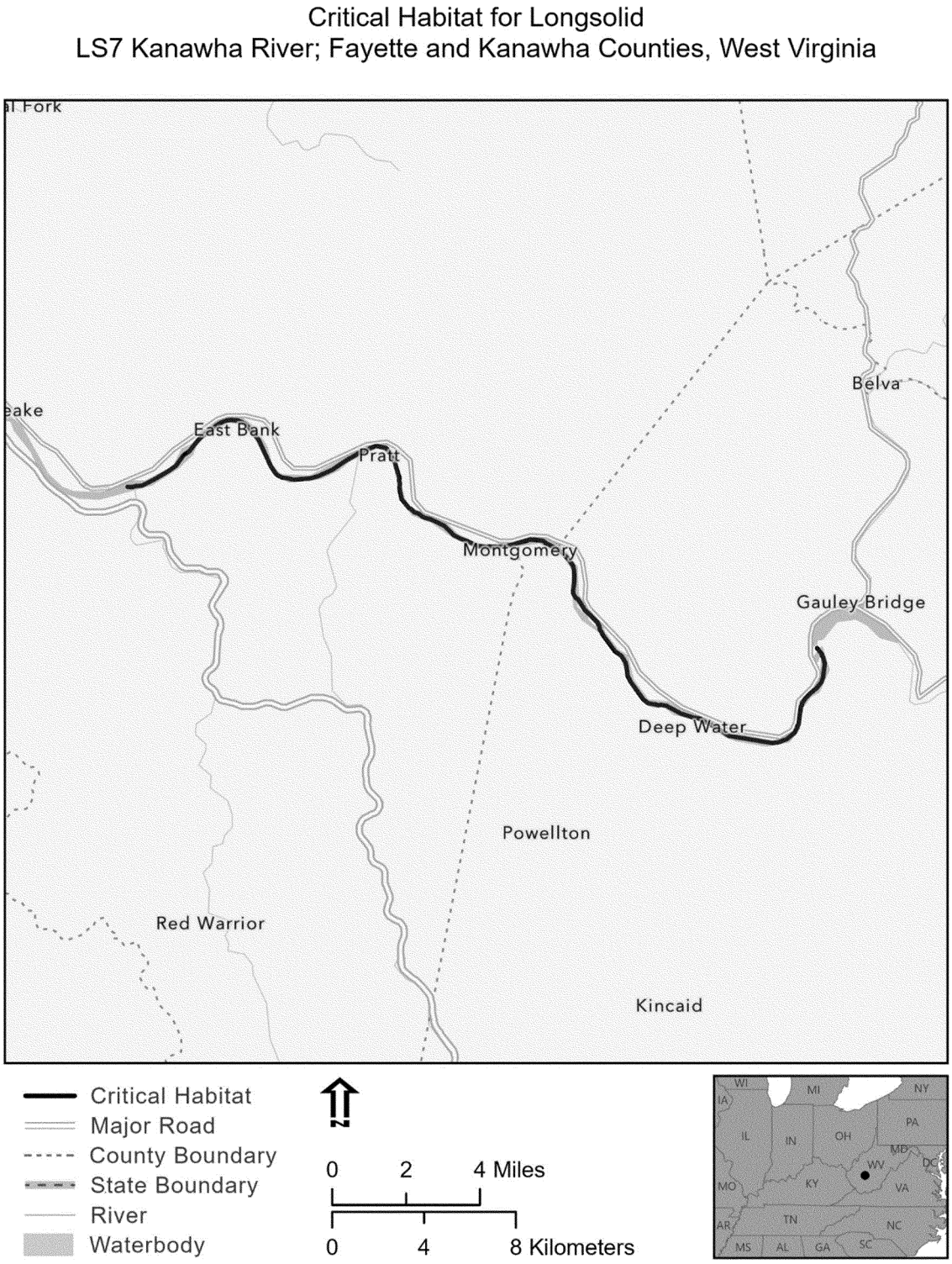


(12) Unit LS 7: Kanawha River; Fayette and Kanawha Counties, West Virginia.

