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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

48 CFR Parts 1602 and 1609

RIN 3206–AO43

Postal Service Reform Act; Establishment of the Postal Service Health Benefits Program

AGENCY: Office of Personnel Management.

ACTION: Interim final rule; request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing an interim final rule with comment period to establish and administer the Postal Service Health Benefits (PSHB) Program pursuant to the Postal Service Reform Act of 2022 (PSRA). Under the statute, OPM must establish a PSHB Program for Postal Service employees, Postal Service annuitants, and their eligible family members, and not later than one year after the date of enactment, the OPM Director must issue regulations to carry out the statute.

DATES:

Effective date: This rule is effective on June 5, 2023.

Comment date: OPM must receive comments on the rule on or before June 5, 2023.

ADDRESSES: You may submit comments, identified by docket number or Regulatory Information Number (RIN) and title, by the following method:

- *Federal Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Louise Dyer Yinug, Senior Policy Analyst, at (202) 972–0913 and Rina Shah, Senior Policy Analyst, at (202) 631–4910.

SUPPLEMENTARY INFORMATION:

Executive Summary

This interim final rule establishes the Postal Service Health Benefits (PSHB) Program within the Federal Employees Health Benefits (FEHB) Program as required by the Postal Service Reform Act of 2022 (PSRA), Public Law 117–108. The PSHB Program will include health benefits plans available only to United States Postal Service (Postal Service or USPS) employees, Postal Service annuitants, and their eligible family members starting January 1, 2025. For these individuals, eligibility for enrollment or coverage in FEHB plans based on Postal Service employment will end on December 31, 2024, and they will be able to enroll in or be covered only by PSHB plans after that time. Subject to limited exceptions, Postal Service annuitants who retire and become Medicare-eligible after December 31, 2024, and their Medicare-eligible family members will be required to enroll in Medicare Part B as a condition of eligibility to enroll in the PSHB Program.

With the enactment of the PSRA and these implementing regulations, the Office of Personnel Management (OPM) may now contract with carriers to offer two categories of health benefits plans through the broad umbrella of the FEHB Program, established under 5 U.S.C. 8901 *et seq.* First, pursuant to 5 U.S.C. 8902, OPM may contract with carriers to offer FEHB plans. Second, pursuant to 5 U.S.C. 8903c, OPM may now contract with carriers to offer PSHB plans through the PSHB Program within the FEHB Program. The broad umbrella of the FEHB Program comprises both FEHB plans and PSHB plans.

Background

Section 101 of the PSRA adds new section 8903c to chapter 89 of title 5, United States Code, and directs OPM to establish the PSHB Program within the FEHB Program for Postal Service employees, Postal Service annuitants, and their eligible family members. OPM will administer the PSHB Program in accordance with chapter 89 of title 5, United States Code, and implementing regulations (5 CFR parts 890 and 892 and 48 CFR chapter 16), including these amended regulations. Under 5 U.S.C. 8903c(c)(3), except as otherwise set forth in 5 U.S.C. 8903c, the provisions of chapter 89 ''applicable to health benefits plans offered by carriers under section 8903 or 8903a shall apply to plans offered under the ''[PSHB] Program.''

The PSHB Program was authorized under the Title I Postal Service Financial Reforms provisions in the PSRA in furtherance of Congress's objective to ''improve the financial position of the Postal Service while increasing transparency and accountability of the Postal Service's operations, finances, and performance.'' [1] OPM is issuing this interim final rule to set forth standards to implement section 101 of the PSRA to establish the PSHB Program. The first Open Season for the PSHB Program will begin on November 11, 2024, and run through December 9, 2024, and the first contract year will begin January 2025.

Section 102 of the PSRA (''The USPS Fairness Act'') amends 5 U.S.C. 8909a which was established in the Postal Accountability and Enhancement Act of 2006 (Pub. L. 109–435) and which required the Postal Service to pre-fund health benefits costs for its retirees. Section 102 of the PSRA repeals the requirement to pay actuarially determined normal cost and amortization payments into the Postal Service Retiree Health Benefits Fund (PSRHBF) established at 5 U.S.C. 8909a, and cancels any unpaid amounts previously required to be paid under section 8909a. Section 102(b) requires OPM to calculate an amount that the Postal Service will pay annually into the PSRHBF using a formula set forth at 8909a(d)(1). This amount will be calculated by June 30 of each year beginning in 2026.

A. Legislative Requirements for Establishing the PSHB Program

Section 101 of Title I of the PSRA directs OPM to ''establish the Postal Service Health Benefits Program within the Federal Employees Health Benefits

[1] H. Rept. 117–89—POSTAL SERVICE REFORM ACT OF 2021, H. Rept. 117–89, 117th Cong. (2023), *https://www.congress.gov/congressional-report/117th-congress/house-report/89/1.*

Program'' under chapter 89 of title 5 of the United States Code. The PSRA specifies that ''[e]xcept as otherwise provided . . . any [PSHB] contract . . . shall be consistent with the requirements of this chapter for contracts under section 8902 with carriers to offer health benefits plans.'' Therefore, generally, the requirements of the FEHB Program will apply to the PSHB Program, unless otherwise set forth in the PSRA or in 5 CFR part 890.

B. PSHB Program Background Information

The PSRA establishes the PSHB Program within the FEHB Program. The FEHB Program was established in 1960 and provides a choice of health plans, including fee-for-service plans and health maintenance organizations, to approximately 8.2 million covered individuals including employees of the Federal Government, Federal retirees (referred to as annuitants due to their eligibility for an annuity), members of their families, former spouses, and other groups statutorily eligible as enumerated in 5 U.S.C. 8901 or set forth in other authorizing legislation. Currently, Postal Service employees, Postal Service annuitants, and their family members are also eligible for FEHB pursuant to 39 U.S.C. 1005.

FEHB plans cover a wide range of health services including routine physical exams, primary and specialist doctor's visits, inpatient hospital care, surgery, laboratory and diagnostic tests, prescription drugs, and mental health services. Required benefits are listed in broad categories in the FEHB statute at 5 U.S.C. 8904 and include hospital benefits, surgical benefits, medical care and treatment, and obstetrical benefits, among others. The benefits, coverage, and premium details of each plan in the FEHB Program are negotiated with OPM each year. Eligible individuals can purchase additional dental and vision coverage through the Federal Employees Dental and Vision Insurance Program.

Each year, OPM issues guidance for health benefits carriers preparing FEHB plan benefits proposals. This guidance references OPM's commitment to ensuring that the Federal Government offers competitive, comprehensive health insurance benefits and includes OPM's policy goals and initiatives for the year. For 2023, these goals included advancing health equity, providing gender affirming care and services, and addressing obesity. This guidance outlines technical requirements for each proposal, including benefit package details such as actuarial value, benefit changes from the previous year, and the drug formulary. Carriers offering PSHB plans, as part of the FEHB Program, will be subject to the same or similar guidance. The PSRA requires that carriers offering PSHB plans will, to the greatest extent practicable, offer benefits and cost-sharing (*e.g.,* deductibles, copayments and coinsurance) equivalent to the benefits and cost-sharing for FEHB plans for that carrier in the initial contract year.

Generally, Federal employees can continue FEHB enrollment into retirement if they have been enrolled in FEHB for five years before retiring or, if less than five years, for all periods in which they were eligible to enroll. FEHB enrollees can also enroll in Medicare when they become eligible for Medicare regardless of whether they are retired or still actively employed. Annuitants who are enrolled in FEHB and covered by Medicare have Medicare as their primary coverage.

C. PSHB Program Eligibility

Under the PSRA, Postal Service employees whose Government contribution under chapter 89 is paid by the Postal Service, Postal Service annuitants whose Government contribution under chapter 89 is required to be paid under 5 U.S.C. 8906(g)(2), and eligible family members of those Postal Service employees and Postal Service annuitants are eligible for coverage under the PSHB Program. Starting January 2025, these Postal Service employees and Postal Service annuitants may not enroll in an FEHB plan. The major difference in eligibility between PSHB plans and FEHB plans is that, generally, as a new condition of eligibility to enroll in the PSHB Program, the PSRA requires that Postal Service annuitants and their eligible family members who are entitled to Medicare Part A (also referred to as ''covered Medicare individuals''), must enroll in Medicare Part B, unless an exception applies.

A ''covered Medicare individual'' under section 8903c(a)(1) generally means an individual who is entitled to Medicare Part A, but the term excludes an individual who is eligible to enroll under section 1818 or 1818A of the Social Security Act (42 U.S.C. 1395i–2, 1395i–2a). Individuals eligible to enroll in Medicare Part A under 1818 are individuals age 65 or older who are not otherwise eligible for premium-free Medicare Part A, typically due to not having the required work history for premium-free Part A. Individuals eligible to enroll under 1818A are disabled individuals who lose Medicare coverage solely because of substantial gainful work. These individuals are exempt from the Medicare Part B enrollment requirement that applies to most other Postal Service annuitants and their PSHB-eligible family members.

For purposes of the FEHB Program, 5 U.S.C. 8901(5) defines a ''member of family'' of employees and annuitants to include spouses and children under 22 years of age, subject to exception, including natural children, adopted children, stepchildren, and foster children. The enactment of the Affordable Care Act in 2010 required health insurers to cover dependents until age 26. At that time OPM issued updates to its regulations to reflect that change and codified 5 CFR 890.302(b) and (c) which defines FEHB covered family members to include such children until they reach the age of 26, subject to exception. The PSHB Program will align with 5 CFR part 890 regarding the definition of family members for all purposes, including the Medicare special enrollment period (SEP) opportunity.

The PSRA adds new definitions to chapter 89. Section 8903c(a)(9) defines a Postal Service employee as ''an employee of the Postal Service enrolled in a health benefits plan under this chapter whose Government contribution is paid by the Postal Service.'' Under section 8903c(a)(8), a Postal Service annuitant ''means an annuitant enrolled in a health benefits plan under this chapter whose Government contribution is required to be paid under section 8906(g)(2).'' Therefore, individuals not meeting the statutory definition of a Postal Service annuitant or Postal Service employee are not eligible to enroll in a PSHB plan. If such individuals are eligible for enrollment in an FEHB plan, they may enroll or continue enrollment in such plan.

The PSRA does not establish a distinct category for Postal Service compensationers, those employees who sustain workplace-related illness or injury, receive workers' compensation payments through the Department of Labor's Office of Workers' Compensation Programs (OWCP) because of that illness or injury, and who are determined by the Secretary of Labor to be unable to return to duty. Section 8901 of title 5, U.S.C. includes ''an employee who receives monthly compensation under subchapter I of chapter 81 of this title and who is determined by the Secretary of Labor to be unable to return to duty'' in the definition of annuitant.[2] However, the PSRA definition of Postal Service annuitant is limited to those who are enrolled in a health benefits plan under

[2] 5 U.S.C. 8901(3)(C).

5 U.S.C. chapter 89, whose Government contribution is required to be paid under section 8906(g)(2).

Section 8906(g)(2) authorizes Government contributions for health benefits for individuals who become Postal Service annuitants ''by reason of retirement'' and their survivors. These contributions are paid first by the Postal Service Retiree Health Benefits Fund with any remaining amount paid by the Postal Service. The description in 8906(g)(2) does not include Postal Service compensationers, as they have not become annuitants by reason of retirement. Postal Service compensationers are more closely aligned with the 8903c(a) definition of Postal Service employee, whose Government contribution is paid by the Postal Service.

The definition of Postal Service employee, rather than Postal Service annuitant, will include Postal Service compensationers. Postal Service compensationers will not be subject to the Medicare Part B enrollment requirement, regardless of Medicare Part A entitlement.

Primary and Secondary Payers

The Centers for Medicare & Medicaid Services (CMS) generally considers those receiving worker's compensation payments to be employees. As described above, compensationers are considered to be employees within the meaning of 42 CFR 411.40, 411.43, and 411.45. Medicare is the secondary payer for all compensationers enrolled in an FEHB plan or a PSHB plan. Even if a compensationer is entitled to or eligible for Medicare benefits, enrolled in Medicare, and enrolled in an FEHB plan, Medicare is still the secondary payer, notwithstanding the statutory annuitant status for purposes of FEHB enrollment, with respect to those compensationers determined unable to return to duty. Should a Postal Service compensationer who is enrolled in a PSHB plan and entitled to or eligible for Medicare benefits choose to enroll in Medicare, that compensationers' Medicare coverage would be secondary to the PSHB plan coverage. Postal Service annuitants enrolled in Medicare and enrolled in a PSHB plan would have Medicare as primary coverage and PSHB plan coverage as secondary.

Impact on Other Benefits

Eligibility for the PSHB Program does not affect eligibility for other Federal benefits. Postal Service employees and Postal Service annuitants may continue to enroll and cover their eligible family members in the Federal Employees Dental and Vision Insurance Program (FEDVIP), Federal Employees' Group Life Insurance (FEGLI), Federal Long Term Care Insurance Program (FLTCIP), and, for Postal Service employees and their family members, participate in the Federal Flexible Spending Account Program (FSAFEDS).

Consultation With the Postal Service and Other Federal Agencies

The PSRA includes the following requirements for consultation between OPM and several other Federal agencies:

- 5 U.S.C. 8903c(e)(3)(B) requires that OPM, in consultation with the Secretary of Veterans Affairs, Secretary of Health and Human Services, and the Postmaster General, promulgate regulations implementing the Department of Veterans Affairs (VA) and Indian Health Service (IHS) coverage exceptions to the Medicare enrollment requirements for certain Postal Service Medicare covered annuitants and family members enrolled in certain health care benefits provided by the VA, or eligible for IHS health services, within a year of enactment. OPM has engaged in this consultation since the PSRA was enacted.
- 5 U.S.C. 8903c(e)(4) requires OPM and the Postal Service, in consultation with the Social Security Administration (SSA) and CMS, to establish a process that will enable the Postal Service to timely inform Postal Service employees, Postal Service annuitants and the family members of Postal Service employees and annuitants of the Medicare enrollment requirements. OPM has engaged in this consultation since the PSRA was enacted.
- 5 U.S.C. 8903c(g)(2) requires OPM to consult with the Department of Health and Human Services (HHS) Secretary, VA Secretary, SSA Commissioner, and the Postmaster General in issuing regulations carrying out section 101 of the PSRA to include (1) a process to timely inform individuals of the enrollment requirements and how to request additional enrollment information in writing; (2) how an individual enrolled in PSHB can request a belated change of plan and be prospectively enrolled in a plan of the Postal Service employee's or Postal Service annuitant's choice; and (3) how individuals can cancel PSHB coverage in writing to the Postal Service because the individuals choose not to enroll in, or to disenroll from, Medicare Part B; and (4) any provisions necessary to implement the section. OPM has engaged in this consultation since the PSRA was enacted.
- 5 U.S.C. 8903c(l)(4)(B) requires the Postal Service to coordinate with OPM, and in consultation with CMS and SSA, to obtain and confirm accuracy of information as the Postal Service determines to be necessary to conduct the Health Benefits Education Program. 5 U.S.C. 8903c(l)(5)(C) requires the Postal Service, in consultation as necessary with OPM and CMS, to develop standards to ensure that information made available by navigators is fair, accurate, and impartial.
- 5 U.S.C. 8903c(l)(6) requires the Postal Service, as part of the regulations for the Health Benefits Education Program, to develop a process in consultation with OPM, SSA, and CMS for addressing inquiries from Postal Service employees and Postal Service annuitants about PSHB or Medicare enrollment.
- Section 101(c) of the PSRA requires OPM to establish a process by regulation to provide information to SSA regarding Postal Service annuitants and their family members who may be eligible to enroll in Medicare Part B during the special enrollment period (SEP) established by the PSRA under the Social Security Act. The section also requires SSA to provide information to OPM and the Postal Service regarding whether Postal Service annuitants and their family members are entitled to benefits under Medicare Part A and enrolled under Medicare Part B to assist OPM and the Postal Service in determining who may be eligible to enroll in Medicare Part B during the SEP, or who may be subject to the Part B enrollment requirements for PSHB eligibility. This interim final rule includes a process for OPM to provide information to SSA for these purposes.
- 5 U.S.C. 8909a(f) requires that OPM, after consultation with the Postal Service, promulgate any regulations determined necessary under section 102 of the PSRA with respect to the Postal Service Retiree Health Benefits Fund. OPM has addressed this provision in this regulation.

Provisions of Interim Final Rule

This interim final rule amends subparts A, C, and E of 5 CFR part 890 related to the FEHB Program and 48 CFR chapter 16, the Federal Employees Health Benefits Program Acquisition Regulation (FEHBAR). This interim final rule also adds a new subpart P to 5 CFR part 890 regulating the new PSHB Program within the FEHB Program.

This regulation establishes rules for the operation of the PSHB Program within the parameters of the PSRA. To the greatest extent possible, OPM is aligning these rules with the FEHB Program's treatment of FEHB plans. Where there is no existing rule

applicable to FEHB plans, OPM is implementing the greatest flexibility for Postal Service employees, Postal Service annuitants, and their eligible family members.

5 CFR Part 890: Federal Employees Health Benefits Program

Subpart A: Administration and General Provisions

OPM is amending § 890.101 to add definitions specific to the PSHB Program, including Postal Service, Postal Service employee, Postal Service annuitant, PSHB plan, and PSHB Program. OPM is also adding definitions for FEHB plan and FEHB Program. These definitions explain the relationship between the FEHB Program and the PSHB Program. In short, the FEHB Program offers FEHB plans, and the PSHB Program within the FEHB Program offers PSHB plans. As a result, the FEHB Program offers both FEHB plans and PSHB plans.

Section 8903c(a) of the PSRA includes definitions for the new PSHB Program. A Postal Service Medicare covered annuitant is defined as an individual who is both a Postal Service annuitant and a covered Medicare individual (*i.e.,* an individual entitled to benefits under Medicare Part A).[3] Section 8903c(e) requires that Postal Service Medicare covered annuitants and eligible family members who are covered Medicare individuals enroll in Medicare Part B to enroll or maintain enrollment in a PSHB plan unless an exception described in section 8903c(e)(3) applies. Section 8903c(a) excludes those who are eligible to enroll in Medicare under section 1818 or 1818A of the Social Security Act from the definition of covered Medicare individual.

OPM is adding a new § 890.115 to apply provisions of part 890 to Postal Service employees, Postal Service annuitants, and eligible family members unless the provision is inconsistent with PSRA law at 5 U.S.C. 8903c or the PSHB regulation in subpart P of part 890.

Subpart C: Enrollment

Postal Service employees and Postal Service annuitants will be eligible for enrollment in PSHB plans, not FEHB plans, starting with the initial PSHB contract year of 2025. Under 5 U.S.C. 8903c(d)(2), Postal Service employees and Postal Service annuitants may not enroll in FEHB plans for plan year 2025 or thereafter. OPM is adding a new § 890.301(p) to implement that prohibition, which will begin after December 31, 2024. There are no statutory exceptions to this prohibition on FEHB plan enrollment.

OPM is amending § 890.302 to apply to the whole of part 890, removing specific references to the FEHB Program to cover both FEHB plans and PSHB plans.

OPM is adding a new paragraph (l) to § 890.303 to indicate that a Postal Service employee eligible to enroll in a PSHB plan who moves to a Federal agency, without a break in service of more than three days, cannot continue in PSHB plan enrollment but may be eligible for FEHB plan enrollment if their position conveys eligibility. This is similar to the current FEHB rules that allow an employee to continue FEHB enrollment if they have a break in service of no more than three days.

Likewise, an employee who moves from a Federal agency to a PSHB-eligible Postal position, without a break in service of more than three days, may change to PSHB plan enrollment in the new job but otherwise may not maintain FEHB plan enrollment.

Enrollees in the PSHB Program will be subject to the FEHB Program requirement of maintaining enrollment for 5 years of service before retirement in order to carry that coverage into retirement. A Postal Service annuitant who (at the time the individual becomes an annuitant) was enrolled in a health benefits plan under chapter 89, including under 8903c, can meet that 5-year requirement if they were so enrolled as a Postal Service employee, as an employee defined at 5 U.S.C. 8901(1),[4] or a mix of both in order to maintain health benefits after retirement. That individual would maintain eligibility to continue enrollment in the FEHB plan or PSHB plan in which they were enrolled immediately before retirement. Subsequent changes in enrollment may be made, as permitted under chapter 89, from one FEHB plan to another FEHB plan, or from one PSHB plan to another PSHB plan under section 8903c, as applicable to the service from which the individual retired.

OPM's existing regulation at 5 CFR 890.303(d)(2), regarding employees who become survivor annuitants, continues to apply, as amended. The rule is expanded and now applies to an employee who is a survivor annuitant of a Postal Service employee or Postal Service annuitant and to a Postal Service employee or Postal Service annuitant who is a survivor annuitant of an employee. In either case, if an employee enrolled in a FEHB plan or a Postal Service employee enrolled in a PSHB plan separates with insufficient service to continue enrollment into retirement, but the separated individual is a survivor annuitant of an employee or annuitant, or of a Postal Service employee or Postal Service annuitant, and the separated individual is entitled to enroll as a survivor annuitant, the enrollment may be reinstated under the FEHB Program or PSHB Program as applicable to the service that gives rise to the survivor annuitant status.

In § 890.308, OPM is adding a new paragraph (i) that may require disenrollment from PSHB plans for Postal Service Medicare covered annuitants or removal from coverage of Medicare covered members of family who are not enrolled in Medicare Part B, unless an exception applies. Generally, unless an individual qualifies for an exception from the Medicare enrollment requirement, the individual will be disenrolled or removed from coverage from a PSHB plan if they have not enrolled in Medicare Part B (for example, during their seven-month Medicare Initial Enrollment Period (IEP), or applicable Medicare SEP). Pursuant to § 890.1612 in the new subpart P, OPM will share information regularly with SSA and CMS to confirm an individual's entitlement to Medicare Part A as well as enrollment or non-enrollment in Medicare Part B.

In a case where OPM, the PSHB Carrier, or the Postal Service belatedly learns that a Postal Service Medicare covered annuitant or eligible family member who is a covered Medicare individual who is enrolled or covered in a PSHB plan is not enrolled in Medicare Part B and does not qualify for an exception to the Medicare enrollment requirement, that individual will be permitted to stay enrolled in or covered by PSHB if they enroll in Medicare during their next enrollment opportunity, which may be the next Medicare General Enrollment Period. This opportunity to stay enrolled in PSHB despite lacking Medicare Part B coverage is not intended to allow a covered Medicare individual to maintain PSHB coverage without a good faith effort to remain continuously enrolled in Medicare Part B. The individual must enroll in Medicare Part B during that next available enrollment period (in this example, the next General Enrollment Period) and pay for any applicable late enrollment penalty assessed by CMS in order to remain in the PSHB plan. Such late enrollment

[3] Section 8903(a)(1) defines the term 'covered Medicare individual' as ''an individual who is entitled to benefits under Medicare part A but excluding an individual who is eligible to enroll under such part under section 1818 or 1818A of the Social Security Act.''

[4] The definition at 5 U.S.C. 8901(1) includes Federal employees and other categories of statutorily eligible individuals.

penalty will increase the Medicare Part B premium as long as the individual is enrolled in Medicare Part B. If the Postal Service Medicare covered annuitant or eligible Medicare covered family member does not enroll in Medicare Part B at the next opportunity such as a Medicare General Enrollment Period, they will be disenrolled or removed from a PSHB plan and, in the case of a Postal Service annuitant, will have no further opportunity to re-enroll in a PSHB plan. Disenrollment of a Postal Service annuitant will also result in the removal of covered family members from PSHB coverage.

In any case where a Postal Service Medicare covered annuitant is disenrolled from a PSHB plan for non-enrollment in Medicare Part B, OPM will treat this removal as a termination. A termination, in contrast with a cancellation, confers rights to a 31-day temporary extension of coverage and rights to conversion for the enrollee and covered family members. Per existing FEHB regulation at 5 CFR 890.401, an enrollee or family member whose enrollment is terminated other than by a cancellation or discontinuance of plan is entitled to a 31-day temporary extension of coverage for self only, self plus one, or self and family without contributions by the enrollee or the Government. During that 31-day period, OPM requires carriers to either offer the individual a guaranteed-issue conversion policy or provide assistance enrolling in such a policy on or off the Health Care Marketplace or Exchange. OPM requests public comment on this approach.

New Subpart P: Postal Service Health Benefits Program

This new subpart P implements section 101 of the PSRA establishing the PSHB Program for Postal Service employees, Postal Service annuitants, and their eligible family members. The PSHB Program set forth at 5 U.S.C. 8903c will be the only health benefits program available to these individuals through 5 U.S.C. chapter 89, and PSHB plans will be offered in lieu of FEHB plans for these individuals beginning with the first contract year in January 2025.

In § 890.1602(c), OPM defines terms specific to the PSHB Program. Statutorily defined terms have the same meaning as in the PSRA. Several other terms are defined to account for the Medicare enrollment requirements for Postal Service Medicare covered annuitants and their Medicare covered members of family in the PSHB.

The term ''cancel'' carries the same meaning as in FEHB, applying when an individual elects not to continue coverage, despite remaining eligible. The PSRA uses the term ''cancel'' in section 8903c(g) to describe when an individual loses PSHB coverage because of a decision not to enroll in Medicare Part B, or to disenroll from Medicare Part B. OPM is using its administrative authority to classify this circumstance as a termination in order to provide the individual with a 31-day temporary extension of coverage and rights to conversion. This classification of certain cancellations as terminations is delineated in § 890.1608(b)(5).

In § 890.1602(d), OPM deems references made to other subparts of part 890 to mean definitions established in subpart P. References incorporated in subpart P that do not apply to Postal Service employees or Postal Service annuitants or their eligible family members are not applicable and do not have meaning in subpart P.

Eligibility

As directed by the PSRA, § 890.1603, ''Eligibility for the Postal Service Health Benefits Program,'' allows that Postal Service employees, Postal Service annuitants, and family members will be eligible for coverage in the PSHB starting with the first contract year beginning January 2025. Under the PSRA, certain individuals are ineligible to enroll or be covered; they include:

- Postal Service Medicare covered annuitants without Medicare Part B coverage who are not covered by an exception in § 890.1604(c);
- Postal Service Medicare covered members of family who do not enroll in Medicare Part B and who are not covered by an exception in § 890.1604(c); and
- Any individual covered by another health benefits plan under chapter 89 of title 5, U.S.C. except as permitted under dual enrollment rules at § 890.302.

OPM is adding § 890.1603(d) to allow former spouses of Postal Service employees and Postal Service annuitants to enroll in an FEHB plan as described in subpart H (''Benefits for Former Spouses''). A former spouse of a Postal Service employee or Postal Service annuitant who is enrolled in an FEHB plan on or before December 31, 2024, may continue enrollment in an FEHB plan and is not required to change to a PSHB plan. Former spouses are not included in the PSRA as eligible for PSHB enrollment. Therefore, an individual who was covered under their spouse's PSHB plan would not continue eligibility if they became a former spouse. Those former spouses could enroll in an FEHB plan. Such former spouses will not be subject to the Medicare Part B enrollment requirement, regardless of Medicare eligibility or enrollment status. OPM invites comment on this approach.

OPM is adding § 890.1603(e) to allow survivor annuitants to be enrolled in PSHB plans in the same way they would have been enrolled in FEHB plans, with the addition of the Medicare enrollment requirement in § 890.1604.

Medicare Enrollment Requirement for Certain Annuitants

Section 890.1604(a) requires that certain Postal Service annuitants who are entitled to Medicare Part A, and their eligible family members who are entitled to Medicare Part A, enroll in Medicare Part B as a condition of eligibility to enroll in or continue enrollment in the PSHB Program. This implements section 8903c(e) of the PSRA and is a unique requirement as a condition of participation in a health benefits program under chapter 89 of title 5, U.S.C. This requirement applies regardless of whether the Postal Service annuitant becomes entitled to Medicare Part A due to age, disability status, or other eligibility pathway.