(i) Unit LS 7 consists of 21 river mi (33.9 km) of the Kanawha River in Fayette and Kanawha Counties, West Virginia. Approximately 18 river mi (29.3 km; 90 percent) of riparian lands that border the unit are private ownership, and 2 river mi (4.6 km; 10 percent) are public (Federal, State, or local) ownership. London and Marmet locks and dams within this unit are operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 7 follows:

Figure 8 to Longsolid (*Fusconaia subrotunda*) paragraph (12)(ii)

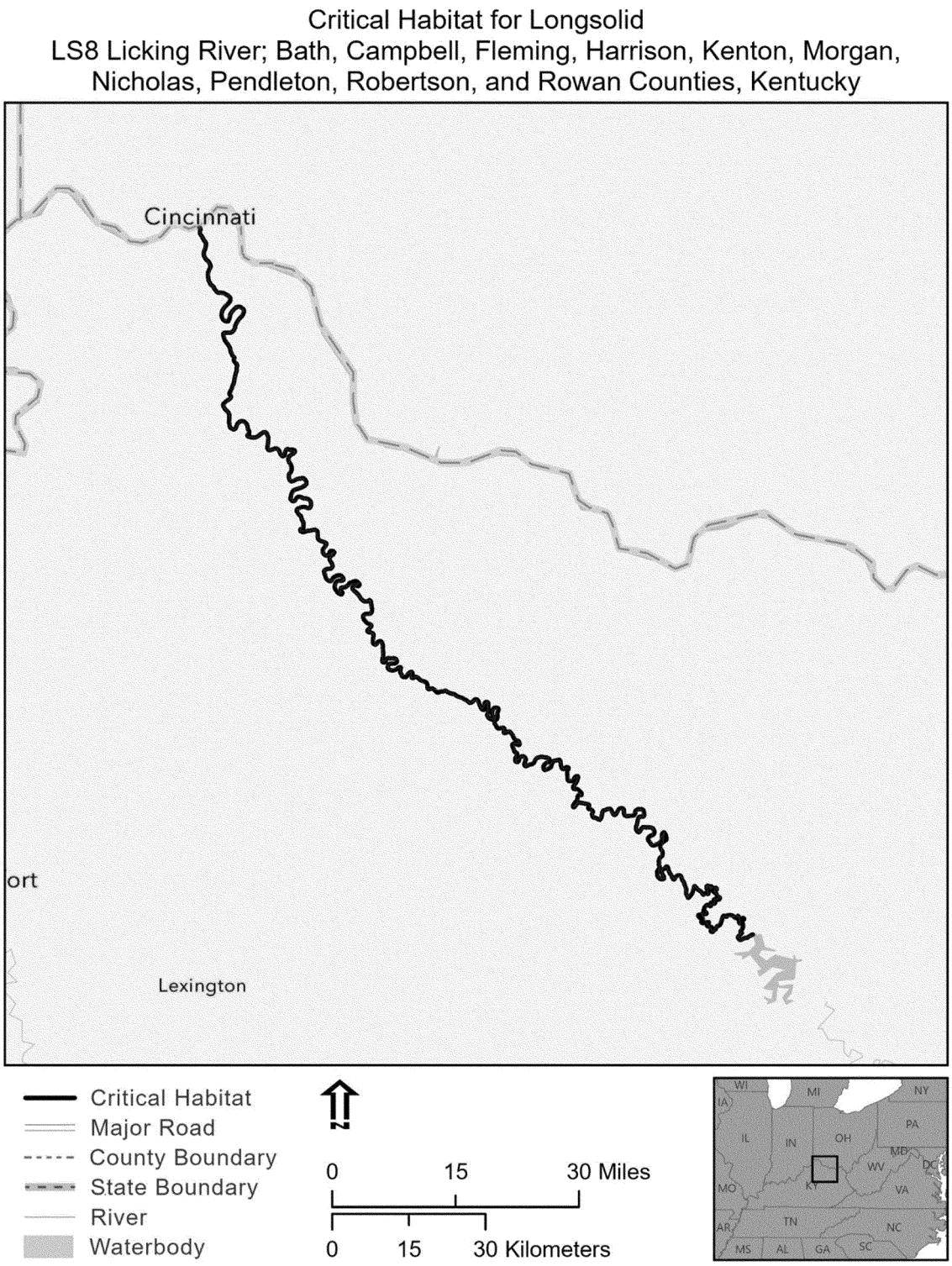


(13) Unit LS 8: Licking River; Bath, Campbell, Fleming, Harrison, Kenton, Morgan, Nicholas, Pendleton, Robertson, and Rowan Counties, Kentucky.

(i) Unit LS 8 consists of 181 river mi (291.5 km) of the Licking River in Bath, Campbell, Fleming, Harrison, Kenton, Morgan, Nicholas, Pendleton, Robertson, and Rowan Counties, Kentucky. Approximately 161 river mi (259.7 km; 90 percent) of riparian lands that border the unit are private ownership, and 19 river mi (31.7 km; 10 percent) are public (Federal, State, or local) ownership. This unit is directly below Cave Run Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 8 follows:

Figure 9 to Longsolid (*Fusconaia subrotunda*) paragraph (13)(ii)

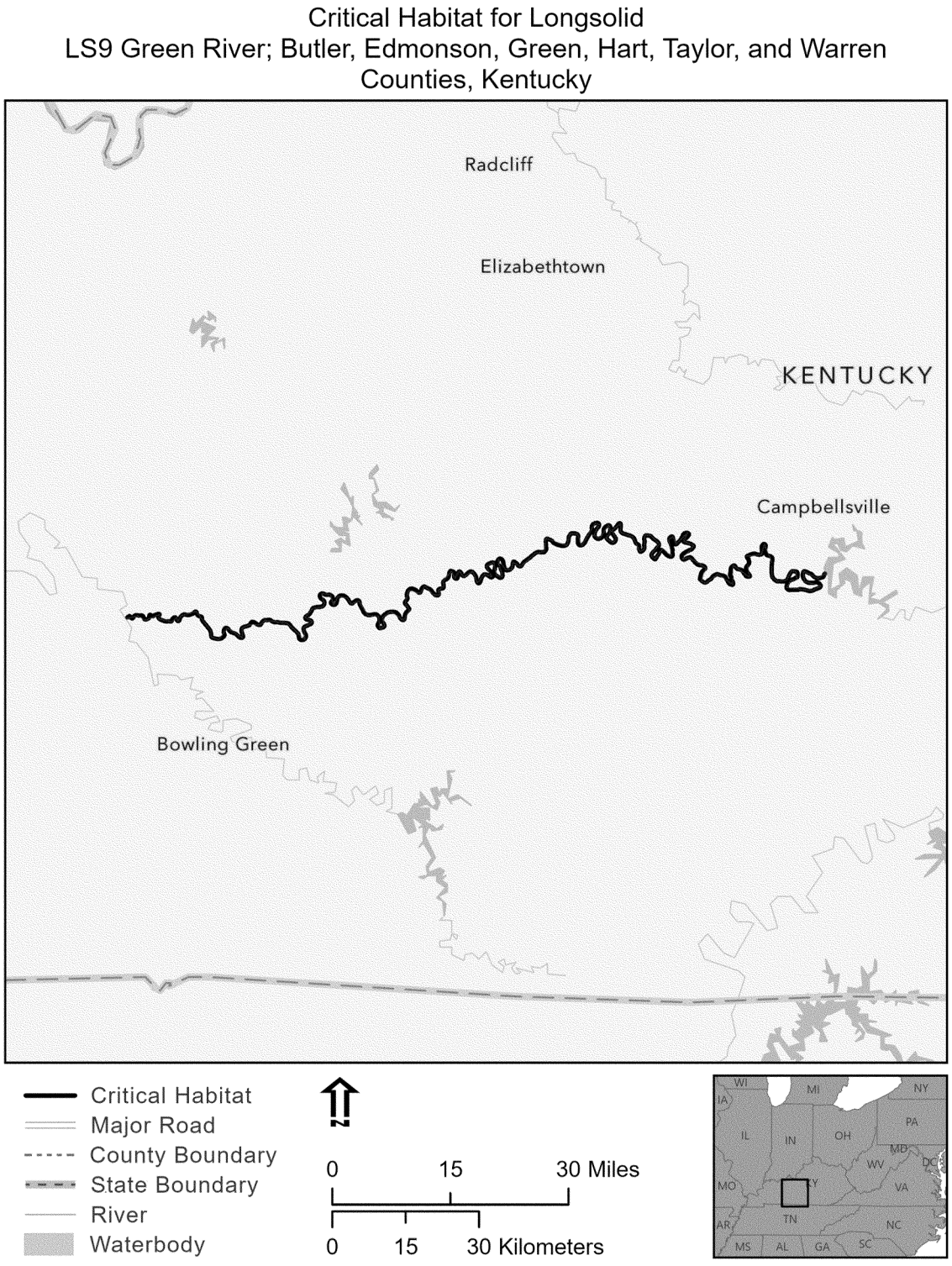


(14) Unit LS 9: Green River; Butler, Edmonson, Green, Hart, Taylor, and Warren Counties, Kentucky.

(i) Unit LS 9 consists of 156 river mi (251.6 km) of the Green River in Butler, Edmonson, Green, Hart, Taylor, and Warren Counties, Kentucky. Approximately 105 river mi (169.2 km; 67 percent) of riparian lands that border the unit are private ownership, and 51 river mi (82.4 km; 33 percent) are public (Federal, State, or local) ownership, including Mammoth Cave National Park. This unit is directly below Green River Dam, which is operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 9 follows:

Figure 10 to Longsolid (*Fusconaia subrotunda*) paragraph (14)(ii)