As described above, all Postal Service compensationers will be considered employees for the purposes of the PSHB Program and will not be subject to the Medicare Part B coverage requirement. PSHB enrollees and covered members of family who are entitled to Medicare Part A and enrolled in Medicare Part B are able to receive their Medicare Part A and B benefits through Original Medicare or by enrolling in an available Medicare Advantage plan. Individuals entitled to Part A and enrolled in Part B may be able to buy Medigap policies, subject to certain requirements.

Disenrollment for Non-Enrollment in Medicare Part B

OPM is amending § 890.308, ''Disenrollment and removal from enrollment,'' to add a new paragraph (i) to insert cross reference to new § 890.1608(b), which describes the circumstances under which an individual can be disenrolled from a PSHB plan for non-enrollment in Medicare Part B.

Postal Service Medicare covered annuitants and their Medicare covered members of family will be required to enroll in Medicare Part B at their first opportunity, usually within the 7-month IEP around their 65th birthday or during an SEP if they are over the age of 65 and still in active employment. An individual can be removed or disenrolled from a PSHB plan if they do not enroll within those enrollment

periods unless they qualify for an exception detailed in § 890.1604(c).

A Postal Service Medicare covered annuitant or Medicare covered member of family could be determined ineligible for PSHB if not enrolled in Medicare Part B. An individual can be disenrolled or removed from a PSHB plan any time after OPM, the PSHB Carrier, or the Postal Service determines that a Medicare covered annuitant or Medicare covered member of family required to be enrolled in Medicare Part B is not so enrolled. The process for disenrollment or removal from a PSHB plan for non-enrollment in Medicare Part B is detailed in § 890.1608(b).

Exceptions to Medicare Part B Enrollment Requirement

Section 890.1604(c) describes the statutory exceptions to the Medicare Part B enrollment requirement for Postal Service Medicare covered annuitants and their Medicare covered members of family. Those exceptions are:

- Individuals who, as of January 1, 2025, are Postal Service annuitants who are not both entitled to benefits under Medicare Part A and enrolled in Medicare Part B;
- Individuals who, as of January 1, 2025, are Postal Service employees who are aged 64 and over;
- Postal Service Medicare covered annuitants and family members residing outside the United States and its territories who demonstrate their residency in accordance with Postal Service regulations;
- Postal Service Medicare covered annuitants and their family members enrolled in certain VA health care benefits. This exemption is derived from 5 U.S.C. 8903c(e)(3)(A)(iv)(II), which refers to individuals ''enrolled in health care benefits provided by the Department of Veterans Affairs under subchapter II of chapter 17 of title 38, United States Code.'' Subchapter II of chapter 17 of title 38, U.S.C. governs who is eligible for various VA health care benefits, including eligibility for VA hospital care and medical services. There is a limited class of veterans who are not required to enroll in the system of patient enrollment referred to in 38 U.S.C. 1705(a) in order to receive VA benefits described in subchapter II of chapter 17 of title 38, United States Code. As such, this regulation is drafted to include all veterans described in 38 U.S.C. 1710, including those who are not required to enroll in the VA's system of patient enrollment referred to in 38 U.S.C. 1705(a);
- Postal Service Medicare covered annuitants and family members eligible for health services provided by the Indian Health Service; and
- A Medicare covered member of family of a Postal Service Medicare covered annuitant who is not required to enroll in Medicare Part B, based on a statutory exception, in order to be eligible for PSHB coverage.

Section 890.1604(c) satisfies the requirement in 5 U.S.C. 8903c(e)(3)(B) that OPM promulgate regulations to implement the VA and IHS coverage exceptions. OPM consulted with VA and IHS beginning in the Spring of 2022 to draft these policies. IHS strongly recommends that Medicare covered Postal Service annuitants and their family members be permitted to use self-attestation as proof of eligibility for IHS health services for purposes of an exception to the Medicare Part B requirement. There are various acceptable documents or evidence that IHS uses as proof of eligibility for IHS health services, and OPM recommends accepting these as proof for the Medicare Part B exception. OPM seeks comment on this approach. Section 890.1604(d) describes how Medicare covered annuitants and Medicare covered members of family can demonstrate that they qualify for an exception to the Medicare enrollment requirement.

As required by the PSRA, § 890.1604(e) allows a Medicare covered annuitant or Medicare covered family member to notify the Postal Service in writing that they choose not to enroll or to disenroll from Medicare Part B. Per the PSRA statute, this would have the effect of cancelling PSHB enrollment. OPM will treat this circumstance as a termination, conferring rights to a 31-day temporary extension of coverage and conversion. OPM invites comment on this approach, which is intended to implement a member-centric approach to the transition to the PSHB Program.

Suspending PSHB Enrollment for Other Forms of Coverage, Including Medicare Advantage

Under 5 CFR 890.304(d)(2), an annuitant or survivor annuitant may suspend FEHB enrollment if they choose to get certain alternative coverage, including Medicare Advantage (MA), Medicaid or a similar state-sponsored program of medical assistance for the needy, Peace Corps, CHAMPVA, TRICARE (including coverage provided by the Uniformed Services Family Health Plan), or TRICARE-for-Life. These rules will apply to the PSHB Program. While PSHB enrollment is suspended, no PSHB premiums would be required. These individuals can re-enroll in a PSHB plan, subject to subpart P requirements, for instance, during the next Open Season, when they involuntarily lose coverage, or move out of an MA Plan's service area.

PSHB Enrollment When an Individual Is Under a Court or Administrative Order To Provide Health Coverage

The Federal Employees Health Benefits Children's Equity Act of 2000 (Pub. L. 106–394) codified at 5 U.S.C. 8905(h) requires OPM to compel appropriate FEHB enrollment of an eligible employee in the presence of a court or administrative order for health insurance coverage of children and to prohibit the discontinuation of such enrollment by an annuitant who continued coverage into retirement. This law will be applied with respect to PSHB enrollment for those Postal Service employees who are under a court or administrative order to provide health insurance coverage and with respect to those Postal Service annuitants for whom a court order continues from when they were an employee, to the extent the Postal Service annuitant remains enrolled in a PSHB plan.

A Postal Service employee or Postal Service annuitant would be subject to the rules concerning court and administrative orders in the same way as employees and annuitants enrolled in an FEHB plan; however, the provisions of 5 U.S.C. 8905(h) cannot be fully and properly applied with respect to Postal Service annuitants for whom a court order continues from when they were an employee. While OPM has authority to compel enrollment in a PSHB plan and withhold the appropriate share of contribution toward premiums, the PSRA includes no authority for OPM to compel enrollment in Medicare Part B by Postal Service Medicare covered annuitants on the grounds of a court order for coverage of children. Further, a Postal Service annuitant who is subject to a court or administrative order to provide health insurance coverage could be disenrolled from PSHB coverage because of non-enrollment in Medicare Part B. In such a circumstance, the child would be without PSHB coverage despite the court or administrative order, and OPM would be without authority to compel continued enrollment in PSHB by a Postal Service annuitant who is required to be enrolled in Medicare Part B as a condition of PSHB enrollment but is not so enrolled.

PSHB Plan Year

The PSHB plan year will run from January 1 to December 31 each year

starting in 2025. Any Open Season enrollment, change of enrollment, or reenrollment will take effect on January 1 of each year starting in 2025. The PSHB plan year is in contrast to the effective date of new FEHB enrollments by employees during the annual Federal Benefits Open Season, which is the first day of the first pay period that begins in the next year, and which follows a pay period during any part of which the employee is in a pay status. *See* § 890.301(f)(4)(i). For Open Season changes in FEHB enrollment for Postal Service employees, the effective date is the first day of the first pay period that begins in January of the next year. *See* § 890.301(f)(4)(ii). Under the current regulations, the effective date for FEHB enrollments and changes in enrollment may be different each year based on which day in January is the first day of the pay period.

OPM is making this change because a calendar year start date is easier for enrollees to track and follow their PSHB coverage. In addition, setting the PSHB plan year start date to January 1 would be consistent with the industry standard; the cutoff date for Postal Service Medicare covered annuitants who are listed as exceptions to the Medicare enrollment requirement; the effective date of benefit changes under OPM's contracts with carriers; health savings accounts for high deductible health plans; flexible spending accounts; coverage under the FEDVIP; and payments to compensationers.

A standard January 1 start date to the plan year may present certain challenges, which became apparent when OPM proposed such a change for the FEHB Program in 1998.[5] Such challenges include an effective way to collect and pro-rate FEHB premiums when one switches plans, given that January 1 is in the middle of a pay period for most Federal and Postal Service employees. Because of these challenges, OPM eventually withdrew the 1998 proposed rule in 2003.[6]

OPM believes the prior challenges are mitigated by the advancement of technology, including the establishment of a centralized enrollment system for the PSHB Program. OPM also believes that payroll offices and other stakeholders will have the necessary lead time to make all appropriate system changes to accommodate this effective date.

OPM invites comments on a January 1 plan year start date for the PSHB Program. OPM invites comments on the operational feasibility of implementing a standard January 1 effective date for Open Season PSHB enrollment actions, including any challenges relating to premium allocation and whether it makes a difference if the centralized enrollment system calculates and requests the partial premium versus the Federal payroll provider.

Enrollment

Section 890.1605 establishes enrollment in the initial contract year, including a transitional Open Season that coincides with the standard FEHB Program Open Season in 2024 for enrollment in health benefits plans offering coverage in 2025. Definitions are included in § 890.1605(a), and the transitional Open Season is defined in § 890.1605(b). Consistent with 5 U.S.C. 8903c(f), the PSHB transitional Open Season will run at the same time as the standard FEHB Open Season outlined at § 890.301(f), starting the Monday of the second full workweek in November, going through the Monday of the second full workweek in December. This is the time period for Postal Service employees and Postal Service annuitants to select and enroll or continue enrollment, or choose not to enroll or continue enrollment, in a PSHB plan. Starting with the 2024 Open Season, Postal Service employees and Postal Service annuitants are ineligible to enroll or continue enrollment in FEHB plans for the 2025 plan year and thereafter.

Automatic enrollment into a PSHB plan for the initial contract year is described in § 890.1605(c). The PSRA requires that FEHB-enrolled Postal Service employees and Postal Service annuitants that do not make an election to enroll in a PSHB plan during the transitional Open Season will be automatically enrolled in a PSHB plan offered by their current FEHB Carrier to begin January 2025. If the carrier offers multiple PSHB plans or options, the individual will be automatically enrolled in the carrier's plan and option with equivalent or most similar benefits and cost-sharing to the individual's current FEHB plan. In a case where the carrier is not offering PSHB plans, those individuals will be automatically enrolled in the lowest-cost nationwide PSHB plan option that is not a high deductible health plan and does not charge an association or membership fee. All automatic enrollments will be into a PSHB plan of the same enrollment type (self only, self and family, or self plus one) as the 2024 FEHB plan.

In the FEHB Program, employees in a nonpay status, such as leave without pay, are not generally able to enroll in an FEHB plan during Open Season. OPM is changing this policy for the PSHB Program for the transitional Open Season in 2024 only. FEHB enrollments and FEHB plan eligibility will terminate at the end of 2024 for all Postal Service employees. Since these individuals can't continue their FEHB plan enrollment into 2025, OPM will permit Open Season elections for eligible Postal Service employees, regardless of pay status with the exception of § 890.303(e) individuals whose enrollment is terminated due to 365 days of nonpay status, for the 2024 Open Season only. OPM invites comment on this approach, which is intended to implement a member-centric approach to the transition to PSHB coverage.

Continuity of Enrollment

Continuity of enrollment for PSHB is detailed in § 890.303 (''Continuation of enrollment''). As described above, OPM is updating the list of exclusions from the continuation of enrollment requirements.

Retroactive Enrollment and Termination

Section 890.103 allows for OPM to correct administrative FEHB plan enrollment errors, including retroactive actions such as enrollments and correction of enrollment code errors. Such corrective actions are subject to appropriate withholding and contributions of premiums, which requires payment from the employee or annuitant for each pay period they are enrolled in a health benefits plan.

These correction of errors provisions will apply in the PSHB Program, as laid out in § 890.1614. This new section adds a clause to state ''except that retroactive corrections to an enrollment under this subpart may not go further back than the initial contract year.'' This is to establish that there cannot be a retroactive correction to a PSHB enrollment before the initial contract year of the PSHB Program.

Terminations are addressed in the FEHB Program according to rules in § 890.304. Section 890.304(b)(2) allows an annuitant whose coverage was terminated due to insufficient annuity to pay withholdings for the health benefits plan in which the annuitant was enrolled, to request reinstatement of coverage from the retirement systems when they failed, due to circumstances beyond their control, to directly pay premiums or to make an election to change enrollment to a health benefits plan so that their annuity was sufficient for the new withholdings. In this

[5] *https://www.federalregister.gov/d/98-23335* (63 FR 46180, August 31, 1998).

[6] *https://www.federalregister.gov/d/03-31768* (68 FR 74513, December 24, 2003).

circumstance, the retirement system may reinstate coverage retroactively to the termination date.

Although 5 U.S.C. 8903c(d)(2) prohibits Postal Service employees and Postal Service annuitants who are covered in PSHB plans from enrolling or continuing enrollment in FEHB plans after 2024, the statute does not prohibit retroactive enrollment into a FEHB plan for an effective date beginning on or before December 31, 2024, before the start of the PSHB Program. Such retroactive enrollments may occur, for instance, due to an enrollment processing error that pre-dated the first contract year of the PSHB Program.

Plan Contracting

Section 890.1610 outlines the minimum standards for PSHB Carriers and plans, including a requirement to provide Medicare prescription drug benefits to Medicare Part D-eligible annuitants and family members pursuant to 5 U.S.C. 8903c(h). Section 8903c(c)(1)(B) of title 5, U.S.C. requires that PSHB plan contracts under the PSHB Program are consistent with the requirements of chapter 89 for FEHB plan contracts under section 8902. The minimum standards for PSHB Carriers will be the same as for FEHB Carriers as described at 48 CFR 1609.70, with the addition of the new § 1609.7002 outlining the minimum standards for PSHB Carriers. A PSHB plan must meet the minimum standards at 5 CFR 890.201. All PSHB plans must have coverage effective on January 1 of each contract year.

As required by 8903c(c)(1)(C), the FEHB Program will offer, to the greatest extent practicable, a PSHB plan from each FEHB Carrier that has a plan with 1,500 or more Postal Service employees or Postal Service annuitants enrolled in the 2023 contract year. In the initial contract year, PSHB Carriers must offer PSHB plans that have coverage with equivalent benefits and cost-sharing to the FEHB plans offered by that carrier, except to the extent needed to integrate Medicare Part D prescription drug benefits. If the FEHB plans offered by a carrier do not meet the requirements under Medicare Part D, then the carrier will need to adjust its corresponding PSHB plan accordingly. A carrier's prescription drug coverage may be different in its PSHB plan than in its FEHB plan.

OPM has the authority to exempt comprehensive medical plans, as described in 5 U.S.C. 8903(4), from the requirement that the PSHB Program include, to the greatest extent practicable, a plan offered by any FEHB Carrier that has a plan with 1,500 or more Postal Service enrollees. Comprehensive medical plans are defined in FEHB statute as one of four health plan categories that OPM is authorized to contract for. The term ''comprehensive medical plans'' refers to health maintenance organizations (HMOs). Many of these HMOs are regional rather than nationally available plans.

PSHB plans will offer the same enrollment types as FEHB plans, including self only, self plus one, and self and family coverage. Only Postal Service employees and Postal Service annuitants, including survivor annuitants, and those eligible for temporary continuation of coverage (TCC), may enroll in PSHB plans established under new subpart P of part 890. Those eligible to enroll may add eligible family members to their enrollment.

Medicare Part D Prescription Drug Coordination

The PSRA requires plans in the PSHB Program to provide prescription drug benefits through Medicare Part D for Part D-eligible Postal Service annuitants and their Part D-eligible family members. Under 5 U.S.C. 8903c(h), PSHB plans are required to provide prescription drug benefits to these individuals through ''employment-based retiree health coverage'' either through a ''prescription drug plan (PDP)'' or a contract with a ''PDP sponsor'' of a prescription drug plan, as terms are defined in section 1860D–22(b), 1860D–41(a)(14), and 1860D–41(a)(13) of the Social Security Act, respectively.

A carrier offering employment-based retiree health coverage, defined in section 1860D–22(c)(1) of the Social Security Act and referred to in section 5 U.S.C. 8903c(h)(2) and a conforming amendment to 1860D–22(b), may provide prescription drug coverage through an employer group waiver plan or EGWP (for a discussion of EGWPs, *see* Prescription Drug Benefit Manual, Chapter 12,[7] Application of CMS Employer Group Waiver Authority).

To ensure compliance with 5 U.S.C. 8903c(h)(2) of the PSRA, a carrier seeking to offer a Medicare Advantage Prescription Drug (MA–PD) plan to PSHB members *must* offer prescription drug coverage for Part D-eligible Postal Service annuitants and their Part D-eligible family members through a PDP or through a contract with a PDP Sponsor and *may,* subject to OPM's approval, offer MA–PD coverage as an alternative for these individuals to elect, should they so choose. Consistent with FEHB Program policy and current FEHB contract provisions, OPM will consider carrier applications for PSHB plans that coordinate with EGWP MA–PDs, subject to the requirements in 8903c(h)(2) and negotiation with OPM.

OPM Right To Withdraw or Non-Renew

Section 890.1611 describes OPM's right to withdraw approval of any PSHB plan or carrier, and to give notice of non-renewal of any health benefits plan contract for failure to meet applicable standards.

Separate PSHB Reserves

Section 890.1610(a)(4) implements the requirement at 5 U.S.C. 8903c(j) that OPM maintain separate reserves, including contingency reserves, for each PSHB plan. These reserves will include an account in OPM's administrative reserve and a contingency reserve for each plan, established under and governed by 5 CFR 890.503, 48 CFR chapter 16, and carrier contract.

Information Sharing

Section 890.1612 requires OPM to enter into agreements with other agencies for information exchange necessary to implement the PSHB Program. As required by section 101(c)(2) of the PSRA, OPM will exchange information to SSA as necessary regarding Postal Service annuitants and their family members who may be subject to the Medicare enrollment requirements described in § 890.1604 or who may be eligible to enroll in Medicare Part B during the new Part B six-month SEP (beginning April 1, 2024) which was created by the PSRA as available to certain Postal Service annuitants and family members who are entitled to Medicare Part A and is described in section 1837(o) of the Social Security Act. In addition, OPM will establish periodic agreements with HHS, the Postal Service, VA, and other Federal agencies as needed to share data and information as is necessary to implement the PSHB Program.

These periodic agreements will specify the data elements that will be shared, the process for information sharing, the frequency of information sharing, and how that data can be used and disclosed. The purpose of these agreements is to determine (1) which Postal Service employees, Postal Service annuitants, and family members may be eligible to enroll in or be covered by in PSHB plans, (2) which Postal Service

[7] CMS, *Medicare Prescription Drug Benefit Manual,* Chapter 12, ''Employer/Union Sponsored Group Health Plans,'' Rev. November 7, 2008, at *https://www.cms.gov/regulations-and-guidance/guidance/transmittals/downlds/dwnlds/r6pdbpdf.*

Medicare covered annuitants and Medicare covered members of family may be subject to the enrollment requirements described in § 890.1604, (3) whether Postal Service Medicare covered annuitants and Medicare covered members of family satisfy the Medicare enrollment requirements at § 890.1604, (4) which Postal Service annuitants and family members may be eligible to enroll in Medicare Part B during the six-month SEP beginning April 1, 2024 under a new section 1837(o) of the Social Security Act, and (5) a system for data sharing as needed for carrying out section 8903c of title 5, United States Code, and this subpart.

Premium Payment

The calculations for contributions and withholdings for PSHB will be made in the same manner as 5 U.S.C. 8906 and subpart E of 5 CFR part 890. The Postal Service Government contribution will be determined using the calculation at section 8903c(i) of title 5, United States Code. Section 8903c(i)(3) states that OPM, when computing the weighted average of the rates offered by carriers for the initial PSHB contract year, shall take into account the enrollment of Postal Service employees and Postal Service annuitants in those carriers' plans as of March 31, 2023. Nonetheless, because OPM expects to have significantly more current Postal Service enrollment data available, OPM intends to use all available 2024 Postal Service enrollment information when determining the 2025 weighted average of the rates for the initial contract year, taking into account 2023 data as a comparison point and for validation purposes, or in the event 2024 data is not available. For all subsequent years, the PSHB plans and FEHB plans will each have the Government contributions calculated in accordance with § 890.501.

Some Postal Service Medicare covered annuitants and/or their Medicare covered members of family who enroll in Medicare during the SEP beginning April 1, 2024, may be subject to a Medicare Part B late enrollment penalty. This penalty is added to the monthly Medicare Part B premium and is usually charged for as long as the individual is enrolled in Medicare. The amount of the Part B late enrollment penalty depends on how long the individual waited to enroll after their initial period of Medicare eligibility. The PSRA requires that the Secretary of HHS enter into an agreement with the Postal Service under which the Postal Service agrees to pay on a quarterly or other periodic basis to the Secretary the amount of the Part B late enrollment premium increases for eligible individuals who enrolled during the SEP. In addition, the PSRA states that the Postal Service may direct OPM to pay such Part B late enrollment penalties for Postal Service Medicare covered annuitants or Medicare covered members of family who enroll in Part B during the 2024 SEP subject to the agreement between the Postal Service and HHS from the PSRHBF established under 5 U.S.C. 8909a until those funds are depleted. Thereafter, those payments will be paid from the Postal Service Fund established under 39 U.S.C. 2003.

USPS Fairness Act

Section 102 of the PSRA (''USPS Fairness Act'') directs OPM to annually calculate a payment to be made by the Postal Service into the PSRHBF beginning in June of 2026. This payment replaces the previously required actuarially determined pre-funding payments (normal cost and amortization) calculated annually by OPM from 2017 through 2021.

The payment into the PSRHBF required under the PSRA is not an actuarially determined pre-funding payment, though OPM's actuaries are responsible for calculating the new formula driven payment into the fund starting in 2026. The PSRA provides the formula by which OPM is to calculate the payment, which is defined as the difference between the Postal Service share of Postal Service annuitant premiums less estimated net claims costs. The PSRA defines estimated net claims costs as the difference between the sum of the costs incurred by the carrier for health services provided to Postal Service annuitants and reasonable administrative expenses less the Postal Service annuitants' share of premium.

Section 102 states that ''[a]fter consultation with the United States Postal Service, [OPM] shall promulgate any regulations the Office determines necessary under this subsection.'' OPM has determined that the formula is sufficiently defined in the law and defining it further in regulation is unnecessary. OPM invites comment on this approach.

The PSRA revises the language under 5 U.S.C. 8909a to provide that any calculation required under 39 U.S.C. 3654(b) should be based on current Postal Service annuitants and current Postal Service employees who would be eligible to retire under 5 U.S.C. 8901(3)(A)(i) or (ii) and who have the required years of health coverage to continue health benefits in retirement. Pursuant to 39 U.S.C. 3654(b), OPM is required to calculate and provide certain information for the Postal Service financial reporting on both health benefits and pension obligations as provided under chapters 83 and 84 of title 5. However, the requirements in the PSRA involving 39 U.S.C. 3654(b) apply only to health benefits and the CSRS and FERS statutes do not provide any similar requirement pertaining to section 3654(b). It would not be appropriate to calculate any pension obligations in the manner now required under 5 U.S.C. 8909a for post-retirement health benefits. As a result, OPM is interpreting the new PSRA provision in section 8909a as applying only to the ''post-retirement health requirements'' in 39 U.S.C. 3654(b). OPM invites comment on this approach.

The term 'future net claims costs' as used in PSRA section 102(e)(1) does not have a definition in regulation or statute. Section 890.1613(e) clarifies that OPM interprets ''future net claims costs'' in section 102(e)(1) to be the same as ''estimated net claims costs'' as defined in section 102(g). OPM invites comment on this approach.

Centralized Enrollment

Since the inception of the FEHB Program in 1960, OPM has prescribed regulations over time that place responsibility for health benefits actions on to an ''employing office,'' as defined at 5 CFR 890.101, an ''employing agency,'' or an ''agency.'' Consequently, the FEHB Program's enrollment functions are not handled by OPM but are dependent on decentralized processes that utilize independent systems at different Federal agencies. Therefore, the Postal Service or other employing office [8] is responsible for processing appropriate requests for FEHB enrollment or changes in enrollment. *See, e.g.,* 5 CFR 890.301(b). An employing office is also responsible for verifying the eligibility of family members. *See* 5 CFR 890.302.

For purposes of the PSHB Program, OPM will shift certain responsibilities from the employing office to a centralized enrollment system which will be administered by OPM or its contractor. As envisioned, the centralized enrollment system will be an electronic enrollment solution for all PSHB stakeholder groups including

[8] The Postal Service is the employing office for Postal Service employees. OPM Retirement Services is the employing office for Postal Service annuitants. The Department of Labor's Office of Workers' Compensation Programs is the employing office for compensationers. The Department of Agriculture's National Finance Center is currently the employing office for individuals enrolled under Temporary Continuation of Coverage, Spouse Equity, and for annuitants whose annuity is insufficient to withhold the cost of health benefits premiums.

enrollees, the Postal Service and other employing offices, and PSHB Carriers. The centralized enrollment system will include an online portal to enter and process enrollment transactions, robust decision support tools, and a customer support center to assist enrollees via phone, email, or online chat. Persons who are unable to access the online portal will be able to enroll through other means such as phone, fax, or mail.

To support the establishment of centralized enrollment for the PSHB Program, OPM is adding several regulatory provisions. OPM may also issue guidance to further delineate responsibilities regarding PSHB enrollment.

Specific Regulatory Provisions

In addition to any future guidance, in §§ 890.1605, 890.1606, 890.1608, and 890.1614, OPM is specifying that OPM will assume responsibility for the following health benefits actions for the PSHB Program: enrollment, changes of enrollment, correction of errors, election not to enroll, and disenrollment of enrollees and removal of family members. OPM will work with the Postal Service and other employing offices to determine additional details about these health benefit actions.

Reconsideration of Initial Decisions

An individual who has received an initial decision affecting their enrollment in the PSHB Program may request a reconsideration of that initial decision. Individuals will be made aware of their right to an independent review and the time, manner, and entity to which the reconsideration request must be made.

Administrative Provisions

As described above and included in § 890.1614(a), correction of errors for PSHB enrollments will follow the rules for FEHB correction of errors, except that a PSHB enrollment cannot be corrected to be effective before the first PSHB contract year.

Section 890.1614(b) requires that carrier entitlement to pursue subrogation and reimbursement recoveries must follow the requirements of § 890.106.

Section 890.1614(c) requires reconciliation of PSHB enrollment between OPM and each PSHB Carrier in a form and manner to be determined by OPM. If a Medicare covered annuitant or member of family is found not to be enrolled in Medicare Part B in violation of the requirements of § 890.1604, that individual may be disenrolled or removed from PSHB enrollment or coverage.

C. Structure of the Interim Final Rule

The regulations outlined in this interim final rule are codified in subparts A, C, E, and the new subpart P of 5 CFR part 890 and 48 CFR chapter 16.

Interim Final Rule With Request for Comments

OPM commonly publishes notices of proposed rulemaking in the **Federal Register** and invites public comment on rules before the provisions of the rules are finalized, either as proposed or as amended in response to public comments, and take effect, in accordance with the Administrative Procedure Act (APA) at 5 U.S.C. 551 *et seq.* and, where applicable, the Civil Service Reform Act of 1978 (CSRA) at 5 U.S.C. 1103(b).

Specifically, 5 U.S.C. 553 and 1103(b) require the agency to publish a notice of certain proposed rules in the **Federal Register** that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved. Further, the APA at 5 U.S.C. 553(c) requires agencies to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of a rule take effect.