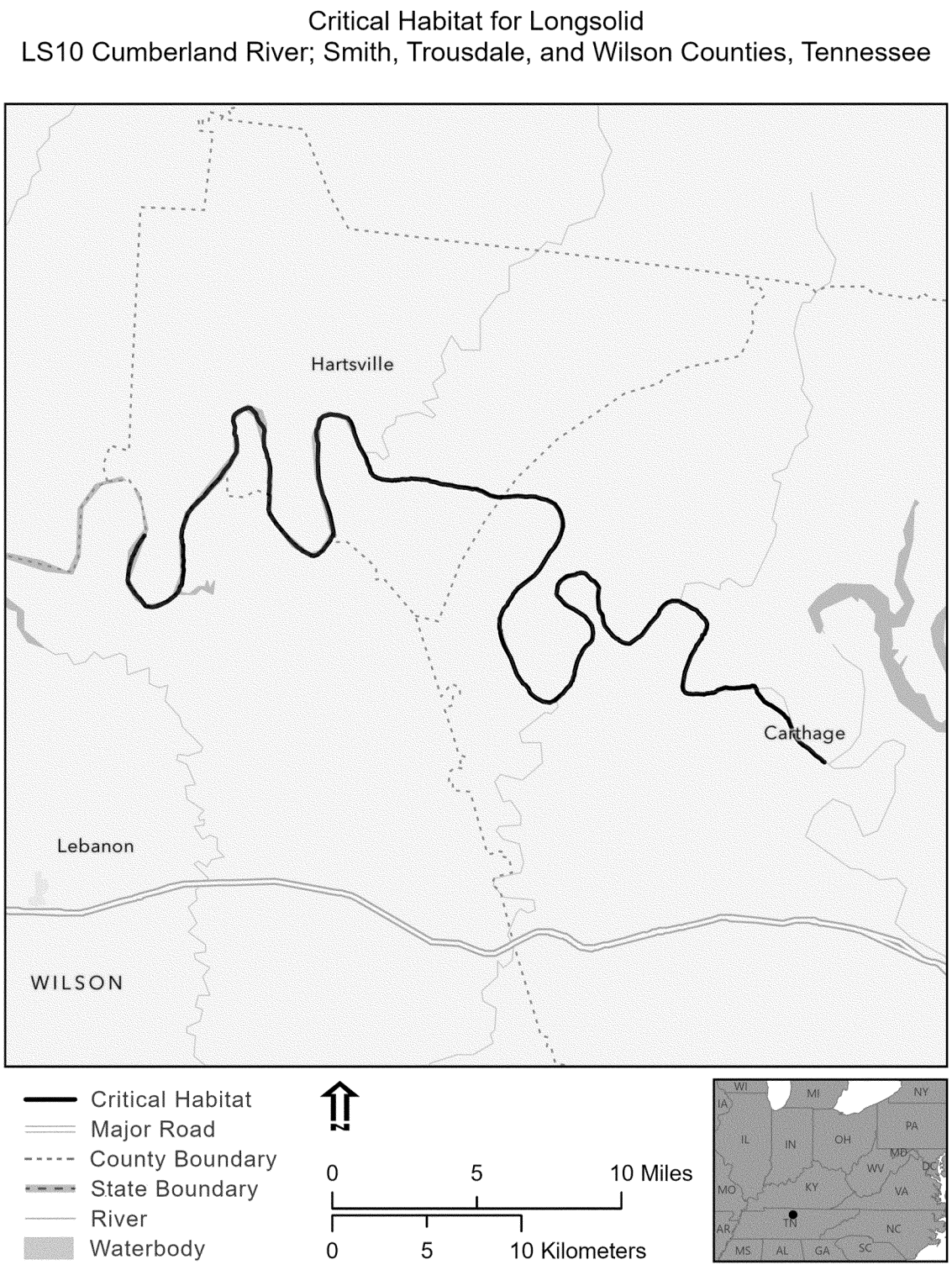


(15) Unit LS 10: Cumberland River; Smith, Trousdale, and Wilson Counties, Tennessee.

(i) Unit LS 10 consists of 48 river mi (77.5 km) of the Cumberland River in Smith, Trousdale, and Wilson Counties, Tennessee. All riparian lands that border the river are owned by the U.S. Army Corps of Engineers (Federal; 48 river mi (77.5 km)). This unit also falls within the Tennessee Wildlife Resources Agency's Rome Landing Sanctuary. Cordell Hull and Old Hickory Dams, upstream and downstream of this unit, respectively, are operated by the U.S. Army Corps of Engineers.

(ii) Map of Unit LS 10 follows:

Figure 11 to Longsolid (*Fusconaia subrotunda*) paragraph (15)(ii)

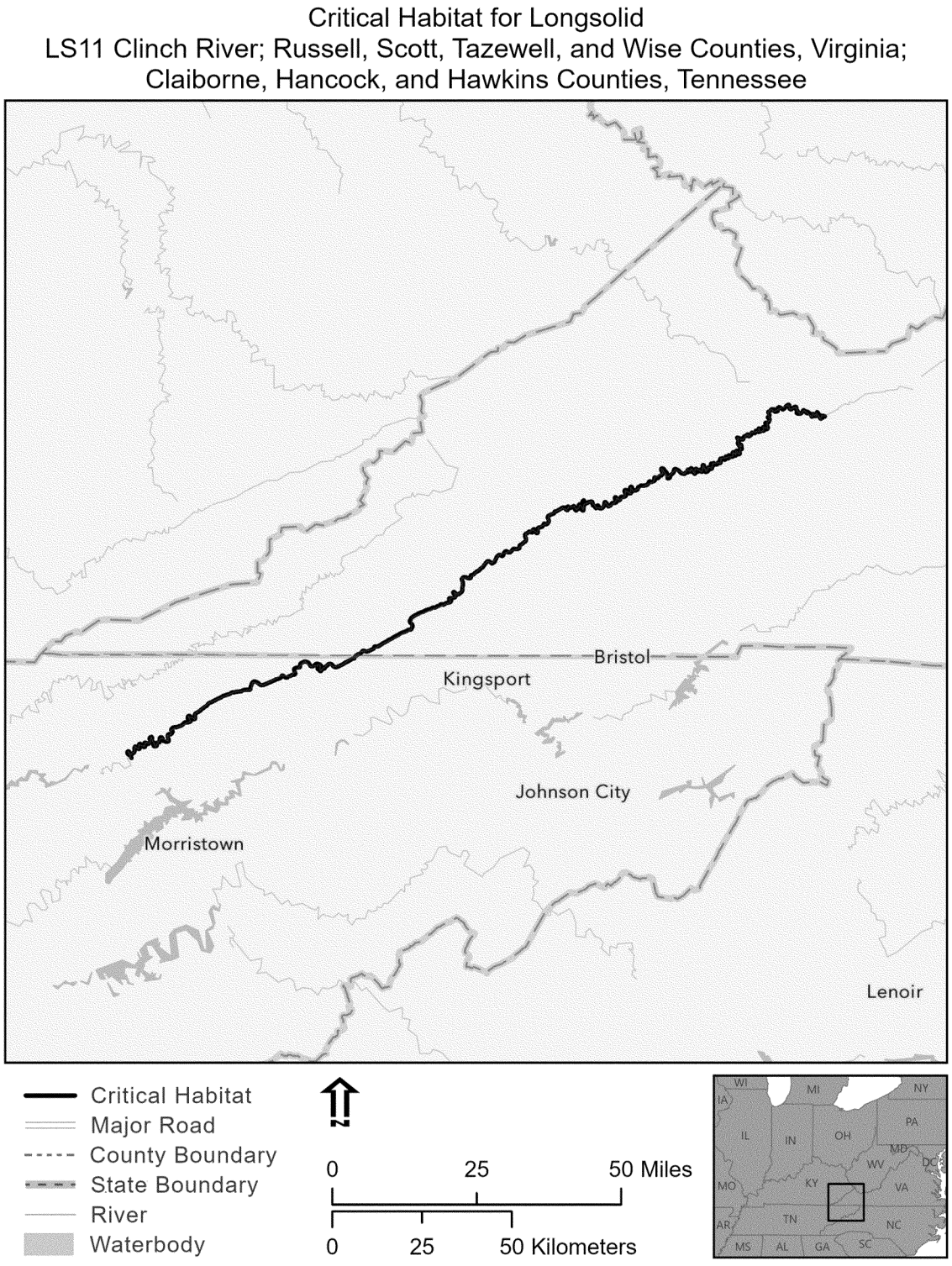


(16) Unit LS 11: Clinch River; Russell, Scott, Tazewell, and Wise Counties, Virginia; Claiborne, Hancock, and Hawkins Counties, Tennessee.

(i) Unit LS 11 consists of 177 river mi (286.1 km) of the Clinch River in Russell, Scott, Tazewell, and Wise Counties, Virginia, and Claiborne, Hancock, and Hawkins Counties, Tennessee. Approximately 160 river mi (258.8 km; 90 percent) of riparian lands that border the unit are private ownership, and 17 river mi (27.3 km; 10 percent) are public (Federal or State) ownership. The Tennessee portion of this unit is encompassed by the Tennessee Wildlife Resources Agency's Clinch River Sanctuary.

(ii) Map of Unit LS 11 follows:

Figure 12 to Longsolid (*Fusconaia subrotunda*) paragraph (16)(ii)