However, the APA also provides that traditional notice and comment procedures are not required when, as relevant here, the agency for good cause finds that following those procedures would be impracticable, 5 U.S.C. 553(b)(B), and the CSRA includes a ''parallel exception,'' *National Federation of Federal Employees* v. *Devine,* 671 F.2d 607, 610 (D.C. Cir. 1982); *see* 5 U.S.C. 1103(b)(3). ''[A] situation is impracticable when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required . . . as when a safety investigation shows that a new safety rule must be put in place immediately.'' *Util. Solid Waste Activities Group* v. *E.P.A,* 236 F.3d 749, 754 (D.C. Cir. 2001) (quotation marks and alterations omitted); *see Mack Trucks, Inc.* v. *E.P.A.,* 682 F.3d 87, 93 (D.C. Cir. 2012). OPM finds that following typical notice and comment procedures would be impracticable here because doing so would not allow sufficient time for the PSHB to be in effect by January 2025, as required by the PSRA. As explained further below, failure to meet this deadline would not only violate the PSRA but would also result in a potential gap in health insurance coverage for Postal Service employees, Postal Service annuitants, and their families. OPM is therefore issuing this interim final rule with request for comment—a temporary measure before OPM issues a final rule in response to comments received.

The deadlines that Congress has specified in the PSRA require this rule to become effective expeditiously. The PSRA provides in part that the Director of OPM shall issue regulations to carry out the PSHB provisions no later than April 6, 2023—just one year after statutory enactment—in consultation with the Secretary of Health and Human Services, the Secretary of Veterans Affairs, the Commissioner of Social Security, and the Postmaster General. *See Devine,* 671 F.2d at 611 (''This is not a case in which the agency received substantial prior notice of a statutory deadline[.]''). The law also requires that health coverage through a PSHB plan must begin in January 2025 and that Postal Service employees and Postal Service annuitants enroll for coverage during an annual Open Season period beginning in 2024.

To meet these statutory deadlines, this rule must go into effect immediately. That is so because until this rule is in place, OPM and the health insurance industry cannot engage in the complex process necessary to develop health insurance plans, make those plans available for enrollment during the 2024 Open Season, and effectuate coverage on January 1, 2025. And that complex process must begin now; specifically:

- For OPM to develop its enrollment plan strategy, and to determine the number, type, and location of FEHB plans committed to participating in the PSHB, OPM needs health insurance carriers seeking to participate in the PSHB Program to submit applications to OPM in *August 2023*—just four months from issuance of this interim final rule. To prepare those applications, health insurance carriers will need to understand the requirements of the PSHB Program, including how they may differ from FEHB plans in a number of key areas. These areas include the Medicare Part D coverage integration requirements for PSHB plans, Medicare benefit coordination, and data exchange capabilities for PSHB enrollment eligibility which include data regarding an individual's entitlement for Medicare Part A and enrollment in Part B, their VA benefit enrollment status, and/or IHS eligibility. Carriers will need to know the implications of the requirements and capabilities outlined in this rule—and will need them to have effect—in order to (1) make a business

decision about whether to participate in the Program and (2) put together a proposed plan that aligns with the requirements of this rule.

• OPM will then need to review such applications to ensure that the plans will satisfy requirements set forth in this rule by the Program start date. Review and vetting of carrier applications—including the financial fitness of the proposed PSHB plan, Postal-specific information system capabilities, and adherence to Medicare Part D coordination requirements such as plans arranging for prescription drug plan coverage—must occur during the *Fall of 2023.*

• In *October 2023,* the Postal Service is required by the PSRA to launch a Health Benefits Education Program to raise employee and annuitant awareness of the PSHB Program and its requirements through the distribution of information and facilitation of enrollment in available plans. While specific information such as rates and benefits will not be available until later in 2024, the Postal Service will structure this Education Program based on the requirements for the PSHB Program as set forth in this rule. Knowledge of the Program's requirements and the health insurance carriers that have applied to participate in the Program starting in 2023 will assist enrollees in understanding the decisions they will need to make.

• *Throughout 2023 and 2024,* OPM will, among other things, develop, test, and implement a Postal Service centralized enrollment system, which will be used by PSHB enrollees to select health plans for the 2025 plan year. OPM must integrate Medicare Part A entitlement and Medicare Part B enrollment data in accordance with existing FEHB regulations and the new PSHB requirements, as set forth in this rule that implements the PSRA. Enrollment data processed by the centralized enrollment system will be transmitted to PSHB Carriers, who will begin serving these enrollees starting January 1, 2025.

• In *April of 2024,* CMS will launch the six-month SEP, during which time Postal Service annuitants and their family members will have the opportunity to enroll in Medicare Part B, without a late enrollment penalty for the Part B enrollee. If Postal Service annuitants and their family members eligible for the SEP are not timely informed that they have this opportunity to enroll in Medicare Part B without having to pay a late enrollment penalty and how to do so, they may incur the standard late enrollment penalty if they subsequently wish to enroll in Part B, should they choose to do so, and such late enrollment penalty could remain in place for as long as they remain enrolled in Part B.

• By *May 31, 2024,* PSHB Program carriers will need to submit rates and benefits proposals to offer health plans for the 2025 plan year.

• In *September 2024,* OPM will publish the negotiated PSHB plan rates and benefits for the 2025 plan year.

• Open Season for enrollee selection of PSHB plans will occur from November 11 through December 9, 2024.

As this timeline makes clear, there are numerous operational interdependencies—beginning with carriers submitting applications to participate in the PSHB Program by August 2023—that necessitate the immediate effectiveness of this regulation. The immediate effectiveness of this rule is necessary not only for OPM to meet the statutorily required January 1, 2025 deadline for providing benefits to enrollees, but also because a failure to do so could result in a loss of healthcare coverage for Postal Service employees, annuitants, and their families. After December 31, 2024, Postal Service employees or Postal Service annuitants will no longer be eligible to enroll in an FEHB plan based on status as a Postal Service employee or Postal Service annuitant, and their family members will no longer be covered by such plan. Accordingly, § 890.1605 establishes that PSHB plans must be available to enroll individuals during the 2024 Open Season, starting on November 11, 2024. If PSHB plans are not available, those individuals may experience a gap in health insurance coverage, and people without insurance coverage have worse access to care and experience worse health outcomes than people who are insured. *See* Office of Disease Prevention and Health Promotion. (n.d.). Access to Health Services. *Healthy People 2030.* U.S. Department of Health and Human Services. *https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/access-health-services; see also* 42 U.S.C. 18091(2)(E) (observing the ''poorer health and shorter lifespan of the uninsured''). Among the catalysts of poorer health is the decreased use of preventive services by individuals experiencing gaps in health insurance coverage, even if only for a relatively short period of time, and especially for individuals at or near retirement age. *See* Sudano, J.J. Jr., Baker, D.W. (2003). *Intermittent Lack of Health Insurance Coverage and Use of Preventive Services.* Am. J. Public Health, 93:130–37, available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447707.* These services include mammography, Pap tests, cholesterol checks, flu vaccination, and prostate and breast cancer screenings. *Id.*

Additionally, OPM is obligated to provide Postal Service employees and Postal Service annuitants an opportunity to enroll in health insurance plans for which they are eligible under current statutory provisions, including provisions granting Postal Service employees and Postal Service annuitants eligibility under chapter 89. *See* 39 U.S.C. 1005(f). The FEHB regulations currently in effect permit health insurance enrollment actions and changes to be made during Open Season periods, which are required to be held annually from mid-November through the mid-December. 5 CFR 890.301(d). Failure to hold a PSHB Open Season period prior to December 31, 2024, when Postal Service employees and Postal Service annuitants lose eligibility for FEHB plan enrollment, may conflict with OPM regulations

In short, given the complexities of establishing this Program, as discussed above, expeditious issuance of these rules is required because otherwise PSHB plans will not be established by January 2025, potentially resulting in the loss of health insurance coverage for millions of Postal Service employees, Postal Service annuitants, and their family members. An interim final rule is therefore necessary so as to avoid the ''possible imminent hazard'' that individuals would face from a gap in coverage, *Mack Trucks, Inc.,* 682 F.3d at 93.

For these reasons, OPM finds good cause to issue this interim rule. But, again, this rule is temporary: OPM invites public comments and will promulgate a final rule as soon as practical after receiving and considering them.

Regulatory Impact Analysis

Need for Regulatory Action

This interim final rule implements sections 101 and 102 of the PSRA which direct OPM to establish the PSHB Program for Postal Service employees, annuitants, and their eligible family members. These sections of the PSRA amend chapter 89 of title 5, United States Code, which identifies the individuals who, starting in 2025, will be eligible to enroll in a PSHB plan and may not remain in an FEHB plan under their Postal Service employment or retirement; those who must enroll in Medicare Part B to maintain enrollment

in PSHB; the health benefits plans that should be offered to the greatest extent practicable; some plan requirements; the need for automatic enrollment in certain circumstances; contributions by the Postal Service; how reserves for PSHB plans are to be structured; requirements for information sharing; and other requirements necessary for PSHB Program implementation.

The PSHB Program is contained within chapter 89, which governs the FEHB Program generally. The PSRA confirms that PSHB plans are subject to the same provisions as FEHB plans unless they are inconsistent with the statute. OPM is given the discretion to make such determinations.

Section 101 of the PSRA codified at 5 U.S.C. 8903c directs OPM to issue regulations establishing the PSHB Program and is given the discretion to include ''any provisions necessary to implement this section.'' Section 8903c(g) addresses the topics for which Congress specifically instructed OPM to promulgate rules, clarifies how existing rules for the FEHB Program will apply to the PSHB Program, as well as new requirements regarding eligibility and enrollment, information sharing with other agencies, PSHB Carrier requirements, and other rules that will govern the PSHB Program. OPM's interim final rule is necessary to provide transparency into how it is implementing the PSRA, memorialize processes and procedures that will apply, allow carriers to begin preparations to enter the PSHB Program, and give individuals who will be impacted as much information about the PSHB Program as early as possible.

These regulatory provisions implement the statutory requirements, and without these provisions, it will be impossible for OPM to comply with its own obligations under the PSRA, and PSHB Carriers, other agencies, and Postal Service employees and annuitants will be uncertain about how the PSHB Program will operate.

Executive Orders 12866 and 13563

Executive Order 12866 at section 3(f) defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis must be prepared for major rules with economically significant effects (annual effect of $100 million or more), and a ''significant'' regulatory action is subject to review by the Office of Management and Budget (OMB). OPM anticipates that this rule is likely to have economic impacts of $100 million or more in at least 1 year, meeting the definition of a ''significant rule'' under Executive Order 12866.

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, distributional impacts, and equity). This rule is a significant regulatory action under E.O. 12866. Therefore, OPM has provided an assessment of the potential costs, benefits, and transfers associated with this rule.

Summary of Impacts

Overall, the PSRA and the PSHB Program, through this regulation, will help to promote the financial stability and long-term viability of the Postal Service, which provides a crucial role for society with respect to communication, commerce, and political participation. The Postal Service was established with the intent to benefit the public and provide reliable, affordable nationwide mail, package delivery, and other services. With the Postal Service's wide reach in providing essential services to nearly everyone in the U.S. in some form, its long-term stability is crucial. The PSRA improves the Postal Service's financial position, and a financially sustainable Postal Service ensures that the Postal Service can continue to fulfill its universal service mission, and make the investments needed to support service excellence, network efficiency, and introduce enhanced products and services for its customers.

This societal benefit will result primarily from the removal of the prefunding obligation related to future retiree health benefits and the shifting of insurance coverage costs away from the Postal Service to Medicare, and ultimately to taxpayers, who together with beneficiaries, fund Medicare. The Postal Service is required by law to be self-sufficient, and the Postal Service, along with its employees, pay taxes to fund Medicare each year, but many of its employees do not enroll in Medicare after they retire. Therefore, and unlike other employers who offer retiree health benefits and pay Medicare taxes, the Postal Service has not been able to ensure that its retiree health care program fully utilizes Medicare. Enabling the Postal Service to generally require its Medicare-eligible annuitants to enroll in Medicare when eligible ensures that the Postal Service can utilize Medicare in a similar manner as other employers, which strengthens its financial position and therefore its ability to continue its critical public service mission.

From a societal perspective, the primary costs associated with the implementation of the PSHB Program will be administrative and operational costs necessary to initiate and maintain the program, including development of information technology (IT) systems, education and outreach, and additional administrative staffing for the design, maintenance, and oversight of the increased quantity of health plans. These costs will be largest in the initial start-up phase and will be borne by Federal agencies, as well as carriers offering both FEHB plans and PSHB plans. The PSRA appropriated $94 million in implementation funding for OPM and other Federal agencies for these administrative and operational costs. Pursuant to section 101(d)(4) of the PSRA, the Postal Service deposited the appropriated funds into the Treasury as a miscellaneous receipt from the Postal Service Fund in fiscal year 2022.

Most of the impact from the PSRA and this regulation will occur via distributional effects. The principal transfer will be the shifting of premium costs from the Postal Service and PSHB members to Medicare as a result of the Medicare Part B enrollment requirements and the integration of Medicare Part D coverage into PSHB plans. This Part D integration could also result in a portion of costs being transferred to the pharmaceutical industry via the statutory manufacturer discounts provided to Part D, in conjunction with discounts negotiated with individual FEHB plans. Further, integrating Part D coverage into PSHB plans may result in a transfer of costs to carriers, particularly those with little Medicare experience, who may need to contract with third-party vendors to assist with integration, increasing administrative costs. The segmentation

of the current FEHB risk pool will result in premiums reflective of each separate risk pool's health care utilization and costs, which are estimated to be higher for Postal Service enrollees compared with non-postal.[9] This may result in a slight reduction in FEHB premiums following implementation.

Ultimately, the total costs and benefits associated with the PSRA, and this interim final rule are highly uncertain because enrollee and carrier reactions to the effects on Medicare, the FEHB Program, and the new PSHB Program are unknown. In accordance with OMB Circular A–4, the following sections outline the benefits, costs, and transfers associated with section 101 of the PSRA and this regulatory action in more detail. Where specific costs were quantifiable, they are included in Table 1.

Regulatory Baseline

The regulatory baseline for this rule is the FEHB Program as it is currently administered, as the eligible population under both programs will largely remain the same. Postal Service employees, Postal Service annuitants, and their eligible family members are currently eligible for FEHB coverage. In 2021, this population totaled approximately 915,000 enrollees and 1.7 million total covered lives. There are nearly 700,000 Postal Service annuitants, including about 123,000 survivor annuitants. Of the Postal Service annuitants, about 500,000 are currently enrolled in the FEHB Program. A majority of these are Self-Only enrollments while 200,000 are Self Plus One or Self and Family enrollments.

Beginning in the 2025 plan year, the PSHB Program will be the only health benefits program available through the Postal Service to Postal Service employees, Postal Service annuitants, and their eligible family members. Unless they meet a specified exception, as previously outlined, Postal Service Medicare covered annuitants and their Medicare covered members of family will be required to enroll in Part B or will lose their eligibility to continue enrollment in the PSHB Program. Once this eligibility is lost, it cannot be reinstated. As with the regulatory baseline, those covered by a PSHB plan will also be responsible for Medicare premiums.

Currently, Postal Service annuitants and their family members that are participating in FEHB are not required to enroll in Medicare Part B, regardless of Medicare status. Based on 2021 data, OPM estimates that 75% of Postal Service annuitants aged 65 and over have enrolled in Medicare Part B. There will be approximately 100,000 Postal Service annuitants and their eligible family members who will be eligible to enroll in Part B during the six-month SEP beginning April 1, 2024.

Prior to the PSRA, the Postal Service paid the Government contribution for all Postal Service employees and annuitants enrolled in FEHB. The Government contribution was paid directly by the Postal Service for employees and from the PSRHBF for annuitants. In addition, the Postal Service was required under the Postal Accountability and Enhancement Act of 2006 to fully prefund retiree health benefits. Section 102 of the PSRA (''The USPS Fairness Act'') amended 5 U.S.C. 8909a to remove this prefunding requirement and replace it with a new calculation for annual payments into the PSRHBF. The law maintains the requirement that the Postal Service continue to pay the Government contribution; directly for employees or through the PSRHBF for annuitants. The Postal Service is also required to pay the Medicare Part B late enrollment penalty for any Medicare covered annuitants and members of family who enroll in Part B during the 2024 SEP. As with the regulatory baseline, there is no Government contribution towards Part B premiums.

Carriers that participate in the PSHB Program will generally be subject to the same minimum requirements for plan design that exist for FEHB plans under the FEHB Program, but PSHB plans will be required to integrate Part D prescription drug benefits for Medicare covered annuitants and Medicare covered members of family. In addition, carriers that are offering both PSHB plans and FEHB plans will need to offer equivalent benefits and cost sharing in the initial year, other than as needed to integrate Part D coverage.

Benefits of Regulatory Action and Implementation

This rule serves to implement the requirements of the PSRA. The regulatory action builds on the statute by offering clarity and efficient implementation. OPM anticipates that the timely promulgation of this rule will allow other Federal agencies, PSHB Carriers, and enrollees to begin necessary education and deliberation.

The Postal Service will benefit from increased financial stability because of the removal of the past-due pre-funding payments and future pre-funding obligations related to the retiree health benefits costs and from having a retiree health benefits program in which more annuitants are enrolled in Medicare. With fewer costs for retiree health benefits, the Postal Service will have more financial stability. Better, more stable Postal Service operations would benefit the country overall. The Postal Service plays a critical role in the nation's communications, commerce, and voting infrastructure. In rural and remote communities especially, many of which lack adequate broadband access and rely heavily on mail service, the Postal Service's universal service mandate ensures crucial access to essentials including medicine and food.[10]

Within these communities, the Postal Service is often the only delivery service carrier with a door-to-door network and is heavily relied on by other delivery service carriers to provide ''last mile'' deliveries. According to the Postal Service Office of Inspector General, the Postal Service provided vital services during the COVID–19 pandemic, including the delivery of critical items such as medications, stimulus payments, election ballots, and record levels of home package deliveries.[11] A Government Accountability Office Report found that the Postal Service experienced a 9 percent decline in total mail volume in 2020 when compared to 2019, but package volume rose by 32 percent over the same period.[12] This underscores the importance of a stable Postal Service to the Nation.

With greater financial stability for the Postal Service, current Postal Service employees, Postal Service annuitants, and their family members will also see greater stability in their future health insurance coverage and other benefits.

Medicare covered annuitants may be eligible, depending on whether they meet statutory income and resource thresholds, for the low-income cost-sharing subsidies and premium subsidies that are part of the Medicare part D program, under section 1860D–14 of the Social Security Act.

[9] *H.R. 3076, Postal Service Reform Act of 2021—Cost Estimate,* Congressional Budget Office (CBO) (2021). *https://www.cbo.gov/system/files/2021-07/hr3076.pdf.*

[10] *The USPS and Rural America,* Institute for Policy Studies (2020), *https://inequality.org/wp-content/uploads/2020/04/IPS-policy-brief-USPS-Rural-America2.pdf.*

[11] *Audit Report Mail Service During the Early Stages of the COVID–19 Pandemic,* USPS Office of Inspector General (Jan. 2021), *https://www.uspsoig.gov/document/mail-service-during-early-stages-covid-19-pandemic.*

[12] *U.S. Postal Service: Volume, Performance, and Financial Changes since the Onset of the COVID–19 Pandemic,* Government Accountability Office Publication 21–261 (2021), *https://www.gao.gov/products/gao-21-261.*

Costs of Regulatory Action and Implementation

Implementation of the PSRA and this regulatory action necessitates the administration and oversight of new health benefits plans, including substantial member education and outreach efforts, additional interagency coordination and the creation of new IT processes to satisfy new statutory eligibility and enrollment requirements, creating startup and ongoing costs to agencies, enrollees, and carriers. Table 1 depicts an accounting statement summarizing the assessment of the administrative costs associated with this regulatory action. Table 2 depicts the expected allocation of total spending over the course of 10 years, beginning in fiscal year (FY) 2023.

TABLE 1—ESTIMATED ADMINISTRATIVE AND IMPLEMENTATION COSTS ASSOCIATED WITH REGULATORY ACTION

Agency/category	Startup costs	Ongoing costs [1]
OPM	$81,680,944	$49,315,703
Personnel	—	24,434,476
IT and IT Contracts	68,307,195	20,961,759
Non-IT Contracts	3,600,000	1,735,695
General (Supplies, Equipment, Communications, Training)	9,773,749	2,183,773
Postal Service	11,500,000	1,425,000
Implementation costs (updating systems, developing training materials, etc.)	11,500,000	—
Personnel (4 Program and 2 IT full-time employees (FTEs))	—	925,000
Communications	—	500,000
Department of Labor	72,500	2,000
Training and Communication	72,500	—
Additional support and communication for separate Open Season	—	2,000
Department of Veterans Affairs	395,000	—
IT Contracts	395,000	—
Social Security Administration	7,327,764	407,881
Staffing and Overhead	5,161,138	407,881
System Updates	2,166,626	—
Ongoing Data Exchange	—	TBD
Indian Health Service	—	—
Carriers	Unknown	Unknown
Total Administrative Costs	100,976,208	51,150,584

[1] Recurring costs represented as fully loaded annual costs beginning in FY2025 and remaining consistent through at least FY2032. Given that development and onboarding will occur during run-up period to PSHB implementation, recurring costs will likely cross multiple fiscal periods and gradually ramp up between FY22 and FY25, although all costs are expected to become fully realized beginning in FY25. For details on the expected allocation of total costs by year, see Table

2. All costs are represented based on 2022 dollars and pay scales and are subject to change based on PSHB enrollment and carrier participation following implementation.

TABLE 2—EXPECTED TOTAL ADMINISTRATION AND IMPLEMENTATION COSTS BY YEAR

[$ Millions]

	FY2023	FY2024	FY2025	FY2026	FY2027	FY2028	FY2029	FY2030	FY2031	FY2032
Total costs (all agencies) [1]	$66.47	$75.14	$52.53	$51.15	$51.15	$51.15	$51.15	$51.15	$51.15	$51.15

[1] Annual cost projections are in terms of 2022 dollars and payscales and *do not* reflect any discounting, inflation, or other adjustments for Federal payroll increases, staff promotions, etc. This table is intended only to summarize the expected timing of the costs outlined in Table 1 and is not meant to reflect budgetary expectations.

Detailed Startup and Ongoing Cost Related to the PSRA

The following sections contain underlying details for the cost estimates presented in Table 1, including, where appropriate, the assumptions and methodology used by individual agencies in preparing them. For the purposes of this regulatory impact assessment (RIA), *Startup Costs* were defined as upfront, non-recurring costs associated with the PSRA implementation and are represented as aggregate total expenditures for the years leading up to and immediately following the PSHB implementation. *Ongoing Costs* were defined as recurring costs (*e.g.,* salary costs) beginning in the years preceding or immediately following the PSRA implementation and expected to persist through at least FY2032. All ongoing costs are presented as fully loaded, annual totals. These estimates for ongoing costs are preliminary, and funding for ongoing costs would be subject to the annual budget process.

OPM

Startup Costs: OPM estimates a total of $81.6 million in start-up costs for the development and administration of the PSHB Program. This estimate includes $68.3 million of IT and IT contract costs for system development and updates, including the creation of the centralized enrollment system. The centralized enrollment system will consolidate data from multiple agencies, including USPS, SSA, CMS, IHS, and VA, to create a centralized platform for verifying eligibility and processing enrollments. While a centralized enrollment system was not mandated by the PSRA, it will create efficiencies through the elimination of decentralized duplicative and manual processes and improve interagency communication. It is expected to yield long term cost-savings that will help offset significant upfront costs of development. Additional IT and IT contract costs are anticipated for updating existing systems, including Benefits Plus and the audit resolution tracking system, and developing new resources to improve customer experience, including the

creation of an enrollment Decision Support Tool.

The remaining $13.4 million in estimated startup costs include $3.6 million for non-IT contractor support throughout implementation and $9.8 million for additional supplies, equipment, training, and communication related to the PSRA. All costs were estimated based on 2022 dollars and contract rates.

Ongoing Costs: As this is a new program, additional staffing and resources will be essential to establish and administer the PSHB. OPM estimates a total of $49.3 million in annual, ongoing costs related to the PSRA. This estimate consists of $24.4 million in annual salary costs for 153.5 additional full-time employees (FTEs) necessary for contract oversight, program operations, systems maintenance, customer service, policy support, and general support. Additionally, OPM anticipates $21 million in annual IT and IT contract costs for ongoing system development and maintenance support, and an additional $1.7 million in annual, non-IT contract costs related to oversight and management of the increased number of health benefits plans within the PSHB and FEHB populations. Finally, OPM estimates an additional $2.2 million in annual costs for training, communications and overhead related to the PSHB program and the annual Open Season period.

The above costs are represented as fully loaded annual projections based on 2022 dollars. Salaries and burden were based on 2022 pay tables and Washington, DC metro area locality adjustment, a burden percentage of 34%, and award and transit subsidies. This adjustment factor was used in lieu of a standard wage rate to more accurately reflect the historical trends in benefit costs for OPM employees, based on the anticipated locations and experience-levels of the aforementioned positions. Additionally, the wage rate is meant to capture overhead costs which were already represented in separate categories. All recurring costs are projected to be fully loaded beginning in FY2025 and to persist through at least FY2032. Given that development and onboarding will occur in the run-up to the PSHB implementation, OPM anticipates that annual costs related to the PSRA will increase steadily between FY2022 and FY2024.

Postal Service

Startup Costs: The Postal Service estimates $11.5 million in start-up costs for updating systems, development of training materials, and the development and maintenance of the Health Benefits Education Program. These estimates were calculated based on anticipated system configuration and assumed effort level and are subject to change based on additional requirements that may be required of the Postal Service.

Ongoing Costs: In preparation for and following implementation of the PSHB, the Postal Service estimates an additional $1.4 million in annual costs for increased staffing and communication needs. Specifically, the Postal Service estimates $0.9 million in salary costs for 6 additional FTEs, including 4 Program and 2 IT FTEs, and an additional $0.5 million towards increased outreach, education, and communication. Given the general retirement eligibility ages in comparison to the Medicare eligibility age, there will be a 3- to-5-year gap between the time of retirement until Medicare enrollment. It will be critical during the initial implementation of the Program and for the subsequent 5–10 years to send constant communications regarding plan options and healthcare costs, along with information about Medicare Part B eligibility periods and how and when to enroll. Additional resources will also be needed to monitor enrollee compliance for the Medicare Part B enrollment exceptions requirements on an ongoing basis. Although recruitment, onboarding, and development costs will gradually ramp up preceding implementation, the ongoing costs are expected to become fully realized beginning in FY25 and will likely persist for a period of 5–10 years following implementation, at which point the Postal Service will reevaluate resourcing needs. All costs were estimated in terms of 2022 dollars and pay scales.

Department of Labor—Office of Workers' Compensation Programs (OWCP)

Startup Costs: OWCP estimates a total of $72,500 in startup costs related to the PSRA. These include an estimated $50,000 in staff time for training on the PSRA changes and implementation, and $22,500 for pre- and post-implementation mailings to approximately 12,500 claimants and beneficiaries regarding changes to health benefit coverage. All costs were estimated based on 2022 dollars and pay scales.

Ongoing Costs: Beginning in 2025, OWCP estimates an additional $2,000 of annual, recurring costs for the creation and distribution of mailing announcements and customer service response letters related to the PSHB Open Season.

Department of Veterans Affairs (VA)

Startup Costs: The VA anticipates startup costs for system updates and development to meet the information sharing requirements outlined in § 890.1612 of the regulation. In total, the VA estimates $395,000 worth of IT contractor development work will be needed to integrate the existing Veteran Verification process with the centralized Enrollment and Eligibility System. The estimated costs are based on the anticipated number of scrum teams and sprints required to build this functionality and the projected firm-fixed-price contract rates. All costs were estimated in 2022 dollars.