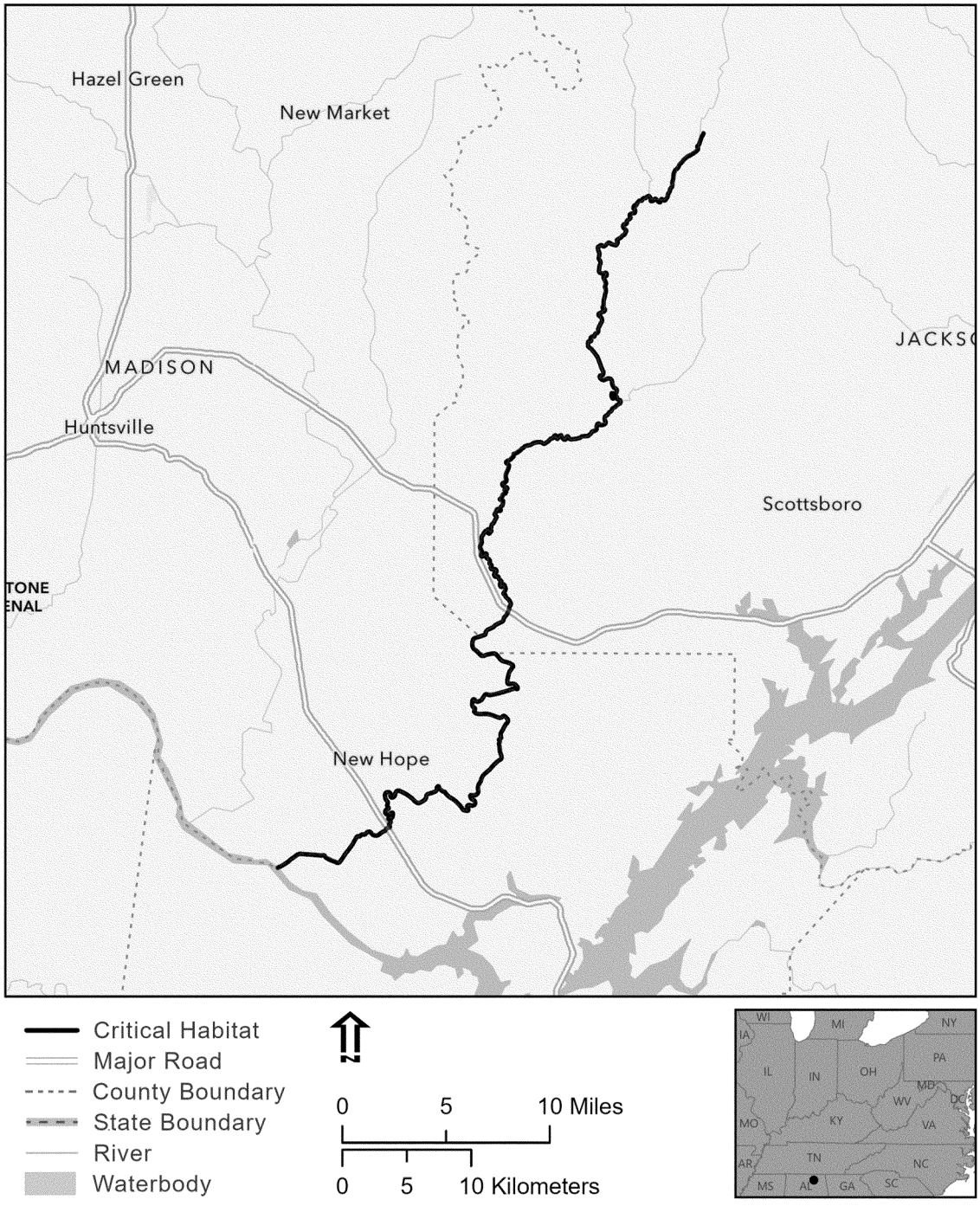
(17) Unit LS 12: Paint Rock River; Jackson, Madison, and Marshall Counties, Alabama.

(i) Unit LS 12 consists of 58 river mi (94.5 km) of the Paint Rock River in Jackson, Madison, and Marshall Counties, Alabama. Approximately 2 river mi (4.1 km; 3 percent) of riparian lands that border the unit are private ownership, and 56 river mi (90.4 km; 97 percent) are public (Federal or State) ownership.

(ii) Map of Unit LS 12 follows:

Figure 13 to Longsolid (*Fusconaia subrotunda*) paragraph (17)(ii)

Critical Habitat for Longsolid
LS12 Paint Rock River; Jackson, Madison, and Marshall Counties, Alabama



* * * * *

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–03998 Filed 3–8–23; 8:45 am]

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Vol. 88, No. 46

Thursday, March 9, 2023

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FEDERAL REGISTER PAGES AND DATE, MARCH

12803–13014	1
13015–13290	2
13291–13654	3
13655–14046	6
14047–14248	7
14249–14472	8
14473–14870	9

CFR PARTS AFFECTED DURING MARCH

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

1201 12805

Proposed Rules:

184 14514
210 14514

3 CFR

Proclamations:

9704 (amended by Proc. 10522) 13267
9980 (revised by Proc. 10522) 13267
10521 12803
10522 13267
10523 13277
10524 13291
10525 13293
10526 13295
10527 13297
10528 13655
10529 14249

Administrative Orders:

Memorandums:
Memorandum of February 27, 2023 13015
Notices:
Notice of March 1, 2023 13285
Notice of March 1, 2023 13287
Notice of March 1, 2023 13289
Presidential Determinations:
No. 2023–05 of Mar. 1, 2023 13657

6 CFR

37 14473

7 CFR

905 14477
906 14479
993 14481
1222 14484
1710 12806

Proposed Rules:

52 14296
984 14083

9 CFR

Proposed Rules:

1 14090
2 14090
3 14090
410 12870

10 CFR

72 13017
429 14014
430 14014

Proposed Rules:

Ch. I 14091
50 ..... 13717, 13735
51 13329
52 13735
170 13357
171 13357
430 13520

11 CFR

Proposed Rules:

113 13384

12 CFR

748 12811

14 CFR

25 13299
39 ..... 12817, 12820, 13301, 13303, 13306, 13309, 13311, 13313, 13659, 13662, 13665, 13668, 13671
71 ..... 14047, 14048, 14486
97 ..... 14487, 14488

Proposed Rules:

21 ..... 13071, 14092
25 ..... 13071, 14092
29 ..... 13071, 14092
39 ..... 13385, 14298, 14301, 14303, 14306
71 ..... 12870, 12872, 13737, 13739, 13740, 13742, 13744, 14514, 14516
259 13387
260 13387
399 ..... 13387, 13389

15 CFR

744 13673

16 CFR

1220 13686

Proposed Rules:

260 14092

17 CFR

232 13872
240 13872
275 13872

Proposed Rules:

275 14672
279 14672

20 CFR

Proposed Rules:

726 14094

21 CFR

11 13018
1308 13692

Proposed Rules:

130 12870
1300 ..... 12875, 12890
1304 ..... 12875, 12890

1306.....12875, 12890

22 CFR

41.....13694

24 CFR

203.....12822, 14252
206.....12822

Proposed Rules:

202.....12906

25 CFR

140.....13018
141.....13018
211.....13018
213.....13018
225.....13018
226.....13018
227.....13018
243.....13018
249.....13018

26 CFR

31.....14490
301.....14259

27 CFR

Proposed Rules:

9.....13072

31 CFR

587.....13316
591.....13022, 13024

33 CFR

100.....14259
165 .....12829, 12831, 13026, 13316, 14259, 14262, 14265, 14266
401.....14266

Proposed Rules:

100.....14309
147.....13745

36 CFR

Proposed Rules:

251.....14517

37 CFR

1.....13028

38 CFR

17.....13033

39 CFR

111.....14268

Proposed Rules:

3010.....13752
3035.....13752
3040.....13752

40 CFR

9.....13696
52 .....12831, 12833, 12835, 13320, 13713, 14049, 14269, 14276, 14278, 14490
63.....13956, 14280
81.....14291
180.....14491, 14495
271.....13034
721.....13696

Proposed Rules:

52 .....13392, 13394, 13752, 13755, 14095, 14104
70.....14104
271.....13077
1090.....13758

41 CFR

60–1.....12842
102–73.....14058

42 CFR

73.....13322

47 CFR

64.....14251
73.....13715, 14294
300.....13715

Proposed Rules:

2.....14312
54.....14529
73 .....13398, 13770, 14107

48 CFR

212.....12861, 12862
225.....12861
232.....12862
242.....12864
252.....12861, 12862

49 CFR

Proposed Rules:

107.....13624
171.....13624
172.....13624
173.....13624
178.....13624
180.....13624
371.....14322
386.....14323
387.....14323

50 CFR

17.....13038, 14794
300.....14066
648.....14499
660.....12865
665.....14081
679 .....12868, 13238, 13328, 14294, 14512

Proposed Rules:

17.....14536
36.....14107
217.....14560
300.....13399
622.....13077
635.....13771
648 .....13408, 14110, 14590

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List January 10, 2023

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