Social Security Administration (SSA)

Startup Costs: SSA estimates $7.3 million in startup costs for staffing support and system updates related to the PSHB implementation. These include an estimated $5.16 million in staffing costs for project management, policy and business process development, and additional technician support for the initial SEP. Additionally, SSA anticipates $2.17 million in up-front costs for system enhancements that will be necessary to support data exchanges and the initial SEP.

Ongoing Costs: SSA anticipates approximately 3 FTEs will be needed to support the PSHB following implementation, with estimated salary and overhead costs totaling $408,000 annually. These costs are based on the anticipated workload for processing annual enrollments and exceptions related to the Medicare coverage requirements for postal annuitants and family members. Additionally, SSA anticipates a small cost for the ongoing data exchange with OPM, although this cost cannot be determined until the data exchange is completed and will ultimately be reimbursed by OPM.

Indian Health Service

Indian Health Service (IHS) estimates de minimis costs for PSHB implementation. This is based upon the assumption that self-attestation will be utilized for Postal Service annuitants and family members to provide proof of eligibility for IHS health services for purposes of an exception to the Medicare Part B requirement.

Carriers (Not Quantified)

Carriers will also have startup costs to participate in the PSHB Program, although the magnitude of these costs is unknown and will likely vary by carrier. Based on the 2021 FEHB headcount, OPM estimates that 41 FEHB Carriers provide coverage to Postal Service

enrollees and they will therefore be impacted by implementation of the PSHB Program. Although OPM anticipates that not all carriers will elect to participate in the Program, at a minimum, assuming only plans with 1,500 or more Postal Service enrollees choose to participate, 28 carriers would be expected to incur additional costs associated with the creation and administration of separate PSHB plans. These costs will likely be incurred for internal training, updating enrollment processes and information systems, updating financial systems, and development of proposals specific to the PSHB Program. In developing plan options for the PSHB, carriers will not simply be able to duplicate FEHB plan designs as the requirement to integrate Part D coverage is substantively different. While large carriers may be able to leverage existing experience integrating Medicare Part D coverage in their other books of business, the need to apply and submit a different PSHB proposal will be a cost to carriers. PSHB Carriers will continue to incur annual costs to offer plans as there will need to be two sets of proposals, contract negotiations, and enrollment processing for carriers offering both PSHB and FEHB plans. This will likely create additional staffing costs on an ongoing basis.

Postal Service Annuitants (Not Quantified)

Existing and future Postal Service annuitants may incur additional costs in navigating both Medicare and PSHB enrollment decisions, particularly in the initial years following implementation. Prior to the PSHB Program Open Season, a six-month SEP will be offered to provide existing Medicare-eligible Postal Service annuitants and their Medicare-eligible family members with the opportunity to enroll in Part B. This enrollment window will take place before PSHB benefits and premiums are set, meaning participants will not know the details of the PSHB premiums when making their Medicare election during the SEP. This could create additional burden and confusion for participants and may result in suboptimal enrollment decisions.

As with the training and communications costs for the first year, Postal Service employees may continue to need training as they approach retirement. They may generally experience new costs associated with interacting with a new set of options, especially if they have already planned to take certain actions upon retirement which are now infeasible under the PSRA. Additionally, as is true currently under FEHB, retirement will not be a PSHB qualifying life event. Postal Service annuitants will need to understand how their PSHB plan election will work with the Part B requirement upon retirement or wait for Open Season alignment in both Medicare and the PSHB to make a suitable choice for their health care insurance needs.

Transfers

The main impact of section 101 of the PSRA and these rules will be a transfer of costs from the Postal Service to the Medicare Program, which is funded by taxpayers, including the Postal Service and beneficiaries. Additionally, a portion of these premium costs will likely be transferred to the pharmaceutical manufacturers due to reduced payments received from Medicare Part D enrollees. Table 3 summarizes the projected changes in annual premium expenditures for each of the primary stakeholders. These projections were obtained from separate, independent analyses performed by CMS, the Postal Service, and OPM, which were produced at different points in time and with different underlying methods and assumptions and are therefore intended to summarize the directional transfer of costs among the different stakeholders, not the overall budgetary impacts of the PSRA. Additionally, all estimates were based on FEHB and Medicare coverage as of 2023, and do not incorporate any changes expected from the Inflation Reduction Act or Carrier Letter 2023–02.[13] Details on the methods and assumptions utilized by each agency are provided in the Table 3 footnotes.

TABLE 3—NET TRANSFER EFFECTS

Projected change in annual coverage costs due to PSRA ($ billions)													
Agency/outlay	FY22	FY23	FY24	FY25	FY26	FY27	FY28	FY29	FY30	FY31	FY32	FY23–27	FY23–32
CMS [1]	0.00	0.00	0.00	0.50	0.76	0.92	1.11	1.16	1.35	1.53	1.73	2.18	9.06
Part B, net of premium [a]	0.00	0.00	0.00	0.09	0.18	0.24	0.31	0.39	0.47	0.57	0.68	0.51	2.93
Part D, net of premium and clawback [b]	0.00	0.00	0.00	0.41	0.58	0.68	0.80	0.77	0.88	0.96	1.05	1.67	6.13
USPS [2]	0.00	0.00	0.00	−0.30	−0.30	−0.30	−0.30	−0.40	−0.40	−0.40	−0.40	−0.90	−2.80
USPS share of employee premiums	0.00	0.00	0.00	−0.30	−0.30	−0.30	−0.30	−0.40	−0.40	−0.40	−0.40	−0.90	−2.80
PSRHBF Annuitant Premiums [3]	0.00	0.00	0.00	−0.17	−0.23	−0.29	−0.36	−0.45	−0.49	−0.53	−0.58	−0.69	−3.10
PSRHBF Share of Annuitant Premiums	0.00	0.00	0.00	−0.17	−0.23	−0.29	−0.36	−0.45	−0.49	−0.53	−0.58	−0.69	−3.10
FEHB and Federal Share USPS Premiums [3]	0.00	0.00	0.00	−0.09	−0.09	−0.10	−0.10	−0.10	−0.11	−0.11	−0.12	−0.28	−0.83
Payments for NP annuitant premiums	0.00	0.00	0.00	−0.06	−0.07	−0.07	−0.07	−0.08	−0.08	−0.09	−0.09	−0.20	−0.61
Federal Share of USPS Annuitant Premiums	0.00	0.00	0.00	−0.03	−0.03	−0.03	−0.03	−0.03	−0.03	−0.03	−0.03	−0.08	−0.21
Employee and Annuitant Share of Premiums	0.00	0.00	0.00	−0.26	−0.26	−0.25	−0.25	−0.25	−0.25	−0.24	−0.23	−0.76	−1.98
Postal employee share PSHB premiums [2]	0.00	0.00	0.00	−0.10	−0.11	−0.12	−0.13	−0.14	−0.15	−0.16	−0.17	−0.34	−1.09
Postal annuitants share PSHB premiums [2]	0.00	0.00	0.00	−0.11	−0.12	−0.14	−0.15	−0.16	−0.17	−0.18	−0.19	−0.37	−1.22
Non-Postal employee share FEHB premiums [3]	0.00	0.00	0.00	−0.04	−0.04	−0.04	−0.04	−0.05	−0.05	−0.05	−0.05	−0.12	−0.36

[13] FEHB Program Carrier Letter Number 2023–02, *FEHB and Medicare Part D Prescription Drug Coordination* (published January 25, 2023).

TABLE 3—NET TRANSFER EFFECTS—Continued

Projected change in annual coverage costs due to PSRA ($ billions)													
Agency/outlay	FY22	FY23	FY24	FY25	FY26	FY27	FY28	FY29	FY30	FY31	FY32	FY23–27	FY23–32
Non-Postal annuitant share FEHB premiums [3]	0.00	0.00	0.00	−0.03	−0.03	−0.03	−0.03	−0.04	−0.04	−0.04	−0.04	−0.09	−0.28
Postal annuitant premiums for Medicare B [1a]	0.00	0.00	0.00	0.03	0.05	0.08	0.11	0.13	0.16	0.19	0.23	0.16	0.98
Total ≠	0.00	0.00	0.00	−0.32	−0.12	−0.01	0.11	−0.05	0.10	0.24	0.41	−0.45	0.35

≠The estimated costs in this table were aggregated from multiple, independent analyses conducted by separate agencies, and are intended only to represent the directional flow of costs between various stakeholders. Due to the differences in assumptions and methodology employed by each agency (as detailed below), the cumulative impacts represented in this table do not directly align with the general expectation, as detailed in the narrative below, that aggregate premium payments will be lower post-PSRA due to the transfer of costs to drug manufacturers via mandatory Part D discounts. All estimates are based on coverage provisions as of 2023 and *do not* reflect expected changes to pharmaceutical coverage from the Inflation Reduction Act or Carrier Letter Number 2023–04, the 2023 FEHB Call Letter.

Sources and methodology:

1. Projected Medicare costs for additional Part B and Part D enrollment were provided by CMS.

a. Part B projections were based on an assumption that about 7,000 new retirees plus spouses would enroll in Part B in 2025, and growth would be consistent with aged enrollment. Additionally, CMS assumed that roughly 14,000 existing retirees would enroll in 2025, which would degrade over time due to deaths. Expected costs and premiums for additional enrollees were assumed to be consistent with current average Part B beneficiaries.

b. CMS estimated additional Part D costs based on projected annual headcounts of Postal Service annuitants. Annual headcounts were estimated using the 2021 Postal Service annuitant enrollment total (approximately 515,000) and applying an annual growth rate based on the number of new postal retirees in 2021. Growth estimates were trended by the projected annual growth in overall Part A and/or Part B enrollment and were decremented yearly by the annual mortality rates from SSA for ages 70–75. Using this methodology, CMS estimated that approximately 603,000 postal retirees would join Part D in 2025 and that this population would grow to 797,000 by 2032. To project annual Part D spending on Postal retirees, CMS assumed a 90/10 split between PDP–EGWP and MAPD–EGWP, and annual costs consistent with current beneficiaries in each of these enrollment categories.

2. Based on estimates provided by USPS actuaries and budget analysts. Projected savings on PSHB premiums are based on the expected reduction in the portion of retirees' medical costs that will be paid by PSHB plans, which is expected to lower overall costs in the combined pool of annuitants and employees and reduce premiums. USPS assumed that 30% of grandfathered annuitants would enroll in Part B during the SEP, resulting in 30,000 new enrollments in 2025. Annual projections for current and annuitant Postal enrollee populations were based on mortality and retirement projections for the postal population, which were developed by OPM.

3. Estimates from OPM Office of Administration (OA) Budget Summary as of January 2023. Assumed 30% of grandfathered annuitants and family members would join during SEP and stable population of total annuitants from 2025–2032 (annual new retirees + family members ≈ deaths in Postal annuitant population). Differential costs of FEHB and PSHB population was estimated using age distribution in the two populations, which skews slightly higher for Postal, and historical average costs by age band for the joint FEHB population. OA estimates a 5.8% reduction in average PSHB premiums beginning in 2025, which is attributed to the Part B and Part D requirements, and a 0.4% reduction in average FEHB premiums. Annual projections were discounted at a rate of 4% annually and assumed a 4.8% medical inflation rate.

Beginning in 2025, mandatory Medicare Part B enrollment for all future Postal Service Medicare covered annuitants enrolled in PSHB, as well as optional enrollment for all current Medicare-eligible annuitants, will transfer a portion of the costs for these individuals from the Postal Service to Medicare. Additionally, the requirement for all PSHB plans to offer Medicare Part D prescription drug benefits will result in a significant transfer of prescription drug costs for all current and future Medicare-eligible annuitants and family members from the Postal Service to Medicare, with a portion of these costs transferred to the pharmacy supply chain in the form of reduced payments. This is due to the Medicare Coverage Gap Discount Program at section 1860D–14A of the Social Security Act, which requires manufacturers to provide a substantial discount on brand name drugs dispensed to applicable beneficiaries in the coverage gap. These industry discounts are in addition to the discounts negotiated with individual FEHB plans, resulting in lower per-member payments for the subset of current and future Postal Service annuitants who would have otherwise elected not to enroll in Part D. It is important to note, however, that all estimates related to Part D savings were conducted prior to the enactment of the Inflation Reduction Act (Pub. L. 117–169), which contained significant prescription drug provisions including, for example, a provision that sunsets the Coverage Gap Discount Program at the end of 2024, and establishes a new Manufacturer Discount Program, beginning Jan. 1, 2025, at section 1860D–14C of the Social Security Act.

The increase in Part B and Part D enrollment and the transfer of costs to Medicare will lower the aggregate costs among the PSHB population, as Medicare will cover a larger portion of the costs for Postal Service annuitants and family members that would have previously been covered by the PSHB plan. Given that premiums are based on average per member costs of the combined pool of annuitants and employees, this will likely result in lower premiums for PSHB plans compared with current FEHB premium amounts. While this will reduce costs for the Postal Service and current Postal Service employees, a portion of these costs will likely be transferred to the estimated 25% of current and future Medicare-eligible Postal Service annuitants and Medicare-eligible family members who elect or are required to enroll in Part B and otherwise would not have. These individuals will ultimately be subject to premiums for both Medicare and PSHB plans which, on net, may be higher than the current FEHB premiums. At the same time, being covered by Medicare in conjunction with a PSHB plan may also reduce out-of-pocket expenses (*e.g.,* co-payments and co-insurance) for annuitants than would otherwise have been incurred. Furthermore, we anticipate that some plans will reimburse all or part of Part B premiums, as is currently the case with some FEHB plans.

It is estimated that the cost of coverage for Postal employees and their eligible family members is slightly higher than for the other Federal employees. The creation of a separate risk pool for Postal Service employees and annuitants will result in premiums that are more reflective of the resulting Postal and non-Postal populations. Removal of these individuals from the FEHB plan population will therefore result in slight reduction in average per member costs which will be directionally reflected in FEHB plan premiums following PSHB implementation. The expected decrease in FEHB plan premiums would be mirrored by a slight increase in PSHB premiums, although this increase would be minimal compared to the expected decrease in premium due to Medicare enrollments, meaning that the likely result will be lower premiums for PSHB plans compared with current FEHB plan premium amounts.

As required in the PSRA, the Postal Service will need to pay to CMS the monthly late enrollment penalties for any Part B enrollments that occurred during the 2024 SEP. These late enrollment penalties are typically assessed to enrollees as a monthly

increase in premiums and are intended to transfer a portion of the increased age-related risk that a late enrollee represents, compared with an individual that was enrolled at age 65. We estimate that approximately 100,000 Postal Service annuitant subscribers aged 65+ currently enrolled in the FEHB Program are not enrolled in Medicare Part B and, thus, would be eligible for the SEP. Given that these individuals have previously elected not to enroll in Part B, it is estimated that around 30% of current Postal Service annuitants will choose to enroll during the SEP. For these individuals, the additional late enrollment penalties will be transferred to the Postal Service.

Additional transfers will likely occur among individual carriers and with third party vendors or contractors as part of the PSHB implementation. In particular, the requirements for integration of Part D coverage into PSHB plans will likely benefit larger carriers with more Medicare experience, who will be better positioned to seamlessly adjust plans to incorporate Part D coverage. Smaller carriers, in particular, are likely to lean on third-party vendors or contractors to assist with the PSHB implementation and/or Part D coverage integration, which will transfer a portion of carrier revenue into these markets.

Uncertainty and Directional Effects Related to Enrollment, Utilization, and Carrier Participation

All benefits, costs, and transfers summarized above are based on baseline assumptions that plan enrollment, carrier participation, and healthcare utilization will remain consistent following implementation of the PSHB Program. It is likely that implementation of the PSHB Program and the additional Medicare enrollment requirements will impact some or all of these baseline assumptions, which will have downstream effects for cost and utilization within both the PSHB and FEHB populations. The magnitude and directionality of these effects will depend on several factors that are presently uncertain.

Individual carriers will likely weigh the costs and benefits of offering FEHB plans and PSHB plans. Shifting enrollment numbers and additional implementation costs may lead some carriers to scale back or discontinue participation in one or both kinds of plans. This would impact the number of available plan options for both PSHB and FEHB enrollees, as well as the likelihood that they would be able to keep their current plans. However, as noted below, it is likely that the PSRA will increase the total number of plans covering both the Postal Service and greater FEHB population.

Similarly, PSHB enrollees required to enroll in Medicare Part B would be subject to additional premiums, which may impact the likelihood of their enrollment in PSHB plans. It is estimated that around 25% of Postal Service annuitants who are otherwise eligible for Part B are not currently enrolled. It is possible they actively declined Part B coverage because they were satisfied with their existing coverage or felt that the additional Medicare premium costs were too high, although it is also possible that they were not fully aware of the benefits of Medicare enrollment on their overall health care expenses over the course of their lifetimes. Assuming that a similar percentage of future Postal Service annuitants would have made a similar determination, these individuals will now be required to enroll as a condition of PSHB eligibility. This may result in some Postal Service annuitants dropping PSHB coverage altogether if they determine that PSHB and Part B coverage together is unaffordable or duplicative for their health care circumstances, though this number may be limited since it would require those annuitants to forgo PSHB coverage for the rest of their lifetimes unless individuals opt to participate in a Medicare Advantage plan. This could potentially result in adverse selection within the PSHB plans, referring to the tendency for individuals with higher health risks to disproportionately elect more generous coverage. Ultimately, this would increase the average risk and costs within the PSHB enrolled population, creating upward pressure on premiums. Additionally, some carriers may elect not to offer or discontinue PSHB plans if they anticipate or experience lower than expected enrollment.

The additional Medicare Part B and Part D coverage may also induce a moral hazard effect due to the more robust coverage and lower cost-sharing. Moral hazard refers to the tendency of individuals to increase health care utilization and spending in response to greater coverage or lower out-of-pocket costs. If an individual is required to enroll in Medicare, they may feel more compelled to utilize the benefits, increasing overall health care consumption. This effect has been demonstrated in numerous studies, most notably the RAND and Oregon Health Insurance Experiments, which found that utilization of both necessary and unnecessary health services increased with increased coverage and lower cost sharing.[14] [15] Increased utilization among these individuals would increase the overall per member costs within the PSHB plans which may result in higher premiums and potentially impact health outcomes.

Any increases to premiums as a result of adverse selection or moral hazard would have future implications on PSHB enrollment and plan selection. If premiums increased, a greater percentage of enrollees may shift into alternative plans with less comprehensive benefits such as plans with reduced formularies and narrower provider networks, lower premiums and higher cost-sharing (*e.g.,* standard option as opposed to high option health plans). This could potentially help to counter moral hazard effects and lower costs, although it could intensify adverse selection into the more robust plans, as high-cost individuals would be less likely to change plans.

Despite the assumption that not all carriers will offer both FEHB plans and PSHB plans, it is likely that the PSRA will increase the total number of plans covering both the Postal and greater FEHB population. This will result in smaller risk pools within each plan, which could lead to greater uncertainty with respect to costs. With smaller risk pools, each enrollee's health status has a larger impact on total costs. This can create greater variability in annual premiums. Smaller risk pools increase individual plans' exposure to high-cost outlier events, as there are fewer low or average-cost enrollees to offset these costs. Administrative costs would also be spread across smaller risk pools. To ensure financial solvency in such scenarios, plans may seek to price this additional risk exposure into premiums, resulting in an increase in the aggregate costs for all PSHB plan and FEHB plan enrollees compared to the baseline.

At present, there remains a great deal of uncertainty with respect to the longer-term impacts on plan enrollment, carrier participation, plan design, and plan premiums. It is possible that a number of current FEHB Carriers will elect not to participate in the PSHB

[14] Brook, Robert H., Emmett B. Keeler, Kathleen N. Lohr, Joseph P. Newhouse, John E. Ware, William H. Rogers, Allyson Ross Davies, Cathy D. Sherbourne, George A. Goldberg, Patricia Camp, Caren Kamberg, Arleen Leibowitz, Joan Keesey, and David Reboussin, *The Health Insurance Experiment: A Classic RAND Study Speaks to the Current Health Care Reform Debate* (2006), *https://www.rand.org/pubs/research_briefs/RB9174.html.*

[15] *See* Heidi Allen & Katherine Baicker, *The Effect of Medicaid on Care and Outcomes for Chronic Conditions: Evidence from the Oregon Health Insurance Experiment,* NBER Working Paper No. 29373 (October 2021), *https://www.nber.org/papers/w29373.*

Program or to drop their current FEHB plan offerings. Consolidation within the FEHB and PSHB markets would likely benefit larger carriers and may yield some efficiencies through greater economies of scale, although on aggregate, it is expected that PSHB implementation will result in a greater number of total plans and increased administrative costs and premiums. Fewer options may also simplify plan choice for employees and annuitants, saving time on plan comparisons.

Enrollment in the PSHB Program, particularly among individuals who are required to enroll in Medicare Part B, is also uncertain. For future Postal Service annuitants, the requirement to enroll in Part B after retirement represents an additional cost. This will likely factor into individual retirement planning decisions and could potentially lead to employees remaining in the workforce longer to delay these additional costs. Likewise, lower-risk individuals may determine that their Medicare coverage, including Part B coverage is sufficient for their health care needs and opt out of PSHB enrollment. These aspects could impact PSHB Program risk pools and influence carriers' decisions on whether to continue operating in the PSHB market. Each of these scenarios could trigger potential downstream effects on utilization and premiums and will be important to monitor. OPM invites comment on all topics addressed in this section.

Alternatives

There are no feasible alternatives to this regulation as it implements section 8903c, as added by the PSRA, which establishes the PSHB Program and is mandated by the law. Therefore, OPM does not have the discretion to forego issuing regulations altogether. However, we considered alternatives to certain aspects of this regulation.

Initial Enrollment in the PSHB Program and Medicare Part B

OPM recognizes that, for a small portion of Postal Service annuitants and their family members who take advantage of the Medicare Part B SEP from April 1 to September 30, 2024, there may be confusion about having two consecutive separate health plan enrollment events given that the PSHB Program Open Season for plan year 2025 will occur from November 11 through December 9, 2024. As with current FEHB plans, however, OPM's rate review process for PSHB plans will not be completed until September 2024, which makes simultaneous enrollment in Medicare Part B and PSHB plans extremely problematic. Should OPM open PSHB plan enrollment at the same time as the Medicare SEP, without completing the rate review process, enrollees would be selecting PSHB plans for which the monthly cost is entirely unknown, leading to more confusion than leaving the Medicare SEP and PSHB Open Enrollment separate.

We explored an opportunity for Postal Service annuitants to ''pre-enroll'' in PSHB plans prior to OPM completing its PSHB rate review process. Combining the opportunity to pre-enroll in a PSHB plan with the Medicare SEP would allow Postal Service annuitants to complete both actions simultaneously. Alternatively, Postal Service annuitants could be automatically enrolled in a PSHB plan at the same time they enroll in Medicare Part B. Automatic pre-enrollment could relieve these Postal annuitants from making two separate enrollment decisions. However, we found both of these options would be undesirable for enrollees and their family members for several reasons.

Allowing individuals to pre-enroll in PSHB plans during the SEP means they would sign up for a plan without knowing their premium obligation. Similarly, because OPM will not have certified the future PSHB plans by the time the Medicare SEP occurs, there would be no way for an individual to know whether a given carrier will be participating in the PSHB Program for the next plan year, let alone what the final contract would look like. In general, while allowing those annuitants taking advantage of the Medicare SEP to simultaneously pre-enroll in a PSHB plan seems like it could reduce confusion and frustration from having two separate enrollment obligations, the timing of simultaneous PSHB pre-enrollment and the Medicare SEP would mean choosing a PSHB plan with unknown benefits and premiums and likely having to review the selection again during the PSHB Open Season period to ensure that the plan an individual pre-enrolled in actually makes sense for them once plan details are finalized and approved by OPM.

Much of the rationale for considering PSHB plan pre-enrollment can be achieved by providing information about automatic enrollment to Postal Service employees, Postal Service annuitants, and their family members. Postal Service annuitants who wish to keep their plan or take as little action as possible can have their needs met as easily with automatic enrollment after Open Season ends instead of OPM implementing a new pre-enrollment or automatic pre-enrollment. In addition, under 5 CFR 890.301(f)(2), the OPM Director has the authority to modify the dates for Open Season or hold additional Open Seasons. These authorities and flexibilities exist under current regulations and may be exercised without needing to make any specific provisions under this rulemaking.

Despite these findings, we invite comments on this approach.

Centralized Enrollment

OPM is developing a centralized enrollment system simultaneously with the implementation of the PSHB Program. As explained above, the centralized enrollment system will shift certain responsibilities from the employing office to a new system which will function as an electronic enrollment solution for all PSHB stakeholder groups. With the advancement of technology over time, the existing decentralized processes related to FEHB enrollment may no longer be the most efficient methods for accomplishing enrollment functions. Developing a centralized enrollment system for the PSHB Program allows OPM to take advantage of IT solutions and create a modern enrollment system for Postal Service employees, Postal Service annuitants, and their family members. OPM considered maintaining the existing enrollment processes that apply to enrollment in FEHB plans but ultimately determined that the establishment of the PSHB provided an ideal opportunity to utilize new technologies and centralization processes that will improve the experience of PSHB stakeholders.

Reconsiderations

The standards for requesting reconsideration of an initial decision affecting enrollment in the PSHB Program will be the same as current FEHB standards at 5 CFR 890.104 and 890.308. Individuals will be made aware of their right to an independent review and generally, the time and manner for requesting reconsideration. OPM is considering establishing PSHB-specific processes and will closely track the implementation of the PSHB Program particularly as Postal Service employees, Postal Service annuitants, family members, PSHB Carriers, employing agencies, and retirement systems become more familiar with the centralized enrollment system.

Effective Date

OPM considered keeping the effective date of coverage for PSHB plans as the first day of the first pay period of the calendar year for Postal Service employees, as is currently done for

FEHB plans. Keeping this effective date for PSHB plans that Postal Service employees are familiar with will not result in implementation costs or risk confusing existing enrollees. However, the benefits of a January 1 effective date outweigh the costs of implementation and educating enrollees, as implementation costs are one-time and after several years there will be little to no ongoing enrollee education needs. Conversely, the benefits of the January 1 date will remain indefinitely. A calendar year start date is easier for enrollees to track and follow and is consistent with the industry standard and many similar programs, including health savings accounts, the Federal Employees Dental and Vision Insurance Program, and the cutoff date for Postal Service Medicare covered annuitants who qualify for an exception to the Medicare enrollment requirement.

Regulatory Flexibility Act

OPM certifies this regulation will not have a significant economic impact on a substantial number of small entities.

Federalism

OPM has examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or Tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988, Civil Justice Reform.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending by State, local, and Tribal governments in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately $177 million. This interim final rule does not mandate any requirements for State, local, or Tribal governments, or for the private sector.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. OMB's Office of Information and Regulatory Affairs has determined that this is a major rule as defined by the Congressional Review Act (5 U.S.C. 804(2)).

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

OPM is investigating whether to create a new information collection or revise an existing information collection for the PSHB Program and seeks public comment on this question. If an information collection is revised, it will be the SF–2809, *Health Benefits Election Form,* under OMB Control number 3206–0160. Information regarding the collection, including all current supporting materials, can be accessed at *https://www.reginfo.gov/public/do/PRAMain.* The systems of records notice for this collection is: OPM/Central–23, ''FEHB Program Enrollment Records,'' available at *https://www.federalregister.gov/d/2021-01259* (86 FR 6377, January 21, 2021). Regardless of whether a revision to the SF–2809 is pursued or a new collection is proposed, OPM will publish a separate 60-day notice at a later date requesting comments.

List of Subjects

5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Postal Service employees, Reporting and recordkeeping requirements, Retirement.

48 CFR Parts 1602 and 1609

Government employees, Government procurement, Health insurance, Postal Service employees, Reporting and recordkeeping requirements.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

Accordingly, OPM amends 5 CFR part 890 and 48 CFR chapter 16 (FEHBAR) as follows:

Title 5—Administrative Personnel

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

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

Authority: 5 U.S.C. 8913; Sec. 890.102 also issued under sections 11202(f), 11232(e), and 11246 (b) of Pub. L. 105–33, 111 Stat. 251; Sec. 890.111 also issued under 36 U.S.C. 5522; Sec. 890.112 also issued under 2 U.S.C. 2051; Sec. 890.113 also issued under section 1110 of Pub. L. 116–92, 133 Stat. 1198 (5 U.S.C. 8702 note); Sec. 890.301 also issued under 26 U.S.C. 9801; Sec. 890.302(b) also issued under 42 U.S.C. 300gg–14; Sec. 890.803 also issued under 50 U.S.C. 3516 (formerly 50 U.S.C. 403p) and 22 U.S.C. 4069c and 4069c–1; subpart L also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064 (5 U.S.C. 5561 note); subpart M also issued under 10 U.S.C. 1108 and 25 U.S.C. 1647b; and subpart P issued under 5 U.S.C. 8903c.

Subpart A—Administration and General Provisions

■ 2. Amend § 890.101 in paragraph (a) by:

■ a. Revising the introductory text; and

■ b. Adding the definitions of ''Federal Employees Health Benefits (FEHB) Program,'' ''FEHB plan,'' ''Medicare covered member of family,'' ''Postal Service Health Benefits (PSHB) Program,'' ''Postal Service Medicare covered annuitant,'' and ''PSHB plan'' in alphabetical order.

The revision and additions read as follows:

§ 890.101 Definitions; time computations.

(a) In this part, the terms *annuitant, carrier, employee, employee organization, former spouse, health benefits plan, member of family,* and *service* have the meanings set forth in 5 U.S.C. 8901; the terms *Postal Service, Postal Service annuitant,* and *Postal Service employee* have the meanings set forth in 5 U.S.C. 8903c; and these terms supplement the following definitions:

* * * * *

Federal Employees Health Benefits (FEHB) Program means the health insurance program administered by the Office of Personnel Management and established under 5 U.S.C. chapter 89.

FEHB plan means a health benefits plan as defined in 5 U.S.C. 8901(6) and governed by this part, with the exception of a PSHB plan.

* * * * *

Medicare covered member of family means an individual who is both a covered Medicare individual and a member of family of a Postal Service Medicare covered annuitant.

* * * * *

Postal Service Health Benefits (PSHB) Program means the health insurance program established under 5 U.S.C. 8903c within the Federal Employees Health Benefits Program.

Postal Service Medicare covered annuitant means an individual who is both a covered Medicare individual and a Postal Service annuitant.

PSHB plan means a health benefits plan offered under the PSHB Program.

* * * * *

■ 3. Add § 890.115 to read as follows:

§ 890.115 Special provisions for Postal Service employees, Postal Service annuitants, and their eligible family members.

Special provisions for Postal Service employees, Postal Service annuitants, and their eligible family members are set forth at subpart P of this part. Provisions of this part generally apply to Postal Service employees, Postal Service annuitants, and their eligible family members, except for provisions which are inconsistent with provisions of 5 U.S.C. 8903c or subpart P.

Subpart C—Enrollment

■ 4. Amend § 890.301 by adding paragraph (p) to read as follows:

§ 890.301 Opportunities for employees to enroll or change enrollment; effective dates.

* * * * *

(p) *Postal Service employees and Postal Service annuitants eligible to enroll only in PSHB plans.* After December 31, 2024, a Postal Service employee or Postal Service annuitant is not eligible to be enrolled in an FEHB plan but may only enroll in a PSHB plan in accordance with subpart P of this part.

■ 5. Amend § 890.302 by revising paragraphs (a)(1) and (a)(2)(i) to read as follows:

§ 890.302 Coverage of family members.

(a)(1) *Enrollment.* An enrollment for self plus one includes the enrollee and one eligible family member. An enrollment for self and family includes all family members who are eligible to be covered by the enrollment except as provided in § 890.308(h). Proof of family member eligibility may be required, and must be provided upon request, to the carrier, the employing office, or OPM. Except as provided in paragraph (a)(2) of this section, no employee, former employee, annuitant, child, or former spouse may enroll or be covered as a family member if they are already covered under another person's self plus one or self and family enrollment.

(2) * * *

(i) *Prohibition on dual enrollment.* A dual enrollment exists when an individual is covered under more than one enrollment under this part. Dual enrollments are prohibited except when an eligible individual would otherwise not have access to coverage and the dual enrollment has been authorized by the employing office.

* * * * *

■ 6. Amend § 890.303 by adding paragraph (j) to read as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(j) *On transfer to or from Postal Service.* The eligibility of a Postal Service employee to continue enrollment under 5 U.S.C. chapter 89 continues without change when they move from the Postal Service to another employing office, without a break in service of more than 3 days, whether the personnel action is designated as a transfer or not. In such a circumstance they may no longer enroll in a PSHB plan under subpart P of this part, and they may only enroll in an FEHB plan. The eligibility of an employee or annuitant to continue enrollment under 5 U.S.C. chapter 89 continues without change when they move from another employing office to the Postal Service, without a break in service of more than 3 days, whether the personnel action is designated as a transfer or not; however, they may no longer enroll in an FEHB plan, and they may only enroll in a PSHB plan under subpart P.

■ 7. Amend § 890.308 by adding paragraph (i) read as follows:

§ 890.308 Disenrollment and removal from enrollment.

* * * * *

(i) *Disenrollment and removal from enrollment: Medicare enrollment requirement for certain Postal Service annuitants and family members.* Postal Service Medicare covered annuitants not enrolled in Medicare Part B may be disenrolled, and Medicare covered members of family not enrolled in Medicare Part B may be removed from coverage, pursuant to § 890.1608(b).

Subpart E—Contributions and Withholdings

■ 8. Amend § 890.501 by revising paragraph (b) introductory text to read as follows:

§ 890.501 Government contributions.

* * * * *

(b) In accordance with the provisions of 5 U.S.C. 8906(a) which takes effect with the contract year that begins in January 1999, OPM will determine the amounts representing the weighted average of subscription charges in effect for each contract year, for FEHB plans and for PSHB plans, respectively, for self only, self plus one, and self and family enrollments, as follows:

* * * * *

Subpart O—[Added and Reserved]

■ 9. Add reserved subpart O.

■ 10. Add subpart P, consisting of §§ 890.1601 through 890.1614, to read as follows:

Subpart P—Postal Service Health Benefits Program

Sec.

890.1601 Purpose.
890.1602 Definitions and deemed references.
890.1603 Eligibility for the Postal Service Health Benefits Program.
890.1604 Medicare enrollment requirement for certain Postal Service annuitants and eligible family members.
890.1605 Enrollment in the initial contract year.
890.1606 Opportunities to enroll, change enrollment, or reenroll; effective dates.
890.1608 Disenrollment, removal, termination, cancellation, and suspension.
890.1609 Temporary extension of coverage, conversion, or temporary continuation of coverage.
890.1610 Minimum standards for PSHB Program plans and Carriers.
890.1611 Withdrawal of approval of health benefits plan or carrier.
890.1612 Information sharing.
890.1613 Contributions and withholdings.
890.1614 Other administrative provisions.

§ 890.1601 Purpose.

This subpart sets forth the establishment, administration, and requirements of the Postal Service Health Benefits Program under 5 U.S.C. 8903c, within the FEHB Program under 5 U.S.C. chapter 89. This subpart incorporates provisions of this part to the extent generally applicable and not inconsistent with this subpart.

§ 890.1602 Definitions and deemed references.

(a) In this subpart, the terms set out in § 890.101 apply unless stated otherwise.

(b) In this subpart, the terms *covered Medicare individual, initial contract year, initial participating carrier, Medicare Part A, Medicare Part B,* and *Postal Service Medicare covered annuitant* have the meanings set forth in 5 U.S.C. 8903c.

(c) In this subpart—

Cancel means to submit to the employing office an appropriate request electing not to be enrolled in a PSHB

plan, by an enrollee who is eligible to continue enrollment, including because the enrollee did not enroll in, or chose to disenroll from, Medicare Part B.

Election not to enroll means to submit an appropriate request electing not to be enrolled in a PSHB plan by an individual who is eligible to enroll, including because the individual chooses not to enroll in Medicare Part B.

Medicare coverage means coverage that meets the requirements of § 890.1604.

(d) In this subpart, wherever reference is made to other subparts of this part—

(1) A reference to employee is deemed a reference to Postal Service employee;

(2) A reference to enrollee is deemed a reference to a Postal Service employee or Postal Service annuitant in whose name the enrollment is carried;

(3) A reference to annuitant, survivor annuitant, or an individual with entitlement to an annuity is deemed a reference to Postal Service annuitant;

(4) A reference to employer, employing agency, employing office, or agency for Postal Service employees is deemed a reference to the Postal Service, for Postal Service annuitants is deemed a reference to the appropriate retirement system or other appropriate entity for compensationers, those enrolled under TCC or Spouse Equity, and annuitants whose annuity is insufficient to withhold the cost of health benefits premiums; and

(5) A reference to carrier is deemed a reference to a PSHB Carrier.

§ 890.1603 Eligibility for the Postal Service Health Benefits Program.

(a) Except as provided by paragraph (b) of this section, the following individuals are eligible to enroll, or to be covered under an enrollment, in a health benefits plan described at 5 U.S.C. 8903c and under this subpart:

(1) Postal Service employee;

(2) Postal Service annuitant; and

(3) Member of family of an individual in paragraph (a)(1) or (2) of this section.

(b) For purposes of this subpart, a Postal Service employee includes a Postal Service employee who receives monthly compensation under 5 U.S.C. chapter 81, subchapter I (''compensationer''), who is determined by the Secretary of Labor to be unable to return to duty.

(c) The following individuals may not enroll, or be covered under an enrollment, in this subpart:

(1) Any Postal Service Medicare covered annuitant who is not enrolled in Medicare Part B and is required to be enrolled in Medicare Part B, in accordance with § 890.1604;

(2) Any Medicare covered member of family of a Postal Service Medicare covered annuitant who is not enrolled in Medicare Part B and is required to be enrolled in Medicare Part B, in accordance with § 890.1604; or

(3) Any individual covered by an FEHB plan under this part, except as permitted by § 890.302(a)(2).

(d) Former spouses of Postal Service employees and Postal Service annuitants may establish their eligibility to enroll under subpart H of this part. A former spouse of a Postal Service employee or Postal Service annuitant who is enrolled in an FEHB plan on or before December 31, 2024, may continue enrollment in an FEHB plan and is not required to enroll in a PSHB plan. A former spouse who is eligible under § 890.803(a)(2) because of their enrollment in a PSHB plan is not eligible to enroll or remain enrolled in a PSHB plan; they may enroll in an FEHB plan and, accordingly, the Medicare enrollment requirements in § 890.1604 would not apply.

(e) Survivor annuitants have the same eligibility for reinstatement of enrollment as described in § 890.303(d) for enrollment in a PSHB plan or an FEHB plan as applicable to the service that gives rise to the survivor annuitant status, except that the Medicare enrollment requirements in § 890.1604 would apply to reinstatements of enrollment into a PSHB plan.

(f) Individuals enrolled or covered under the PSHB Program are eligible to elect temporary continuation of coverage as provided under subpart K of this part.

§ 890.1604 Medicare enrollment requirement for certain Postal Service annuitants and eligible family members.

(a) Except as provided by paragraph (c)(1) of this section, a Postal Service Medicare covered annuitant may not enroll or continue enrollment in a health benefits plan under this subpart unless the annuitant is entitled to benefits under Medicare Part A and enrolled in Medicare Part B.

(b) Except as provided by paragraph (c)(2) of this section, where a Postal Service annuitant is a covered Medicare individual and is required to enroll in Medicare Part B in order to be enrolled in a health benefits plan under this subpart, a Medicare covered member of family of the Postal Service annuitant may not enroll in a health benefits plan under this subpart as a member of family of the Postal Service annuitant unless the member of family is enrolled in Medicare Part B.

(c) Pursuant to paragraph (d) of this section, the requirements under paragraphs (a) and (b) of this section, as applicable, shall not apply to the following individuals:

(1) A Postal Service Medicare covered annuitant who—

(i) As of January 1, 2025, is a Postal Service annuitant who is not both entitled to Medicare Part A and enrolled in Medicare Part B;

(ii) As of January 1, 2025, was a Postal Service employee who is at least 64 years of age;

(iii) Resides outside the United States (which includes the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands), provided that the individual demonstrates such residency to the Postal Service;

(iv) Is enrolled in health care benefits provided by the Department of Veterans Affairs (VA) under 38 U.S.C. chapter 17, subchapter II, including individuals who are not required to enroll in the VA's system of patient enrollment referred to in 38 U.S.C. 1705(a), subject to the documentation requirements in paragraph (d)(2) of this section; or

(v) Is eligible for health services from the Indian Health Service, subject to the documentation requirements in paragraph (d)(3) of this section.

(2) A Medicare covered member of family who—

(i) Is eligible for PSHB coverage based on a Postal Service Medicare covered annuitant who is not required to enroll in Medicare Part B in order to be eligible for coverage under this subpart;

(ii) Resides outside the United States (which includes the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands), provided that the individual demonstrates such residency to the Postal Service;

(iii) Is enrolled in health care benefits provided by the VA under 38 U.S.C. chapter 17, subchapter II, including individuals who are not required to enroll in the VA's system of patient enrollment referred to in 38 U.S.C. 1705(a) to receive VA hospital care and medical services, subject to the documentation requirements in paragraph (d)(2) of this section; or

(iv) Is eligible for health services from the Indian Health Service subject to the documentation requirements in paragraph (d)(3) of this section.

(d) To qualify for an exception under paragraph (c) of this section, a Postal Service Medicare covered annuitant or a Medicare covered member of family must meet one of the following documentation requirements:

(1) Demonstrating qualification to the Postal Service for the exceptions at paragraphs (c)(1)(iii) and (c)(2)(ii) of this section;

(2) Documentation from the Department of Veterans Affairs in a form, manner, and frequency as prescribed by OPM demonstrating the individual meets an exception identified in paragraphs (c)(1)(iv) and (c)(2)(iii) of this section; or

(3) Documentation from the Indian Health Service (IHS) in a form, manner, and frequency as prescribed by OPM in consultation with IHS demonstrating the individual meets an exception identified in paragraphs (c)(1)(v) and (c)(2)(iv) of this section.

(e) A Postal Service Medicare covered annuitant or a Medicare covered member of family may notify the Postal Service, in writing, if they choose not to enroll in or to disenroll from Medicare Part B as described in § 890.1608(e). This will have the effect of a termination of coverage, pursuant to § 890.1608(b).

(f) The process for disenrollment or removal from PSHB enrollment for non-enrollment in Medicare Part B is described in § 890.1608(b).

§ 890.1605 Enrollment in the initial contract year.

(a) *Definitions.* In this section—

Current enrollment type means the type of coverage (self only, self plus one, or self and family) of the FEHB plan in which the individual is enrolled during the contract year immediately preceding the initial contract year;

Current option with respect to an individual, means the option under a FEHB plan in which the individual is enrolled during the contract year immediately preceding the initial contract year; and

Current plan means, with respect to an individual, the FEHB plan in which the individual is enrolled during the contract year immediately preceding the initial contract year.

(b) *Transitional Open Season.* (1) During the Open Season that immediately precedes the initial contract year (*i.e.,* the transitional Open Season), a Postal Service employee or Postal Service annuitant—

(i) May elect to enroll or elect not to enroll in a PSHB plan; and

(ii) Will not be enrolled or continue enrollment in an FEHB plan under this part as a Postal Service employee or a Postal Service annuitant.

(2) A Postal Service employee or Postal Service annuitant who is eligible to enroll in a PSHB plan and is enrolled in an FEHB plan but who does not make an election during the transitional Open Season either to enroll in a PSHB plan or not to enroll in a PSHB plan will be automatically enrolled in a PSHB plan pursuant to paragraph (c) of this section.

(3) During the transitional Open Season, a Postal Service employee in a nonpay status, such as leave without pay, except for the case of a 365-day period of nonpay status as set forth at § 890.303(e), may enroll in a PSHB plan or may be automatically enrolled in a PSHB plan pursuant to paragraph (b)(2) of this section.

(c) *Automatic enrollment.* Each Postal Service employee or Postal Service annuitant who is enrolled in a current plan and does not enroll or make an election not to enroll, for the initial contract year, will be automatically enrolled in a PSHB plan by OPM as follows:

(1) In a PSHB plan by the carrier of the individual's current plan if the carrier offers only one plan under this subpart.

(2) If the carrier of the individual's current plan offers more than one health benefits plan or option under this subpart, in the plan and option offered by that carrier that provides coverage with equivalent benefits and cost sharing to the individual's current plan and option, as determined by OPM.

(3) If there is no such plan as identified by OPM in paragraph (c)(1) or (2) of this section, in the lowest-cost nationwide plan option offered under this subpart that is not a high deductible health plan and does not charge an association or membership fee as determined by OPM.

(4) All enrollments under paragraph (c)(1) of this section will be in the same enrollment type as the current enrollment type.

(d) *Automatic enrollment—effect on family members.* A Postal Service employee or Postal Service annuitant automatically enrolled under paragraph (c) of this section will be enrolled in the same enrollment type they were enrolled in immediately preceding the initial contract year. The enrollee's family member(s), if eligible, will be covered under the same enrollment type they were covered under immediately preceding the initial contract year.

(1) A self plus one enrollment will cover the same eligible family member as in the current plan. Automatic enrollment does not verify eligibility of family members. The enrollee must make an affirmative enrollment change to remove an ineligible family member and may replace them with an eligible family member or change the enrollment to a self only or to a self and family enrollment type. Failure to affirmatively change an automatic enrollment to remove an ineligible family member from a self plus one enrollment will result in coverage only for the enrollee but premium withholding for a self plus one enrollment.

(2) A self and family enrollment will include all eligible members of family. Automatic enrollment does not verify identity of eligible family members. The enrollee must affirmatively notify the PSHB Carrier, employing office, or OPM of any changes to members of family.

(e) *Belated enrollment and enrollment changes.* Belated enrollments and enrollment changes will be permitted as follows:

(1) In general, belated enrollments or belated enrollment changes are permitted in accordance with § 890.301(c) for Postal Service employees and § 890.306(c) for Postal Service annuitants.

(2) Any individuals who should have been automatically enrolled pursuant to this section but were not, are deemed to have met the requirement to show that they were unable to enroll for cause beyond their control.

(3) OPM may, in its discretion, deem other individuals or groups of individuals to have met the requirement to show that they were unable to enroll for cause beyond their control.

(4) Unless required to be a prospective change by governing premium conversion under part 892 of this chapter, a belated Open Season enrollment or enrollment change, coverage, and premium obligation take effect on January 1 of the contract year.

§ 890.1606 Opportunities to enroll, change enrollment, or reenroll; effective dates.

(a) Except as otherwise provided in this subpart, a Postal Service employee may enroll or change enrollment, as provided by § 890.301, in a PSHB plan and may not enroll in a FEHB plan as a Postal Service employee.

(b) Except as otherwise provided in this subpart, a Postal Service annuitant may change enrollment or reenroll as provided by § 890.306, in a PSHB plan and may not enroll or reenroll in a FEHB plan as a Postal Service annuitant.

(c) Except as otherwise provided in this subpart, reinstatement of enrollment in accordance with § 890.305 is permitted in a PSHB plan.

(d) Except as otherwise provided in this subpart, initial decisions and reconsiderations on enrollment and eligibility under this subpart will be made pursuant to § 890.104.

(e) Under this subpart, an enrollment, change of enrollment, or reenrollment

made during Open Season takes effect on the January 1 of the next year.

(f) Under this subpart, OPM will effectuate the following health benefits actions: to enroll or change enrollment; to elect not to enroll; and to reenroll. The employing office makes determinations of eligibility under 5 U.S.C. chapter 89, pursuant to application of 39 U.S.C. 1005.

§ 890.1608 Disenrollment, removal, termination, cancellation, and suspension.

(a) *Enrollment in FEHB plan terminates prior to the initial PSHB contract year.* For individuals who are eligible to enroll under this subpart pursuant to § 890.1603(a), enrollment in an FEHB plan and coverage of the enrollee and covered family members under that FEHB plan will terminate at the end of the contract year preceding the initial contract year. Coverage under a FEHB plan will remain available for an eligible family member who is or becomes covered as a member of family of a FEHB plan enrollee who is not eligible for a PSHB plan pursuant to § 890.1603(a)(1) or (2). Individuals whose coverage is terminated under this paragraph (a) are not eligible for temporary continuation of coverage under subpart K of this part pursuant to § 890.1103(b).

(b) *Disenrollment and removal from enrollment: Postal Service Medicare covered annuitants and Medicare covered members of family not enrolled in Medicare Part B.* (1) Unless the individual qualifies for an exception under § 890.1604(c), a Postal Service Medicare covered annuitant may be disenrolled and a Medicare covered member of family may be removed from PSHB coverage if not enrolled in Medicare Part B either:

(i) By the end of their Medicare initial enrollment period or applicable Medicare special enrollment period; or,

(ii) Any time after January 1, 2025, that the PSHB Carrier, the Postal Service, or OPM determines that the individual was required to be enrolled but has not enrolled in Medicare Part B.

(2) A Postal Service Medicare covered annuitant will not be disenrolled and a Medicare covered member of family will not be removed from PSHB coverage in a case where that individual was not informed of their obligation to enroll in Medicare Part B, or it would be against equity and good conscience to remove the individual. In such a case, that individual will be permitted to stay enrolled in or covered by PSHB if they enroll in Medicare during their next enrollment opportunity, such as the next Medicare general enrollment period.

(3) A Postal Service Medicare covered annuitant will not be disenrolled and a Medicare covered member of family will not be removed from PSHB coverage due to not being enrolled in Medicare Part B if such individual qualifies for one of the exceptions in § 890.1604(c).

(4) A Postal Service Medicare covered annuitant may not be disenrolled if they have suspended PSHB enrollment while enrolled in a Medicare-sponsored plan under section 1833, 1876, or 1851 of the Social Security Act as described in § 890.304(d)(2).

(5) Disenrollment of a Postal Service Medicare covered annuitant from a PSHB plan under this section shall be considered a termination with entitlement of the enrollee and PSHB covered family members to a 31-day temporary extension of coverage and the right of conversion under § 890.401.

(c) *Ineligibility under this subpart.* The PSHB Carrier, Postal Service, other applicable employing offices, or OPM, as appropriate, may take action to disenroll ineligible individuals from enrollment or remove covered members of family from an enrollment pursuant to § 890.308.

(d) *Removal due to fraud or misrepresentation.* Pursuant to § 890.308(e)(3) and (f)(3), fraud or intentional misrepresentation of the fact of non-enrollment in, or disenrollment from, Medicare Part B may be grounds for retroactive disenrollment and removal to the date of loss of eligibility.

(e) *Cancellation of PSHB in writing to the Postal Service due to lack of Medicare coverage.* As required by 5 U.S.C. 8903c(g)(3)(D), the Postal Service Medicare covered annuitant or a Medicare covered member of family may cancel coverage under this subpart in writing to the Postal Service because the individuals choose not to enroll in or to disenroll from Medicare Part B. In such a case, PSHB enrollment or coverage under this subpart will be cancelled as described in paragraphs (e)(1) through (4) of this section.

(1) The cancellation of a Postal Service Medicare covered annuitant's PSHB plan enrollment—

(i) Is effective as of the last day of the last pay period in which the Postal Service Medicare covered annuitant was enrolled in Medicare Part B, or the last day of the last pay period before the individual became a Postal Service Medicare covered annuitant; and

(ii) Cancels the PSHB plan coverage of any family members covered under a self plus one or self and family enrollment, subject to applicable provisions at § 890.1609.

(2) The cancellation of a Medicare covered member of family's PSHB plan coverage is effective the last day in which the Medicare covered family member was enrolled in Medicare Part B, or the last day before the individual became eligible for Medicare but did not enroll.

(3) When writing to notify the Postal Service that a Medicare covered member of family will not enroll in or will disenroll from Medicare Part B, the Postal Service Medicare covered annuitant may elect to decrease their PSHB plan enrollment type as described in § 890.306(e).

(4) Cancellation of PSHB enrollment or coverage under this paragraph (e) shall be treated as a termination and an enrollee or covered family member whose enrollment or coverage is canceled is entitled to a 31-day temporary extension of coverage and right of conversion in accordance with § 890.401.

(f) *Temporary extension of coverage and conversion.* A Postal Service employee, Postal Service annuitant, or their covered family member whose enrollment or coverage is terminated other than by cancellation of the enrollment or discontinuance of the plan, in whole or part, is entitled to a 31-day temporary extension of coverage and right of conversion in accordance with § 890.401.

§ 890.1609 Temporary extension of coverage, conversion, or temporary continuation of coverage.

(a) A 31-day temporary extension of coverage and right of conversion under subpart D of this part is available from the health benefits plan under 5 U.S.C. chapter 89 in which the enrollee or covered family member was most recently enrolled or covered.

(b) If an individual was enrolled in or covered by a PSHB plan until becoming eligible for temporary continuation of coverage under subpart K of this part, the individual may elect coverage under subpart K by a PSHB plan offered under this subpart.

§ 890.1610 Minimum standards for PSHB Program plans and Carriers.

(a) *Minimum standards for PSHB plans.* To qualify for approval by OPM, a health benefits plan under this subpart shall—

(1) Meet the minimum standards for health benefits plans at § 890.201, unless otherwise stated in this subpart;

(2) Provide prescription drug benefits pursuant to 5 U.S.C. 8903c(h)(2);

(3) Provide equivalent benefits and cost-sharing in the initial contract year to the carrier's FEHB plan, as applicable, pursuant to section 8903c(c)(2);

(4) Maintain separate reserves, including contingency reserves, with respect to enrollees in each PSHB plan as directed by OPM; and

(5) Begin coverage on January 1 of each year.

(b) *Minimum standards for PSHB Carriers.* The minimum standards for health benefits carriers under this subpart shall be those contained in 48 CFR 1609.70.

(c) *Approval of plans with 1,500 or more Postal enrollees.* To the greatest extent practicable, in the initial contract year, OPM shall approve a health benefits plan offered by a carrier under this subpart that has equivalent benefits and cost-sharing to the FEHB plan offered by that carrier in which the total enrollment of Postal Service employees and Postal Service annuitants was 1,500 or more in the 2023 contract year. OPM may exempt a comprehensive medical plan, as described in 5 U.S.C. 8903(4), from the requirement in this paragraph (c).

(d) *Withdrawal of plan approval.* Failure on the part of the PSHB Carrier's plan to meet the standards in this section is cause for OPM's withdrawal of approval of the plan in accordance with § 890.1611.

§ 890.1611 Withdrawal of approval of health benefits plan or carrier.

(a) OPM may withdraw approval of a health benefits plan or carrier under this subpart and may give notice of non-renewal of a contract pursuant to § 890.204 if the standards in § 890.1610 and 48 CFR 1609.70 are not met.

(b) Contracts to offer health benefits plans in the PSHB Program pursuant to 5 U.S.C. 8903c(c)(1)(A) are subject to nonrenewal in accordance with § 890.205.

§ 890.1612 Information sharing.

(a) OPM shall establish periodic agreements with the Social Security Administration regarding Postal Service annuitants and their eligible family members for purposes of:

(1) Determining whether Postal Service Medicare covered annuitants and Medicare covered members of family of those annuitants satisfy the Medicare enrollment requirements at § 890.1604; and

(2) Determining which Postal Service annuitants and family members of such annuitants may be eligible to enroll in Medicare Part B under section 1837(o) of the Social Security Act.

(b) OPM shall identify Postal Service annuitants and their eligible family members who may be covered Medicare individuals from OPM's stored enrollment data. OPM will provide identifying information about these annuitants and their eligible family members to the Social Security Administration via secure data transfer for the purposes as outlined in the periodic agreements.

(c) OPM shall establish periodic agreements with the Department of Health and Human Services, the United States Postal Service, the Department of Veterans Affairs, and other Federal agencies as needed to share data and information as is necessary to carry out 5 U.S.C. 8903c and this subpart.

(d) These agreements shall specify, at a minimum, the purpose and legal authorities that govern the elements of information or data to be shared, the process that will be used for sharing the information or data, the frequency of sharing the information and data, and the permitted uses and redisclosure of the information and data.

(e) The agreements established under paragraph (c) of this section shall, to the greatest extent practicable, ensure that data is shared for the following purposes:

(1) To determine which Postal Service employees or Postal Service annuitants may be eligible to enroll in a PSHB plan; and which family members may be covered;

(2) To determine which Postal Service Medicare covered annuitants and their Medicare covered members of family may be subject to the enrollment requirements described in § 890.1604; and

(3) To create a system for data sharing as needed for carrying out 5 U.S.C. 8903c and this subpart.

§ 890.1613 Contributions and withholdings.

(a) *In general.* The calculations for contributions and withholdings for coverage under this subpart will be made in the same manner as 5 U.S.C. 8906 and subpart E of this part.

(b) *Postal Service contribution.* The Government contribution with respect to the Postal Service for health benefits plans under this subpart shall be determined annually in accordance with § 890.501 commencing 2024 using the weighted average of rates offered by PSHB plans for the following year with respect to self only, self plus one, and self and family enrollments. For the initial contract year, the weighted average applicable for determining the Government contribution by the Postal Service will be determined using the calculation at 5 U.S.C. 8903c(i), except that OPM will use available data with respect to Postal Service enrollment for 2024, taking into account 2023 data.

(c) *Medicare late enrollment penalty.* Upon request by the Postal Service, and only until the Postal Service Retiree Health Benefits Fund is depleted, OPM will pay out of the Fund any late enrollment penalties required under section 1839(e)(1) of the Social Security Act for individuals who enrolled during the special enrollment period established under section 1837(o) of the Social Security Act (42 U.S.C. 1395p).

(d) *Calculations for the Postal Service Retiree Health Benefits Fund.* As directed by 5 U.S.C. 8909a OPM shall make annual computations with respect to the cost of claims attributable to Postal Service annuitants and their covered family members, and the United States Postal Service shall pay into the Fund annually according to those computations.

(e) *Clarification of statutory terms.* OPM has determined that ''future net claims costs'' in the calculation in 5 U.S.C. 8909a(e)(1) is equivalent to ''estimated net claims costs'' as defined in 5 U.S.C. 8909a(g).

§ 890.1614 Other administrative provisions.

(a) *Correction of errors.* Correction of errors under this subpart may be made according to § 890.103, except that retroactive corrections to an enrollment under this subpart may not apply retroactively beyond the initial contract year. OPM retains authority to order correction of errors under this subpart.

(b) *Carrier entitlement to pursue subrogation and reimbursement recoveries.* Carrier entitlement to pursue subrogation and reimbursement recoveries must follow the requirements of § 890.106.

(c) *Enrollment reconciliation.* (1) OPM and each PSHB Carrier must, at OPM's direction and in the manner requested by OPM, reconcile PSHB plan enrollment records, including with a list of the Postal Service Medicare covered annuitants and their Medicare covered members of family that satisfy the Medicare enrollment requirements at § 890.1604.

(2) Any Postal Service Medicare covered annuitant or a Medicare covered member of family of such annuitant that is found to be enrolled or covered under a PSHB plan without satisfying the Medicare enrollment requirements at § 890.1604 shall be disenrolled or removed pursuant to § 890.1608.

(d) *Information about PSHB Program enrollment requirements.* OPM shall provide timely information about PSHB Program enrollment requirements to the United States Postal Service to disseminate to Postal Service

employees, Postal Service annuitants, and their eligible family members. Any requests for more information should be directed, in writing, to the United States Postal Service.

(e) *All other provisions.* Other requirements of this part not referenced within this subpart shall be interpreted to apply to the PSHB Program consistent with definitions and deemed references, unless it conflicts with this subpart, as determined by the Director.

(f) *Conflicts.* In the event of a conflict between a provision of this subpart and a provision in this part, as determined by the Director, this subpart will supersede.

Title 48—Federal Acquisition Regulations System

CHAPTER 16—OFFICE OF PERSONNEL MANAGEMENT FEDERAL EMPLOYEES HEALTH BENEFITS ACQUISITION REGULATION

PART 1602—DEFINITIONS OF WORDS AND TERMS

■ 11. The authority citation for part 1602 is revised to read as follows:

Authority: 5 U.S.C. 8903c and 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

■ 12. Add sections 1602.170–17 through 1602.170–22 to read as follows:

Sec.

* * * * *

1602.170–17 Postal Service.
1602.170–18 Postal Service annuitant.
1602.170–19 Postal Service employee.
1602.170–20 PSHB Carrier.
1602.170–21 PSHB plan.
1602.170–22 PSHB Program.

* * * * *

1602.170–17 Postal Service.

Postal Service means the United States Postal Service.

1602.170–18 Postal Service annuitant.

Postal Service annuitant has the meaning set forth in 5 U.S.C. 8903c(a)(8).

1602.170–19 Postal Service employee.

Postal Service employee has the meaning set forth in 5 U.S.C. 8903c(a)(9).

1602.170–20 PSHB Carrier.

PSHB Carrier means a carrier that enters into a contract with OPM under 5 U.S.C. 8902 to offer a health benefits plan in the PSHB Program.

1602.170–21 PSHB plan.

PSHB plan means a health benefits plan offered under the PSHB Program.

1602.170–22 PSHB Program.

Postal Service Health Benefits (PSHB) Program means the Program established under 5 U.S.C. 8903c within the Federal Employees Health Benefits Program.

PART 1609—CONTRACTOR QUALIFICATIONS

■ 13. The authority citation for part 1609 is revised to read as follows:

Authority: 5 U.S.C. 8903c and 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

■ 14. Add section 1609.7002 to read as follows:

1609.7002 Minimum standards for Postal Service Health Benefits Carriers.

(a) The carrier of a PSHB plan shall meet the minimum standards as described in 1609.7001.

(b) To the greatest extent practicable, an FEHB Carrier (defined in 1602.170–1) that offers an FEHB plan (defined in 1602.170–9) in which the total enrollment includes 1,500 or more Postal Service employees or Postal Service annuitants in the contract year beginning January 2023 must offer a PSHB plan in the initial contract year. OPM may exempt a comprehensive medical plan, as described in 5 U.S.C. 8903(4), from the requirement in this paragraph (b).

[FR Doc. 2023–07080 Filed 4–4–23; 4:15 pm]

BILLING CODE 6325–63–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–R07–OAR–2022–0959; FRL–10493–02–R7]

Air Plan Approval: Iowa; Electronic Submittal of Air Quality Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the State Implementation Plan (SIP) and the Operating Permit Program for the State of Iowa. This final action will amend the SIP to require the electronic submittal of air emissions reporting, construction permit applications, and Title V permit applications, and make administrative updates. These revisions do not impact the stringency of the SIP or have an adverse effect on air quality. The EPA's proposed approval of this rule revision is being done in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on May 8, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2022–0959. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: Bethany Olson, Environmental Protection Agency, Region 7 Office, Air Permitting and Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7905; email address: *olson.bethany@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to EPA.

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I. What is being addressed in this document?
II. Have the requirements for approval of a SIP and the operating permit plan revisions been met?
III. What action is the EPA taking?
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. What is being addressed in this document?

The EPA is approving revisions to the Iowa SIP and the Operating Permits Program received on June 3, 2022. The revisions incorporate recent changes to Iowa Administrative Code. The following chapters are impacted:

- Chapter 20, ''Scope of Title—Definitions;''
- Chapter 21, ''Compliance;'' and
- Chapter 22, ''Controlling Pollution.''

The revisions require the electronic submittal of air emissions reporting, construction permit applications, and Title V permit applications, and make administrative updates. EPA finds that these revisions meet the requirements of the Clean Air Act, do not impact the stringency of the SIP, and do not adversely impact air quality. The full text of these changes can be found in the State's submission, which is included in the docket for this action.

II. Have the requirements for approval of a SIP and the operating permit plan revisions been met?

The State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from January 12, 2022, to February 14, 2022, and held a public hearing on February 14, 2022. Iowa received one comment in support of the rule during the comment period. Iowa did not revise the rule based on public comment prior to submitting to EPA, as noted in the State submission included in the docket for this action.

In addition, as explained above, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

III. What action is the EPA taking?

The EPA accepted public comment on the proposed rule from January 24, 2023, to February 23, 2023. During this period, EPA received two comments outside the scope of this action and is accordingly not addressing any adverse comments. Therefore, the EPA is finalizing its proposal to approve revisions to the Iowa SIP and the Operating Permits Program at IAC 567–20.2, 567–21.1, 567–22.1, 567–22.105(1), 567–22.105(2) and 567–22.128(4).

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Iowa rules 567–20.2, 567–21.1, 567–22.1, 567–22.105(1), 567–22.105(2) and 567–22.128(4) discussed in section I of this preamble and as set forth below in the amendments to 40 CFR part 52. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).
- This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 5, 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

40 CFR Part 52

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

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: March 30, 2023.

Meghan A. McCollister,

Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA amends 40 CFR parts 52 and 70 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart Q—Iowa

■ 2. In § 52.820, the table in paragraph (c) is amended by revising the entries ''567–20.2'', ''567–21.1'', and ''567–22.1'' to read as follows:

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

§ 52.820 Identification of plan.

* * * * *

(c) * *

EPA-APPROVED IOWA REGULATIONS

Iowa citation	Title	State effective date	EPA approval date	Explanation
Iowa Department of Natural Resources Environmental Protection Commission [567] Chapter 20—Scope of Title-Definitions				
*	*	*	*	*
567–20.2	Definitions	5/11/22	4/6/23, [insert **Federal Register** citation].	The definitions for ''anaerobic lagoon,'' ''odor,'' ''odorous substance,'' ''odorous substance source'' are not SIP approved.
*	*	*	*	*
Chapter 21—Compliance				
567–21.1	Compliance Schedule	5/11/22	4/6/23, [insert **Federal Register** citation].	
*	*	*	*	*
Chapter 22—Controlling Pollution				
567–22.1	Permits Required for New or Existing Stationary Sources.	5/11/22	4/6/23, [insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

PART 70—STATE OPERATING PERMIT PROGRAMS

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

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

■ 4. Appendix A to part 70 is amended by adding paragraph (y) under ''Iowa'' to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Iowa

* * * * *

(y) The Iowa Department of Natural Resources submitted for program approval revisions to rules 567–22.105(1), 567–22.105(2) and 567–22.128(4) on June 3, 2022. The state effective date is May 11, 2022. This revision is effective May 8, 2023.

* * * * *

[FR Doc. 2023–07055 Filed 4–5–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2020–0062; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BE55

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Pearl Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the pearl darter (*Percina aurora*) under the Endangered Species Act of 1973 (Act), as amended. In total, approximately 524 river miles (843 river kilometers) in Clarke, Covington, Forrest, George, Green, Lauderdale, Jackson, Jones, Newton, Perry, Simpson, Stone, and Wayne Counties, Mississippi, fall within the boundaries of the critical habitat designation. The effect of this regulation is to designate critical habitat for the pearl darter under the Act.

DATES: This rule is effective May 8, 2023.

ADDRESSES: This final rule is available on the internet at *https://www.regulations.gov* and on the Mississippi Ecological Services Field Office website at *https://fws.gov/office/mississippi-ecological-services.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *https://www.regulations.gov at* Docket No. FWS–R4–ES–2020–0062.

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–2020–0062 and on the Mississippi Ecological Services Field Office website at *https://fws.gov/office/mississippi-ecological-services.* Any additional tools or supporting information that we developed for this critical habitat designation will also be available on the Service's website set out above or at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: James Austin, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS 39213; telephone 601–321–1129. 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. To the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Designations of 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 designates a total of 524 river miles (843 river kilometers) of critical habitat for the pearl darter in the Pascagoula River and Pearl River basins in Mississippi. We listed the pearl darter as a threatened species under the Act on October 20, 2017 (82 FR 43885, September 20, 2017).

The basis for our action. 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.

Economic impacts. In accordance with section 4(d)(2) of the Act, we prepared an economic analysis of the impacts of designating critical habitat for the pearl darter. When we published the proposed rule to designate critical habitat, we announced, and solicited public comments on, the draft economic analysis (86 FR 36678, July 13, 2021).

Previous Federal Actions

Please refer to the final listing rule for the pearl darter, which published in the **Federal Register** on September 20, 2017 (82 FR 43885), for a detailed description of previous Federal actions. Subsequent to the final listing, we proposed to designate critical habitat for the pearl darter on July 13, 2021 (86 FR 36678).

Peer Review

In accordance with our peer review policy 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 actions under the Act, we solicited independent scientific review from four knowledgeable individuals with scientific expertise that included familiarity with the pearl darter or related species, the geographic region in which the species occurs, the species' biological needs, threats to the species, and conservation biology principles. We received responses from two peer reviewers on the proposed critical habitat rule.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding critical habitat for the pearl darter. The peer reviewers generally concurred with our methods and conclusions and provided additional information and suggestions for clarifying and improving the accuracy of the information in several sections of the preamble to the proposed rule. Peer reviewer comments are addressed below in Summary of Changes From the Proposed Rule and incorporated into this final rule as appropriate.

In addition, some of the peer reviewer comments also contained suggestions that were applicable to general recovery issues for the pearl darter, but not directly related to the critical habitat designation (*i.e.,* meaning these comments are outside the scope of the critical habitat rule). These general comments included topics such as the use of reintroductions and the number of areas used as reintroduction sites. While these comments may not be directly incorporated into the critical habitat rule, we have noted the suggestions and look forward to working with our partners on these topics during recovery planning for the pearl darter.

Summary of Comments and Recommendations

On July 13, 2021, we published in the **Federal Register** (86 FR 36678) a proposed rule to designate critical habitat for the pearl darter and to make available the associated draft economic analysis; the public comment period for that proposed rule was open for 60 days, ending September 13, 2021. We also contacted and invited appropriate Federal, State, and local agencies, scientific organizations, and other interested parties to comment on the proposed critical habitat designation and draft economic analysis during the comment period. Notices of the availability of these documents for review and inviting public comment were published by The Clarion Ledger on July 17, 2021. We did not receive any requests for a public hearing.

During the comment period, we received seven public comment letters on the proposed rule; a majority of the comments supported the designation, two comments opposed the designation in two separate areas, and most comments included suggestions on how we could refine or improve the designation. All substantive information provided to us during the comment period has been incorporated directly into this final rule or is addressed below.

Peer Reviewer Comments

(1) Comment: Both peer reviewers provided comments questioning why Unit 2 included only the Strong River and not any of the historical range within the mainstem Pearl River, as doing so would increase redundancy within the Pearl River drainage.

Our Response: We recognize the importance of redundancy within the Pearl River drainage. Based on the best available science, we determined that the Strong River is the only area within the Pearl River drainage that currently meets the criteria for unoccupied critical habitat (see *Areas Unoccupied at the Time of Listing* subsection below). This does not mean that areas within the mainstem Pearl River do not contain some or all of the physical or biological features essential to the conservation of the species, but rather that we do not have information that areas in the mainstem Pearl River meet the criteria for unoccupied critical habitat. The lower Strong River also represents the stream reach within the Pearl River drainage with the best potential for recovery of the species due to current conditions, suitability for reintroductions, and access for monitoring. Further evidence of the presence of physical or biological features within this reach of the Strong River is demonstrated by recent increases in other benthic fish species (*e.g.,* frecklebelly madtom (*Noturus munitus*), crystal darter (*Crystallaria asprella*)) that declined concurrent with the extirpation of the pearl darter (Piller

et al. 2004, pp. 1007–1011; Wagner et al. 2018, pp. 4–5).

As described in the proposed rule, this unit currently provides some of the physical or biological features essential to the conservation of the pearl darter, including a stable channel with bottom substrates of fine and coarse sand, silt, loose clay, coarse gravel, fine and coarse particulate organic matter, and woody debris; a natural hydrograph with flows to support the normal life stages of the pearl darter; and the species' prey sources. Successful conservation of the pearl darter will require the reintroduction of pearl darter within the species' historical range; the lower Strong River unoccupied unit advances this goal. Reestablishing a population in the Strong River will provide for increased redundancy within the historical range and increase the species' ecological representation. Lastly, this river reach also provides the potential for the pearl darter to expand its range into other historically occupied areas, including the mainstem Pearl River, which currently may be or may later become suitable, to ensure that the species has an adequate level of redundancy within the Pearl River drainage and guard against future catastrophic events.

Comments From States

Section 4(b)(5)(A)(ii) of the Act requires the Service to give actual notice of any designation of lands that are considered to be critical habitat to the appropriate agency of each State in which the species is believed to occur and invite each such agency to comment on the proposed designation.

(2) Comment: The Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) provided a comment letter in support of the designation of critical habitat and recommended an extension of proposed Unit 1 in the Chunky River. Specifically, the MDWFP provided a publication with survey data for pearl darter in the Chunky River (Ellwanger et al. 2021, entire) collected after the proposed rule was published, which included records of adult pearl darter upstream of the previously known records in the Chunky River. The MDWFP requested an upstream increase of the critical habitat designation within the Chunky River system of approximately 6.5 river miles (mi) (10.5 river kilometers (km)) to the uppermost Highway 80 crossing in Newton County, Mississippi (32.324 °N, 88.976 °W).

Our response: We incorporated this new information and minor extension of critical habitat into the rule and associated economic analysis based on the received information. At the time of listing in 2017, the pearl darter was known from 19 river mi (31 river km) within the Chunky River (82 FR 43885; September 20, 2017, p. 43888). The 2021 detection provided by MDWFP was a result of targeted sampling within suitable habitat of the Chunky River (Ellwanger et al. 2021, entire), where targeted sampling had not previously been completed. This detection resulted in an expansion of the known range of the species within the Chunky River to 28 river mi (45 river km) of occupied habitat. We consider this additional mileage of stream reach to be occupied at the time of listing because the newly discovered segment upstream has the physical or biological features essential to the conservation of the species and there are no impediments to connectivity between the new occurrence record and the areas occupied at the time of listing. Thus, the additional mileage was likely unknown to be occupied at the time of listing due to a lack of targeted surveys for the species rather than absence of the species from this segment. Although previous fish surveys had been completed in this segment, they were not targeting the pearl darter or its habitat and may not have detected the species, which is difficult to detect during surveys due to the species' small size and rarity. As such, surveys within a particular reach of an occupied stream are not always definitive of the species' absence, which lends support for considering the 6.5 river mi (10.5 river km) segment as occupied at the time of listing.

Public Comments

(3) Comment: One public commenter noted that it is not necessary for the Service to designate the Leaf River as critical habitat for the pearl darter as the existing stream management practices are adequate to protect the habitat used by the pearl darter and, based on data collected over the last 20 years, the Leaf River is a healthy habitat for fish and macroinvertebrates. They also note that the pearl darter has increased in abundance over the past 20 or more years in the Leaf River.

Our Response: As directed by the Act, we proposed as critical habitat those specific areas occupied by the species at the time of listing on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. Although the commenter suggested that abundance is increasing within the Leaf River and existing stream management practices are adequate to protect the habitat, the designation of critical habitat within the Leaf River is appropriate given that the segment was occupied at the time of listing and meets the definition of critical habitat as it has all of the physical or biological features essential to the conservation of the species. These features include: unobstructed and stable river channels with connected sequences of runs and bends associated with pools and scour holes, required substrates, a natural flow regime, adequate water quality conditions, and presence of a prey base.

(4) Comment: One commenter noted that the Service should develop a habitat suitability index, to assess the habitat impacts on the pearl darter, before designation of any critical habitat.

Our Response: As discussed above in our response to comment 3, we proposed as critical habitat those specific areas at the time of listing on which are found those physical or biological features essential to the conservation of the species. Further, Section 4(b)(2) of the Act states that the Secretary must make the designation based on the best scientific data available. We have used the best available information to determine areas that contain the physical or biological features essential to the conservation of the species, which are reflected in our proposed rule and this final designation.

We appreciate the suggestion to develop a habitat suitability index for the pearl darter. Subsequent to our proposed designation of critical habitat, we developed a habitat suitability index following standard modeling approaches (Elith et al. 2006, entire; Cutler et al. 2007, entire) using the best available science to inform the recovery efforts. This analysis identified areas throughout the Pascagoula River drainage that are considered suitable habitat and are aligned with our critical habitat designation (Service 2020, unpublished data).

(5) Comment: One commenter offered information about forestry best management practices and the conservation benefits they provide to aquatic species on private, working forests and requested that the Service include several references supporting these benefits.

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. 2018, entire). We also recognize that 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) to an extent that these operations do not impair the species' conservation. We have included some of these references here in our response. In addition, in our proposed rule, we included the use of BMPs for forestry activities as an example of special management actions that would minimize or ameliorate threats to water quality.

(6) Comment: One commenter stated the designation of critical habitat in Unit 2 is not based on the best scientific data available, particularly that the water quality in Unit 2 does not meet the current State of Mississippi criteria, and that there is not scientific support for the statement that there is a high potential for successful reintroduction into the Pearl River drainage.

Our Response: We have identified that some of the physical or biological features essential to the conservation of the species can be found within Unit 2 in the Pearl River drainage (see *Summary of Essential Physical or Biological Features,* below). We have revised our description of the physical or biological features present in Unit 2 to reflect that the water quality physical or biological feature currently is not met during all portions of the year. However, Unit 2 in the Strong River provides some of the physical or biological features essential to the conservation of the pearl darter, including a stable channel with bottom substrates of sand, silt, loose clay and gravel, bedrock, fine and coarse particles of organic matter, woody debris, and a natural hydrograph with flows to support the normal life stages of the pearl darter and the species' prey sources. In addition, channel integrity is controlled and protected by natural bedrock outcrops, and improvement in water quality is indicated by the resurgence of other benthic fish species (*e.g.,* frecklebelly madtom and crystal darter) that historically co-occurred with the pearl darter and experienced declines when the pearl darter disappeared from the drainage (Piller et al. 2004, pp. 1007–1011; Tipton et al. 2004, pp. 57–60; Wagner et al. 2018, entire). We also acknowledge observations from a biologist that has worked in the Strong River since the 1970s (Hartfield 2021, pers. comm.) and a local landowner (Gillespie 2021, pers. comm.). Both have noted improvements in water quality due to a reduction in pollutants from chicken farming and other sources since the 1970s, presumably due to enactment and enforcement of the Clean Water Act of 1972, which has greatly improved water quality monitoring.

The assessment that this species has high potential for successful reintroduction is based on the fact that the species has been successfully propagated in captivity (Campbell and Schwarz 2019, entire) and suitable habitats are still found at the type locality on the Strong River (Wagner 2022, pers. comm.). Suttkus et al. (1994, p. 19) note habitat for the pearl darter in the Strong River, which is consistent with habitat descriptions from recent surveys in the Pascagoula (Slack et al. 2005, pp. 9–11; Clark et al. 2018, pp. 104–105) and observations of the habitat currently found at the type locality within the Strong River (Wagner 2022, pers. comm.).

Moreover, recent and ongoing studies have filled many of the previously identified knowledge gaps for the species that will inform successful reintroduction planning. Habitat associations have been studied (Clark et al. 2018, p. 103). Completed genetic work is being used to inform propagation and serve as a reference for reintroduction (Schaefer et al. 2020, entire). We are currently working with the University of Southern Mississippi to study the life history of the species through an ongoing project. Data collected through this project have been used to help inform the Service on the timing of spawning for the species, which will help to better monitor existing populations and any newly introduced populations. Additionally, a preliminary study of the diet of pearl darter has found the species not to be a specialist as it was noted to consume larval mayflies, caddisflies, black flies, and ostracods (Service 2022, unpublished data). We recognize that additional studies and information will help improve the reintroduction planning for the species although recent and ongoing studies have addressed many of the knowledge gaps that previously existed.

(7) Comment: One commenter notes that the economic analysis fails to consider costs to projects related to mitigation measures, water quality issues, project modifications, and project relocations.

Our Response: 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 our incremental effects memorandum (IEM), we clarified the distinction between the recommendations that will 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 pearl darter's critical habitat. As discussed in section 3 of the screening analysis (Industrial Economics, Incorporated (IEc) 2020, pp. 9–19), the Service does not anticipate making any additional project modification recommendations to avoid adverse modification of pearl darter critical habitat beyond what we already recommend to avoid impacts to other listed species with similar habitat requirements, including the Gulf sturgeon (listed as Atlantic sturgeon (Gulf subspecies); *Acipenser oxyrinchus desotoi*), ringed map turtle (*Graptemys oculifera*), and yellow blotched map turtle (*Graptemys flavimaculata*). This statement is true for both Unit 1, which is occupied such that the species already would be considered for consultation since it is listed, and Unit 2, which is unoccupied. The screening analysis also highlights the project recommendations contained in the Standard Local Operations Procedures for Endangered Species (SLOPES) agreement for Mississippi between the Service and the U.S. Army Corps of Engineers. In making this determination in our economic analysis, the Service considered the potential for recommendations that include mitigation measures, are specific to water quality issues, or may result in project relocations.

(8) Comment: One commenter asserts that the economic analysis should consider the potential for losses in value among properties adjacent to the proposed river miles.

Our Response: Existing economics literature suggests that critical habitat may affect property values (List et al. 2006, entire; Auffhammer et al. 2020, entire). This literature references particular species and geographic contexts, and the transferability of the results to other species and regions is uncertain. As described in section 4 of the screening analysis (IEc 2020, pp. 19–20), this literature has not evaluated the effects of riverine critical habitat on adjacent property values. While perceptional effects on land values are possible, the likelihood and magnitude of such effects for this rule are uncertain. Although the screening analysis acknowledges this uncertainty, it does not conclude that these effects are likely, and we did not consider potential impacts to property values given the lack of support in the available literature (IEc 2020, p. 20). Lastly, the commenter did not provide information or literature on potential loss in property value that would lead us to change our evaluation in the screening analysis.

(9) Comment: One commenter suggests that the economic analysis

should consider the costs associated with unrealized future development and lost tax revenues associated with activities in Unit 2.

Our Response: As described in response to comment 7 above and in section 3 of the screening analysis (IEc 2020, pp. 9–19), the Service does not anticipate making project modification recommendations to avoid adverse modification of pearl darter critical habitat beyond what has already been recommended to avoid impacts to other listed species with similar habitat requirements, including the Gulf sturgeon and ringed map turtle. The costs associated with changes in development activity would be incurred regardless of whether critical habitat for the pearl darter is designated along the Strong River because of the presence of other listed species. Therefore, the critical habitat designation for the pearl darter is unlikely to affect future development or tax revenues in the region.

(10) Comment: One commenter noted that the Service incorrectly states in the discussion of administrative costs of section 7 consultations in the draft economic analysis that the critical habitat designation will not result in any additional consultations on the Strong River.

Our Response: As Unit 2 overlaps with the listed range of the Gulf sturgeon and ringed map turtle, all activities with a Federal nexus that may affect pearl darter critical habitat would in fact require consultation even absent the critical habitat designation for the pearl darter in order to consider potential effects on the Gulf sturgeon and ringed map turtle. It is also important to note that activities potentially affecting critical habitat can occur outside of the area designated as critical habitat. Activities occurring upstream of the area designated as critical habitat for the Gulf sturgeon, which would include Unit 2, that could negatively impact water quality and then Gulf sturgeon critical habitat would require consultation under section 7(a)(2) of the Act where there is a Federal nexus. For example, in 2019, the Service consulted on a bridge replacement project situated along the Strong River in Simpson County and specifically considered the Gulf sturgeon critical habitat as well as the ringed map turtle. Similarly, in 2006, the Service considered both the Gulf sturgeon critical habitat and ringed map turtle during a consultation regarding a new pipeline crossing within the Strong River drainage. The proposed Unit 2, therefore, does benefit from the baseline protections afforded to other species with similar habitat needs given the connectivity of the Strong River with existing critical habitats on the Pearl River.

Summary of Changes From the Proposed Rule

After consideration of the comments we received during the public comment period (refer to Summary of Comments and Recommendations, above) and new information published or obtained since the proposed rule was published, we made changes to the final critical habitat rule. Many small, non-substantive changes and corrections that do not affect the determination (*e.g.,* updating the Background section of the preamble in response to comments, minor clarifications) were made throughout the document. Below is a summary of changes made to the final rule.

Economic Analysis

(1) The draft economic analysis incorrectly displayed that the unoccupied habitat in proposed Unit 2 overlaps with the designated critical habitat for other species. Specifically, in Exhibit 1, Summary of Proposed Critical Habitat Units for the Pearl Darter, of the screening memo (IEc 2020, p. 6), incorrect information was displayed in the column Overlaps With Existing Critical Habitat For Other Aquatic or Riparian Listed Species under Unit 2. The ''Yes'' should have been a ''No'' as the proposed critical habitat does not overlap with critical habitat for other species. This error was corrected and is addressed in the updated memorandum from IEc (IEc 2021, p. 1).

(2) Updated the economic analysis to include consideration of the additional 6.5 river mi (10.5 river km) within Unit 1. Despite the increase in size of Unit 1, the total incremental costs are not expected to change relative to the screening analysis (IEc 2020, entire; IEc 2021, entire).

Preambles to the Rulemaking Documents

The following items describe changes made between statements in the preamble of the proposed rule and those in the preamble of this final rule.

(3) In *Criteria Used To Identify Critical Habitat,* based on feedback from a peer reviewer, we removed a statement that indicated the pearl darter's representation would increase from current levels by allowing for local environmental adaptation and increasing genetic representation. The Service had not provided adequate information to support that statement, and the species currently has low levels of genetic diversity within its occupied range.

(4) In *Application of the ''Adverse Modification'' Standard,* we included a statement that, during a consultation under section 7(a)(2) of the Act, the Services may find that activities likely to destroy or adversely modify critical habitat include activities that occur within critical habitat or affect the critical habitat.

(5) In *Habitats Representative of the Historical, Geographical, and Ecological Distributions of the Species,* we:

(a) Changed a statement that the pearl darter is definitively extirpated to it being considered extirpated within the Pearl River basin, based on information from peer reviewers. Given the species' cryptic nature, lack of targeted surveys within the Pearl River basin, and the fact that extirpation is a high bar to definitively prove, researchers do not consider the pearl darter to be definitively extirpated from this system despite a lack of detections over the past several decades.

(b) Added information from a habitat suitability model that was developed for recovery efforts (Service 2021, unpublished data), which confirmed that our proposed designation of critical habitat contains areas indicated as suitable for the species.

(c) Incorporated additional citations—provided through the public comment and peer review process—to support our discussion of physical and biological features, species needs, and species occurrence.

(d) Updated the calculation of the proportion of habitat lost from ''roughly half'' to 36 percent. The updated total better accounts for the proportion of occupied habitat lost with the extirpation of the species within the Pearl River basin.

(6) In *Space for Individual and Population Growth and for Normal Behavior,* we removed the description of the habitat for the prey of pearl darter and described only habitat as found in recent literature (Slack et al. 2005, pp. 9, 11).

(7) In *Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements* section and *Summary of Essential Physical or Biological Features,* we incorporated information from a recent preliminary diet study (Service, unpublished data) of specimens from the Chunky River and Chickasawhay River. This study confirmed that the pearl darter is a dietary generalist.

(8) In *Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring,* we incorporated information that indicates

that spawning has not been observed in the wild, but rather individuals in spawning condition have been collected.

(9) In *Areas Occupied at the Time of Listing,* we have incorporated information from two additional citations (Clark et al. 2018, entire; Ellwanger et al. 2021, entire) that add known distribution information for the species.

(10) In *Final Critical Habitat Designation,* we have revised our description of the physical or biological features present in Unit 2 to reflect our recognition that the physical or biological feature pertaining to water quality is not currently met during all portions of the year.

Rule Text

(11) In the rule portion of this document we have made the following changes:

(a) In the list of the physical or biological features required for the pearl darter, we adjusted the descriptions of the bottom substrates and prey base, based on information received during the comment period; and,

(b) In the designation of critical habitat for Unit 1, we expanded the designation in the Chunky River based on information submitted by the Mississippi Department of Wildlife, Fisheries, and Parks as described above in the response to comment 2.

I. Critical Habitat

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).

This critical habitat designation was proposed when the regulations defining ''habitat'' (85 FR 81411; December 16, 2020) and governing the 4(b)(2) exclusion process for the Service (85 FR 82376; December 18, 2020) were in place and in effect. However, those two regulations have been rescinded (87 FR 37757; June 24, 2022, and 87 FR 43433; July 21, 2022) and no longer apply to any designations of critical habitat. Therefore, for this final rule designating critical habitat for the pearl darter, we apply the regulations at 50 CFR 424.19 and the 2016 Joint Policy on 4(b)(2) exclusions (81 FR 7226; February 11, 2016).

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 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 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).

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 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 section 9 of the Act. 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 the 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 those planning efforts calls for a different outcome.

Prudency and Determinability

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. In our proposed critical habitat rule (86 FR 36678; July 13, 2021), we found that designating critical habitat is both prudent and determinable for the pearl darter. In this final rule, we reaffirm those determinations.

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.

Habitats Representative of the Historical, Geographical, and Ecological Distributions of the Species

The pearl darter is historically known from rivers and streams within the Pearl River and Pascagoula River drainages in Mississippi and Louisiana, and the species was described from the lower Strong River within the Pearl River drainage of Mississippi (Suttkus et al. 1994, pp. 15–20). The darter has been considered extirpated from the Pearl River drainage for several decades apparently due to system-wide channel and water quality degradation occurring in the late 1960s to early 1970s (Kuhajda 2009, pp. 17–18; Wagner et al. 2017, entire). With this presumed extirpation, 36 percent of the historical, geographical, and ecological habitats of the pearl darter are no longer occupied. Channel integrity and water quality within the Pearl River drainage have since improved due to the enactment of State and Federal laws and regulations addressing water pollution and in-channel sand and gravel mining. In the lower Strong River, channel integrity is controlled and protected by natural bedrock outcrops, and water quality has improved as indicated by the resurgence of other benthic fish species that historically co-occurred with the pearl darter (Piller et al. 2004, pp. 1007–1011; Tipton et al. 2004, pp. 57–60; Wagner et al. 2018, entire).

Within the Pascagoula River drainage, the pearl darter is known to occur within the Pascagoula, Chickasawhay, Leaf, Chunky, and Bouie Rivers and the Okatoma and Black Creeks (Suttkus et al. 1994, pp. 15–20; Wagner et al. 2017, pp. 3–10, 12; Clark et al. 2018, pp. 100–103; Schaefer et al. 2020, pp. 26–27, 43–44). This area was reaffirmed as suitable habitat throughout a contiguous distribution based on a habitat suitability model developed for the species (Service 2021, unpublished data).

The lower Strong River within the Pearl River drainage and the rivers and streams identified above within the Pascagoula River drainage are representative of the historical, geographical, and ecological distribution of the species.

Space for Individual and Population Growth and for Normal Behavior

The pearl darter is found in free-flowing, low-gradient streams and rivers with pools and scour holes associated with channel bends and runs (Slack et al. 2002, p. 10; Bart et al. 2001, p. 13). Presence of the darter is associated with bottom substrates including fine and coarse sand, silt, loose clay, coarse gravel, fine and coarse particulate organic matter, and woody debris (Slack et al. 2005, pp. 9, 11). Pearl darter occurrence within these habitats may be seasonal with spawning occurring in upstream reaches and growth and

recruitment in downstream reaches (Bart et al. 2001, pp. 13, 15). Therefore, a continuum of perennial, uninterrupted, and interconnected natural small stream-to-river channel habitat is required for downstream drift of larvae or movement of juveniles and upstream migration of spawning adults.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The pearl darter requires unimpeded and interconnected stretches of perennial and flowing streams and rivers with adequate water quality. Water temperatures at pearl darter collection sites have ranged from 8 to 30 degrees Celsius (°C) (46.4 to 86.0 degrees Fahrenheit (°F)) (Suttkus et al. 1994, pp. 17–19; Bart et al. 2001, p. 13, Slack et al. 2002, p. 10), with dissolved oxygen of 5.8 to 9.3 milligrams per liter (mg/1) (Suttkus et al. 1994, pp. 17–19; Bart et al. 2001, pp. 7, 13–14; Slack et al. 2002, p. 10). The species is apparently sensitive to warmer water temperatures and may seasonally require tributaries with canopy shading and/or cool spring flows as seasonal refugia from warmer, unshaded river channels (Bart et al. 2001, p. 14).

Preliminary analysis of diets of specimens from the Chunky River and Chickasawhay River show the species feeds on larval mayflies, larval caddisflies, larval black flies, ostracods (crustaceans), chironomids (midges), and gastropods (snails). Food availability is likely affected by adequate flow, channel stability, water quality, and local habitat conditions, which may vary throughout or between the rivers and streams occupied or historically occupied by the species. Pearl darter have been maintained in captivity for at least 2 years on a diet of bloodworms (Campbell and Schwarz 2019, entire).

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Pearl darter have been collected at sites with cool to warm water temperatures (8 to 30 °C (46.4 to 86.0 °F)), high dissolved oxygen (5.8 to 9.3 mg/l), slightly acidic to basic pH values (6.3 to 7.6), and low levels of pollution (Suttkus et al. 1994, pp. 17–19; Bart et al. 2001, pp. 7, 13–14; Slack et al. 2002, p. 10). Spawning has not been observed in the wild for pearl darter. However, adult pearl darter have been collected in spawning condition in the Strong River where they were associated with bedrock and broken rubble (Suttkus et al. 1994, p. 19) and in three probable spawning sites in the Pascagoula River system that were characterized by extensive outcrops of limestone or sandstone (Bart and Piller 1997, p. 8). Pearl darter in spawning condition in the Pascagoula River drainage have also been collected over firm gravel in relatively shallow, flowing water from April to early May (Bart et al. 2001, p. 13). Ideal conditions for spawning have been described as channel reaches with good canopy shading, an extensive buffer of mature forest, and good water quality (Bart et al. 2001, p. 15).

Adults collected in spawning condition in the Pearl and Strong Rivers (Mississippi) were documented during March through May (Suttkus et al. 1994, pp. 19–20), and young of year were collected in June (Suttkus et al. 1994, p. 19). Based on collection occurrence patterns, some researchers have postulated that adult pearl darter migrate upstream during the fall and winter to spawn in suitable upstream gravel reaches with elevated river discharge during the spring dispersing the larvae and juveniles into downstream reaches (Bart et al. 2001, p. 14; Ross et al. 2000, p. 11). Other studies have hypothesized that the species disperses locally from shallow spawning habitats into nearby deeper habitats where their presence is more difficult to detect (Slack et al. 2002, p. 18). The pattern of the disappearance of the pearl darter from all stream orders in the Pearl River drainage over a relatively short period of time suggests that some degree of seasonal interchange between tributary and river channel subpopulations may have been a factor in the species' presumed extirpation from that drainage. Therefore, until more is known relative to seasonal dispersal, connectivity between instream habitats should be considered essential for successful breeding and rearing of the pearl darter.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of pearl darter from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the proposed critical habitat (86 FR 36678; July 13, 2021) and final listing rule (82 FR 43885; September 20, 2017) for the pearl darter. We have determined that the following physical or biological features are essential to the conservation of the pearl darter:

(1) Unobstructed and stable stream and river channels with:

(a) Connected sequences of channel runs and bends associated with pools and scour holes; and

(b) Bottom substrates consisting of fine and coarse sand, silt, loose clay, coarse gravel, fine and coarse particulate organic matter, or woody debris.

(2) A natural flow regime necessary to maintain instream habitats and their connectivity.

(3) Water quality conditions, including cool to warm water temperatures (8 to 30 °C (46.4 to 86.0 °F)), high dissolved oxygen (5.8 to 9.3 mg/l), slightly acidic to basic pH (6.3 to 7.6), and low levels of pollutants and nutrients meeting the current State of Mississippi criteria as necessary to maintain natural physiological processes for normal behavior, growth, and viability of all life stages of the species.

(4) Presence of a prey base of small aquatic macroinvertebrates, including larval mayflies, larval caddisflies, larval black flies, ostracods (crustaceans), chironomids (midges), and gastropods (snails).

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 pearl darter faces threats from water quality degradation from point and non-point source pollution, discharges from municipalities, and geomorphological changes to its channel habitats (82 FR 43885, September 20, 2017, pp. 43888–43893). The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: (1) Actions that alter the minimum or existing flow regime, including impoundment, channelization, or water diversion; (2) actions that significantly alter water chemistry or temperature by the release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point or non-point source; and (3) actions that significantly alter channel morphology or geometry, including channelization, impoundment, road and bridge construction, or instream mining.

Examples of special management actions that would minimize or ameliorate threats to the pearl darter include: (a) Restoration and protection of riparian corridors; (b) implementation of best management practices to minimize erosion (such as State and industry best management practices for road construction, forest management,

or mining activities); (c) stream bank restoration projects; (d) private landowner programs to promote watershed and soil conservation (such as the U.S. Department of Agriculture's Farm Bill and the Service's Private Lands programs); (e) implementation of best management practices for storm water; and (f) upgrades to industrial and municipal treatment facilities to improve water quality in effluents.

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 designating critical habitat in areas within the geographical area occupied by the species at the time of listing. We also are designating specific areas outside the geographical area occupied by the species because we have determined that a designation limited to occupied areas would be inadequate—and therefore designation of unoccupied area is essential—to ensure the conservation of the species.

The current distribution of the pearl darter is reduced from its historical distribution, and we anticipate that recovery will require continued protection of the existing population and habitat, as well as establishing a population within its historical range (*i.e.,* unoccupied critical habitat), to ensure there are adequate numbers of pearl darter occurring in stable populations for the species' continued conservation. Furthermore, rangewide recovery considerations, such as maintaining existing genetic diversity and striving for representation of all major portions of the species' historical range, were considered in formulating the proposed critical habitat designation.

We are designating critical habitat in areas within the geographical area occupied by the species at the time of listing. We identified areas with current occurrence records that we deemed suitable habitat (see delineation steps, below) and that had one or more of the physical or biological features identified for the pearl darter that may require special management considerations or protection. We also are designating specific areas outside of the geographical area occupied by the species at the time of listing because we have determined that those areas are essential for the conservation of the species. For those unoccupied areas, we have determined that it is reasonably certain that the unoccupied areas will contribute to the conservation of the species and contain one or more of the physical or biological features that are essential to the conservation of the species.

Threats to pearl darter occurring in the Pascagoula River drainage are compounded by the species' naturally low numbers and short life span, but the species' conservation potential is primarily limited by its extirpation from the Pearl River drainage and, therefore, its lack of redundancy. The documented Pearl River drainage extirpation was rapid and system-wide, including all mainstem and tributary collection sites seemingly simultaneously. As such, we consider pearl darter occurring within the Pascagoula River and its tributaries as a single population. The loss of the species' redundancy with its extirpation from the Pearl River drainage has also diminished its genetic and ecological representation and, therefore, increased the species' vulnerability to catastrophic events and population changes. A successful reintroduction into the Pearl River drainage would restore the species' redundancy within its historical range. Thus, reintroducing the species into the Pearl River drainage would contribute to the resilience and conservation of the pearl darter.

Factors implicated in the Pearl River extirpation include geomorphic instability (*i.e.,* channel erosion and degradation), sedimentation, and point source pollution from municipalities and industries (*e.g.,* Bart and Suttkus 1995, p. 14; Tipton et al. 2004, pp. 59–60). One or all of these factors may have been responsible for the diminishment or loss of some or all of the physical or biological features essential to the conservation of the pearl darter within the drainage (*e.g.,* channel stability, substrate, water quality, prey base). We now find that these factors have been reduced to a degree that the pearl darter may be successfully reintroduced into the Pearl River.

For example, active channel erosion and degradation that may have been precipitated by the 1956 construction of the Pearl River navigation system in the lower basin and aggravated by the 1963 construction of the Ross Barnett Reservoir in the upper basin have diminished. Moreover, instream mining is now prohibited by the States of Mississippi and Louisiana, thus resulting in more stable channel habitats within the basin. In addition, point-source pollution from untreated municipal and industrial discharge into the Pearl River has been significantly reduced by enactment and enforcement of the Clean Water Act of 1972 (33 U.S.C. 1251 *et seq.*). The improvement of the physical or biological features within the Pearl River drainage is also demonstrated by recent observed increases in other benthic fish species (*e.g.,* crystal darter, frecklebelly madtom), which experienced declines concurrent with the extirpation of the pearl darter (Piller et al. 2004, pp. 1007–1011; Tipton et al. 2004, pp. 57–60; Wagner et al. 2018, p. 13). These improvements indicate that one or more of the physical or biological features essential to the conservation of the pearl darter are now present within the Pearl River drainage. Because the Pearl River drainage habitat contains the physical or biological features for the pearl darter and supports other benthic fish species with similar life processes, we conclude that the drainage contains the resources and conditions necessary to support the life processes for the pearl darter and is essential for the conservation of the species.

We completed the following steps to delineate critical habitat:

(1) Compiled all available current and historical occurrence data records for the pearl darter in both the Pascagoula and Pearl River drainages.

(2) Used confirmed presence from 1994–2021 as the foundation for identifying areas currently occupied in the Pascagoula River drainage.

(3) Evaluated habitat suitability of stream segments that contain the identified physical or biological features and that are currently occupied by the species and retained all occupied stream segments.

(4) Evaluated unoccupied segments of the Pearl River drainage for suitability of spawning and recruitment, darter reintroduction, and monitoring and management of a reintroduced population.

(5) Evaluated unoccupied segments of the Pearl River drainage for connectivity with reaches that were historically occupied and identified areas containing the physical or biological features essential to the conservation of the species that may require special management considerations or protection.

Sources of data for this critical habitat designation include the proposed and final listing rules (81 FR 64857, September 21, 2016; 82 FR 43885, September 20, 2017), fish collection databases provided by the MDWFP,

survey reports and observations, and peer-reviewed publications.

Areas Occupied at the Time of Listing

We used reports and collection data to map species site collections and occurrences between 1994 and 2021, to determine areas occupied at the time of listing. Based on the best available scientific data, we determined that all currently known occupied habitat for the pearl darter was also occupied by the species at the time of listing and that these areas contain all of the physical or biological features essential to the conservation of the species although they may require special management considerations or protection.

As stated above, we delineated units based on documented occurrences and the existing physical or biological features essential to the conservation of the species. Collection occurrence patterns suggest that adult pearl darter migrate upstream to spawn in suitable gravel or bedrock reaches with elevated spring river discharge dispersing larvae and juveniles into downstream reaches; an alternative hypothesis considers that the pearl darter moves from shallow, easily collected spawning habitats into deeper habitats where it is more difficult to detect the fish (see *Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring,* above). While both hypotheses are partially supported by data, we note that the disappearance of the species from the Pearl River drainage occurred fairly rapidly and simultaneously in all stream orders, suggesting some element of migration may be involved in the darter's life history. To allow for potential seasonal movement between stream reaches, we are designating one continuous unit of occupied critical habitat within the Pascagoula River drainage. This unit includes portions of the Chunky, Bouie, Leaf, Chickasawhay, and Pascagoula Rivers as well as reaches of Okatoma and Big Black Creeks as described below under Final Critical Habitat Designation.

Clark et al. (2018, entire) provides a thorough review of the distribution of the species from 1950 through 2016, throughout both the Pearl River and Pascagoula River drainages prior to the listing of the species in 2017. Since the 2017 listing of the species, there have been 86 site collections of pearl darter in the Pascagoula River drainage (Wagner et al. 2019, pp. 8–18; Schaefer et al. 2020, pp. 26–27, 43–44; Ellwanger et al. 2021, p. 5). One of these collections in 2018 extended the known range approximately 60 mi (97 km) in Black Creek, above its confluence with the occupied reach of Big Black Creek (Schaefer et al. 2020, pp. 26–27). An additional collection in 2021 extended the known historical range approximately 4.0 river mi (6.4 river km) upstream in the Chunky River, which is upstream of the second-most upstream State Highway 80 and Chunky River crossing (Ellwanger et al. 2021, p. 10). We consider this additional mileage of stream reach to be occupied at the time of listing because the reaches between the previously identified populations in Big Black Creek or Chunky River and the newly discovered populations upstream both have the physical or biological features essential to the conservation of the species and its potential seasonal migration. Further, there are no impediments to connectivity between the new occurrence records and the areas that were known to be occupied when the species was listed in 2017. The potential for seasonal migration, the species' small size and rarity, and the fact that surveys for the pearl darter are difficult and not always definitive of the species' absence within a particular reach of an occupied stream also support considering this area occupied at the time of listing.

In making these determinations, we recognize that collection sites for the pearl darter occur at areas generally accessible to fish biologists and that occupied habitats within a river reach may vary depending upon life stage, stream size, and season. Additionally, stream habitats are highly dependent upon upstream and downstream channel habitat conditions for their maintenance. Therefore, we considered the areas occupied at the time of listing to extend from an identifiable landmark (*e.g.,* bridge crossing, tributary confluence, etc.) nearest the uppermost records within second or third order streams through their confluence with third and fourth order streams downstream to an identifiable landmark near the lowermost areas of collection in the Pascagoula River (*i.e.,* forks of the East and West Pascagoula River). Within the current range of the pearl darter within the Pascagoula River drainage, some habitats may or may not be actively used at all times by individuals; however, these areas are necessary for maintaining population connectivity as well as other physical or biological features essential to the conservation of the species and, therefore, are considered the geographic area occupied at the time of listing for the pearl darter. This area (referred to below as *Unit 1: Pascagoula River Unit*) contains all of the physical or biological features essential to the conservation of the pearl darter but may require special management conditions or protections.

Areas Unoccupied at the Time of Listing

To consider areas not occupied by the species at the time of listing for designation, we must demonstrate that these areas are essential for the conservation of the pearl darter. The occupied critical habitat designation does not include geographic areas within the Pearl River drainage—the only other area in which the pearl darter historically occurred—as it is considered extirpated in that drainage. In addition, because the Pascagoula River drainage population is the only extant population, that population provides no redundancy for the species. Based upon the species' rapid and system-wide extirpation from the Pearl River drainage, a series of back-to-back stochastic events or a single catastrophic event could similarly significantly reduce resiliency or extirpate the Pascagoula River population. For these reasons, we determined that we cannot conserve the species by designating only occupied habitat as it includes only a single population in a single drainage. Thus, we determined that habitat in another historical drainage is needed for the long-term survival and recovery of the species. Therefore, because we determined that the one occupied area alone is not adequate for the conservation of the species, we have identified and are designating as critical habitat specific areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species. We used historical occurrence data and the physical or biological features described earlier to identify unoccupied habitat essential for the conservation of the pearl darter.

Based on our review, we determined that the lower Strong River, a major tributary of the Pearl River, has the potential for future reintroduction and reoccupation by the pearl darter provided that stressors are managed and mitigated. Reestablishing a population in the Strong River will restore the species' redundancy within the historical range and increase the species' ecological representation. The specific area of the lower Strong River encompasses the minimum area of the species' historical range within the Pearl River drainage while still providing ecological diversity so that the species can evolve and adapt over time. This river reach also provides the potential for the pearl darter to expand its range into other historically occupied areas that currently may be or may later become suitable to ensure that the

species has an adequate level of redundancy within the Pearl River drainage and guard against future catastrophic events. The lower Strong River also represents the stream reach within the historical range with the best potential for reestablishment of a population in the Pearl River due to current conditions, suitability for reintroductions, and access for monitoring.

Accordingly, we are designating one unoccupied unit in the lower Strong River within the Pearl River drainage. As described below in the individual unit descriptions (see description for *Unit 2: Strong River Unit* below), this unit contains some of the physical or biological features essential to the conservation of the species and is reasonably certain to contribute to the conservation of the species.

General Information on the Maps of the Critical Habitat Designation

The areas designated as critical habitat include only stream channels within the ordinary high-water line. There are no developed areas within the critical habitat boundaries except for transportation and pipeline crossings, which do not remove the suitability of these areas for the pearl darter. 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 pearl darter. 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 would affect the physical or biological features in the adjacent critical habitat.

We are designating as critical habitat areas 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 the species. We have determined that occupied areas are inadequate to ensure the conservation of the species. Therefore, we are designating additional areas as unoccupied critical habitat. We have determined that these units are habitat for the species and will both contribute to the conservation of the species and contain at least one physical or biological features essential to the conservation of the species (see description for *Unit 2: Strong River Unit* below for explanation).

The two units are designated based on one or more of the physical or biological features being present to support pearl darter's life-history processes. One unit contains all of the identified physical or biological features and supports multiple life-history processes. The other unit contains only some of the physical or biological features necessary to support the pearl darter's particular use of that habitat.

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–2020–0062, on our internet site *https://fws.gov/office/mississippi-ecological-services,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**).

Final Critical Habitat Designation

We are designating approximately 524 river mi (843 river km) in two units as critical habitat for pearl darter. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for pearl darter. The two areas designated as critical habitat are: (1) Pascagoula River Unit and (2) Strong River Unit. Table 1 shows the critical habitat units and the approximate area of each unit.

TABLE OF CRITICAL HABITAT UNITS FOR PEARL DARTER

[Unit length estimates include only stream channels within the ordinary high-water line]

Unit	Riparian land ownership					
	Occupancy	Federal mi (km)	State mi (km)	County mi (km)	Private mi (km)	Total mi (km)
1. Pascagoula River	Occupied	* 45 (72)	* 76 (122)		380 (611)	* 494 (794)
2. Strong River	Unoccupied			0.4 (0.6)	30 (48.4)	30 (49)
Total mi (km)		* 45 (72)	* 76 (122)	0.4 (0.6)	410 (659.4)	* 524 (843)

* 7 mi (11 km) of pearl darter critical habitat stream miles shared between State and Federal lands.
Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for pearl darter, below.

Unit 1: Pascagoula River Unit

Unit 1 consists of 494 river mi (794 river km) of occupied connected river and stream channels within the Pascagoula River drainage in Mississippi, including:

- 63 mi (102 km) of the Pascagoula River channel from its confluence with the West Pascagoula River in Jackson County, upstream to the confluence of the Leaf and Chickasawhay Rivers in George County;
- 80 mi (129 km) of Big Black Creek/Black Creek channel from its confluence with the Pascagoula River in Jackson County, upstream to U.S. Highway 49 Bridge in Forrest County;
- 160 mi (257 km) of Chickasawhay River channel from its confluence with the Leaf River just north of Enterprise, Clarke County, upstream to the confluence of Okatibbee Creek and Chunky River in Clarke County;
- 28 mi (45 km) of Chunky River channel from its confluence with Okatibbee Creek in Clarke County, upstream to the third (most upstream)

Highway 80 Crossing in Newton County;

- 119 mi (192 km) of Leaf River channel from its confluence with the Chickasawhay River in George County, upstream to the bridge crossing at U.S. Highway 84 in Covington County;
- 15 mi (24 km) of Bouie River channel from its confluence with the Leaf River, upstream to the confluence of Okatoma Creek in Forrest County; and
- 28 mi (45 km) of Okatoma Creek from its confluence with the Bouie River in Forrest County, upstream to the bridge crossing at U.S. Highway 84 in Covington County.

The riparian lands (channel borders) in this unit are generally privately owned agricultural or silvicultural lands with short reaches owned and managed by the U.S. Forest Service or the State (see table above). All channel segments in Unit 1 are occupied by the pearl darter, and the unit contains all the physical or biological features essential to the conservation of the species, including deep pools, runs, and bends and scour holes; mixtures of bottom substrates of fine and coarse sand, silt, loose clay, coarse gravel, fine and coarse particulate organic matter, and woody debris; a natural hydrograph with flows and water quality that currently support the normal life stages of the pearl darter; and the species' prey sources.

Special management considerations and protections that may be required to address threats within the unit include minimizing surface water withdrawals or other actions that alter stream flow; reducing excessive use of manures, fertilizers, and pesticides near stream channels; improving treatment of wastewater discharged from permitted facilities; and implementing practices that protect or restore riparian buffer areas along stream corridors.

Unit 2: Strong River Unit

Unit 2 consists of 30 river mi (49 river km) of unoccupied habitat in the Strong River channel from its confluence with the Pearl River, upstream to U.S. Highway 49, in Simpson County, Mississippi. The riparian lands in this unit are generally privately owned agricultural or silvicultural lands with a short channel reach (0.39 mi (0.63 km)) owned and operated by the Simpson County Park Commission (see table above). Unit 2 is not within the geographic range occupied by the pearl darter at the time of listing, but this area was historically known to provide spawning and recruitment habitat prior to the species' extirpation from the Pearl River drainage. This unit currently provides some of the physical or biological features essential to the conservation of the pearl darter, including a stable channel with bottom substrates of fine and coarse sand, silt, loose clay, coarse gravel, fine and coarse particulate organic matter, and woody debris; a natural hydrograph with flows to support the normal life stages of the pearl darter; and the species' prey sources. Further evidence of the presence of physical or biological features within this reach of the Strong River is demonstrated by recent increases in other benthic fish species (*e.g.,* frecklebelly madtom) that declined concurrent with the extirpation of the pearl darter (Piller et al. 2004, pp. 1007–1011; Wagner et al. 2018, pp. 4–5).

As described above, the best available information demonstrates that the pearl darter disappeared from the entire Pearl River and all known tributary segments virtually simultaneously. Therefore, it is possible that a series of back-to-back stochastic events or a single catastrophic event could significantly reduce or extirpate the surviving pearl darter population within the Pascagoula River drainage. Due to the species' lack of redundancy, its naturally small numbers within the Pascagoula River drainage, and its short life span, the pearl darter is more vulnerable to existing and future threats, including habitat degradation and loss, catastrophic weather events, and introduced species. This unit would serve to protect habitat needed to reestablish a wild population within the historical range in the Pearl River drainage and recover the species. Reestablishing a population of the pearl darter within Unit 2 also would increase the species' redundancy and restore ecological representation, better ensuring its survival if a stochastic event were to impact the Pascagoula River population. This unit is essential for the conservation of the species because it will provide habitat for range expansion in known historical habitat that is necessary to increase viability of the pearl darter by increasing its resiliency, redundancy, and representation.

The need for reintroduction of the pearl darter into the Pearl River drainage has been recognized and is being discussed by our conservation partners. The landowner of the type locality (location where the species was described) within the Strong River unit has been working with the Service and MDWFP to regularly monitor for the presence of the pearl darter and other benthic fish and expressed interest in reestablishing the species on the property. Methods and facilities for propagating the species have been developed, tested, and proven at a Service fish hatchery. Accordingly, we are reasonably certain this unit will contribute to the conservation of the pearl darter.

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: (a) if the amount or extent of taking specified in the incidental take statement is exceeded; (b) 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; (c) 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 (d) 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).

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:

(1) Actions that would block or disconnect stream and river channels. Such activities could include, but are not limited to, the construction of dams or weirs, channelization, and mining. These activities could result in destruction of habitat, block movements between seasonal habitats, fragment and isolate subpopulations within critical habitat units, and/or affect flows within or into critical habitat.

(2) Actions that would affect channel substrates and stability. Such activities include channelization, impoundment, mining, road and bridge construction, removal of riparian vegetation, and land clearing within or into critical habitat. These activities may lead to changes in channel substrates, erosion of the streambed and banks, and excessive sedimentation that could degrade pearl darter habitat.

(3) Actions that would reduce flow levels or alter flow regimes within or into critical habitat. These could include, but are not limited to, activities that block or lower surface flow or groundwater levels, including channelization, impoundment, groundwater pumping, and surface water withdrawal or diversion. Such activities can result in long-term changes in stream flows that affect habitat quality and quantity for the darter and its prey.

(4) Actions that would affect water chemistry or temperature or introduce pollutants and nutrients at levels above State of Mississippi criteria. Such activities include, but are not limited to, the release of chemical pollutants, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water quality conditions to levels that are beyond the tolerances of the pearl darter or its prey species.

(5) Actions that would result in the introduction, spread, or augmentation of nonnative aquatic species in occupied stream segments or in stream segments that are hydrologically connected to occupied stream segments, even if those segments are occasionally intermittent, or in the introduction of other species that compete with or prey on the pearl darter. Possible actions could include, but are not limited to, stocking of non-native fishes or other related actions. These activities also can introduce parasites or disease or affect the growth, reproduction, and survival of the pearl darter.

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 final 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.

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 (IEc 2020, entire; IEc 2021, entire). The analysis, dated July 13, 2020, was made available for public review from July 13, 2021, through September 13, 2021 (IEc 2020, entire). The economic analysis addressed probable economic impacts of critical habitat designation for the pearl darter. 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 the critical habitat designation for the pearl darter is summarized below and available in the screening analysis for the pearl darter (IEc 2020, entire; IEc 2021, entire), available at *https://www.regulations.gov.*

We received public comment on our draft economic analysis during the public comment period and updated the analysis based on public comments. The economic analysis now considers the addition of 6.5 river mi (10.5 river km) of critical habitat in the Chunky River. Because the initial assessment considered economic impacts across the entire Pascagoula River basin and the additional river segment falls within the boundary of this watershed, the updates made to the economic analysis did not change the overall conclusions of the analysis.

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 proposed designation of critical habitat for the pearl darter, first we identified in the IEM dated April 21, 2020, probable incremental economic impacts associated with the following categories of activities: (1) roadway and bridge construction and repair; (2) commercial or residential development; (3) dredging; (4) groundwater pumping; (5) instream dams and diversions; (6) storage, distribution, or discharge of chemical pollutants; (7) oil and gas; (8) utilities; (9) water quantity and supply; and (10) water quality. 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, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the pearl darter is present, Federal agencies already 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. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will 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 pearl darter's critical habitat. 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 pearl darter also would 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 critical habitat designation for the pearl darter totals approximately 524 mi (843 km) of river and stream channels in two units. Riparian lands bordering the critical habitat are under private (78 percent), county (0.1 percent), State (15 percent), and Federal (9 percent) ownership. A small portion (1.3 percent) has shared State and Federal ownership. Unit 1 is occupied by the pearl darter and represents 94 percent of the proposed critical habitat. Within this occupied unit, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the pearl darter. Therefore, only administrative costs are expected in actions affecting this unit. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would not be significant because they are predominantly administrative in nature.

Unit 2 is currently unoccupied by the species but is essential for the conservation of the species. This unit totals 30 mi (49 km) of river and stream channels and comprises 6 percent of the total proposed critical habitat designation. In this unoccupied area, any conservation efforts or associated probable impacts would be considered incremental effects attributed to the critical habitat designation. However, two threatened species, Gulf sturgeon and ringed map turtle currently occupy this unit. Conservation efforts to protect these species also would protect pearl darter critical habitat.

The economic analysis finds that the total annual incremental costs of critical habitat designation for the pearl darter are not anticipated to reach $100 million in any given year based on the anticipated annual number of consultations and associated administrative costs, which are not

expected to exceed $710,000 in any year.

In Unit 1, which constitutes 94 percent of the critical habitat area, the activities that may affect the critical habitat are already subject to section 7 consultation due to the presence of pearl darter. We determined that the project modification recommendations made to avoid jeopardy to the pearl darter also would result in the avoidance of adverse modification. Thus, for projects and activities occurring in Unit 1, no additional project modification recommendations are likely to result from this critical habitat rule and costs would be limited to additional administrative effort.

A relatively small fraction (6 percent) of the critical habitat designation is in Unit 2, which is not currently occupied by the species. In these areas, activities that may affect the critical habitat for the pearl darter are also already subject to section 7 consultation due to the presence of other listed species (Gulf sturgeon and ringed map turtle) with similar habitat requirements. Additionally, activities that may affect pearl darter critical habitat in Unit 2 generally implement project modification recommendations from a standardized set provided in the Mississippi Standard Local Operations Procedures for Endangered Species (SLOPES) agreement. Through this agreement that was entered into in June 2017, the U.S. Army Corps of Engineers (COE) and the Service have established routine procedures for jointly implementing section 7 requirements for all projects that require COE permits. The agreement requires the COE to consult species-specific SLOPES documents to determine if a project is expected to adversely affect the species or its habitat. As part of the agreement, species-specific avoidance and minimization measures have been established for COE projects. The measures described for the pearl darter are similar to the measures described for overlapping species. Because the COE addresses permitting for projects with water impacts, all projects with a Federal nexus in the pearl darter critical habitat are likely to follow the Mississippi SLOPES procedures and recommendations. Therefore, even absent critical habitat designation, these activities are likely to avoid adverse effects on the habitat.

As discussed above, we considered the economic impacts of the critical habitat designation, and the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the pearl darter based on economic impacts.

Exclusions Based on Impacts on National Security and Homeland Security

In preparing this rule, we have determined that there are no lands within the designated critical habitat for pearl darter 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 (SHAs), or candidate conservation agreements with assurances (CCAAs), 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 pearl darter, 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 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 the 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 final designation based on other relevant impacts.

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 proposed 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 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 July 13, 2021, proposed rule (86 FR 36678) 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. In our economic analysis, we did not find that this critical habitat designation will 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 finding:

(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 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 pearl darter 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 pearl darter 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 this critical habitat designation 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, the 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 designation 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 analysis 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 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 interests fall within the boundaries of the final critical habitat for the pearl darter, so no Tribal lands will be affected by the designation.

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 Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Mississippi Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, 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. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by revising the entry for ''Darter, pearl'' under Fishes to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
FISHES				
*	*	*	*	*
Darter, pearl	*Percina aurora*	Wherever found	T	82 FR 43885, 9/20/2017; 50 CFR 17.95(e).[CH]
*	*	*	*	*

■ 3. In § 17.95, amend paragraph (e) by adding an entry for ''Pearl Darter (*Percina aurora*)'' following the entry for ''Niangua Darter (*Etheostoma nianguae*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Pearl Darter (*Percina aurora*)

(1) Critical habitat units are depicted for Clark, Covington, Forrest, George, Greene, Jackson, Jones, Lauderdale, Newton, Perry, Simpson, Stone, and Wayne Counties, Mississippi, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of pearl darter consist of the following components:

(i) Unobstructed and stable stream and river channels with:

(A) Connected sequences of channel runs and bends associated with pools and scour holes; and

(B) Bottom substrates consisting of fine and coarse sand, silt, loose clay, coarse gravel, fine and coarse particulate organic matter, or woody debris.

(ii) A natural flow regime necessary to maintain instream habitats and their connectivity.

(iii) Water quality conditions, including cool to warm water temperatures (8 to 30 °C (46.4 to 86.0 °F)), high dissolved oxygen (5.8 to 9.3 mg/l), slightly acidic to basic pH (6.3 to 7.6), and low levels of pollutants and nutrients meeting the current State of Mississippi criteria, as necessary to maintain natural physiological processes for normal behavior, growth, and viability of all life stages of the species.

(iv) Presence of a prey base of small aquatic macroinvertebrates, including larval mayflies, larval caddisflies, larval black flies, ostracods (crustaceans), chironomids (midges), and gastropods (snails).

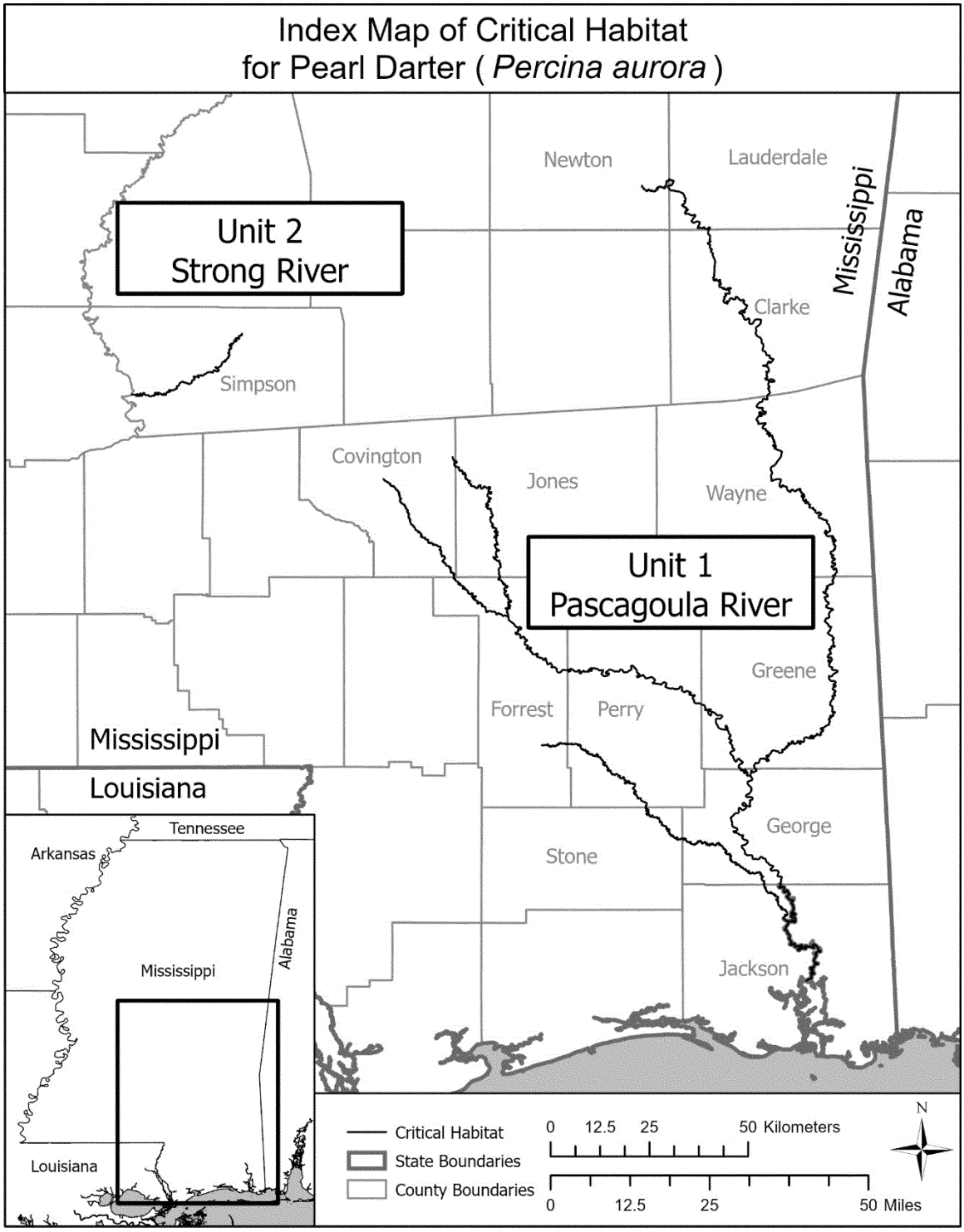
(3) Critical habitat includes only the stream channels within the ordinary high water line and does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on May 8, 2023.

(4) Data layers defining map units were created using U.S. Geological Survey's National Hydrography Dataset flowline data on a base map of State and County boundaries from the U.S. Department of Agriculture's Natural Resources Conservation Service. Critical habitat units were mapped using the Geographic Coordinate System North American 1983 coordinates. 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://fws.gov/office/mississippi-ecological-services,* at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2020–0062, 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 follows:

BILLING CODE 4333–15–P

Figure 1 to Pearl Darter (*Percina aurora*) paragraph (5)



(6) Unit 1: Pascagoula River drainage, Clarke, Covington, Forrest, George, Greene, Lauderdale, Jackson, Jones, Newton, Perry, Stone, and Wayne Counties, Mississippi.

(i) Unit 1 consists of 494 river miles (mi) (794 river kilometers (km)) of connected river and stream channels within the Pascagoula River drainage, including:

(A) The Pascagoula River from its confluence with the West Pascagoula River in Jackson County, upstream 63 mi (102 km) to the confluence of the Leaf and Chickasawhay Rivers in George County;

(B) The Big Black/Black Creek from its confluence with the Pascagoula River in Jackson County, upstream 80 mi (129 km) to U.S. Highway 49 Bridge in Forrest County;

(C) The Chickasawhay River from its confluence with the Leaf River just north of Enterprise, Clarke County, upstream 160 mi (257 km) to the confluence of Okatibbee Creek and Chunky River in Clarke County;

(D) The Chunky River from its confluence with Okatibbee Creek in Clarke County, upstream 28 mi (45 km) to the third (most upstream) Highway 80 Crossing in Newton County;

(E) The Leaf River from its confluence with the Chickasawhay River in George County, upstream 119 mi (192 km) to the bridge crossing at U.S. Highway 84 in Covington County;

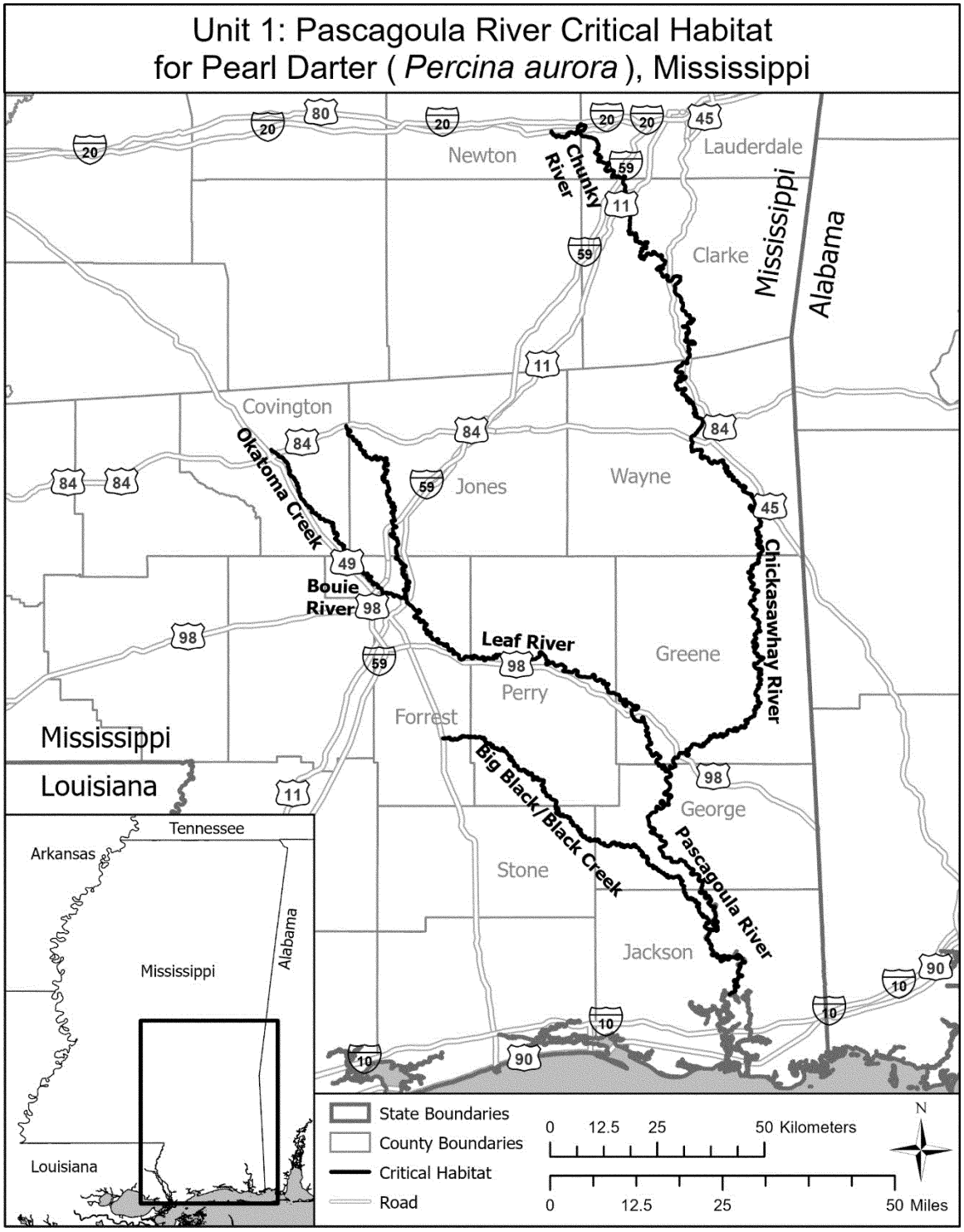
(F) The Bouie River from its confluence with the Leaf River, upstream 15 mi (24 km) to the confluence of Okatoma Creek, in Forrest County; and

(G) The Okatoma Creek from its confluence with the Bouie River in Forrest County, upstream 28 mi (45 km) to the bridge crossing at U.S. Highway 84 in Covington County.

(ii) The channel borders (and therefore the stream channel bottoms) in Unit 1 are generally privately owned agricultural or silvicultural lands with the exception of 76 mi (122 km) of the Pascagoula River channel border owned and managed by the Mississippi Department of Wildlife, Fisheries, and Parks, and 45 mi (72 km) owned by the U.S. Forest Service.

(iii) Map of Unit 1 follows:

Figure 2 to Pearl Darter (*Percina aurora*) paragraph (6)(iii)



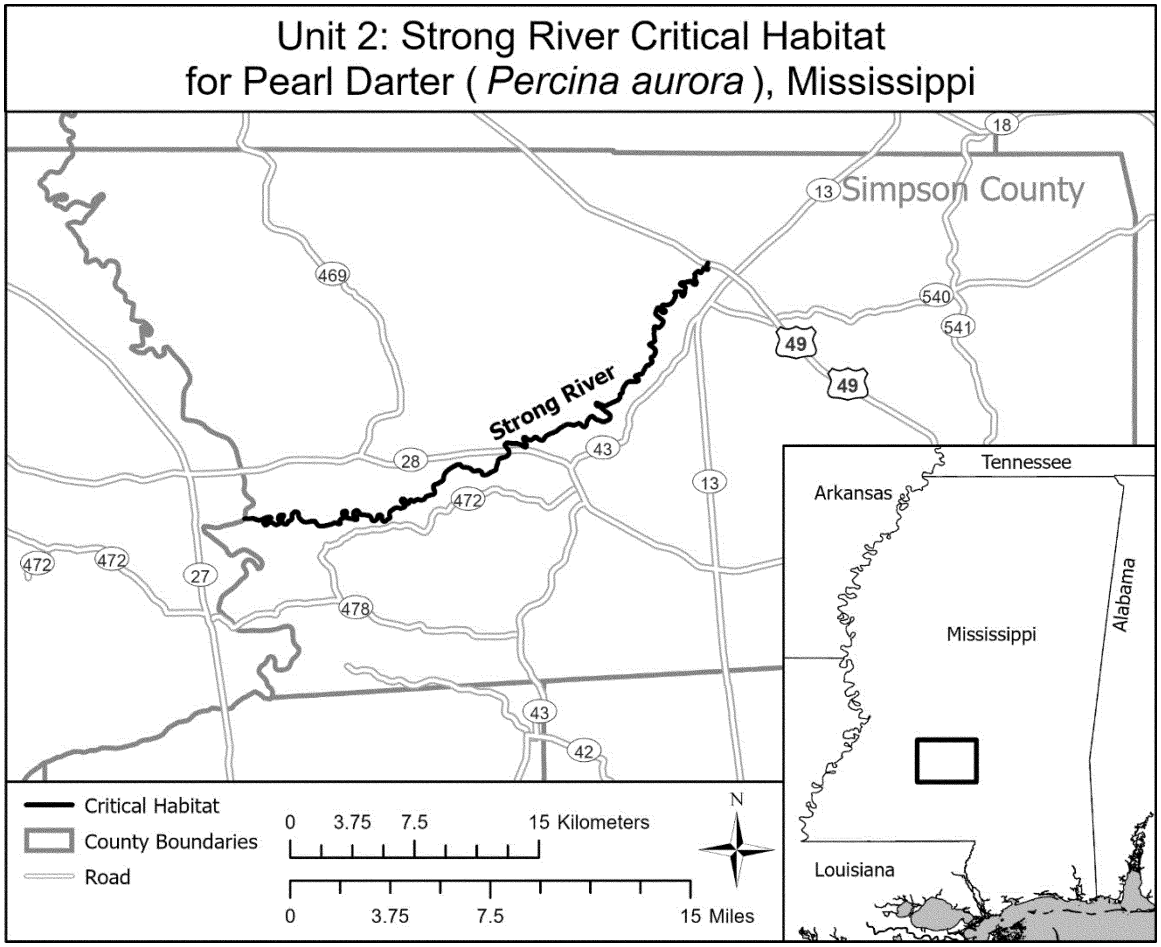
(7) Unit 2: Strong River, Simpson County, Mississippi.

(i) Unit 2 consists of approximately 30 mi (49 km) of the Strong River channel from its confluence with the Pearl River, upstream to U.S. Highway 49 in Simpson County.

(ii) The channel borders (and therefore the stream channel bottoms) in this unit are generally privately owned agricultural or silvicultural lands with the exception of a short channel reach (0.39 mi (0.63 km)) owned and managed by the Simpson County Park Commission.

(iii) Map of Unit 2 follows:

Figure 3 to Pearl Darter (*Percina aurora*) paragraph (7)(iii)



* * * * *

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–07081 Filed 4–5–23; 8:45 am]

BILLING CODE 4333–15–C

Proposed Rules

Federal Register
Vol. 88, No. 66
Thursday, April 6, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0432; Project Identifier AD–2022–01384–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all The Boeing Company Model 747–8 and 747–8F series airplanes. This proposed AD was prompted by reports of cracks in stringers, common to the end fittings, forward and aft of the pressure bulkhead at station (STA) 2360 at multiple stringer locations. This proposed AD would require repetitive inspections of stringer sidewalls and certain stringer assemblies, common to the end fittings, forward and aft of the pressure bulkhead at STA 2360 for any crack, and applicable on-condition actions. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 22, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0432; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com*.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2023–0432.

FOR FURTHER INFORMATION CONTACT: Stefanie Roesli, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th Street, Des Moines, WA 98198; phone and fax: 206–231–3964; email: *stefanie.n.roesli@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0432; Project Identifier AD–2022–01384–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Stefanie Roesli, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th Street, Des Moines, WA 98198; phone and fax: 206–231–3964; email: *stefanie.n.roesli@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received reports of cracks in the stringers, common to the end fittings, forward and aft of the pressure bulkhead at STA 2360. The cracks were found at stringer locations S–14L, S–15L, S–17L, S–18L, S–36L, S–38L, S–38R, S–44L, S–44R, S–46L, S–46R, S–48R, S–49R and S–50R on the forward side and at S–4R, S–5L, S–5R, S–6L, S–6R, S–7L, S–7R, S–8L, S–8R, S–20L, S–20R, S–21L, S–21R, S–22R, S–24L, S–24R, S–25L and S–38L on the aft side of the pressure bulkhead. In addition, Boeing found cracks in stringer S–44L on the forward side of the pressure bulkhead during routine inspection in production. An investigation found that during airplane assembly, un-shimmed or incorrectly shimmed gaps, which were larger than engineering requirements, caused excessive and sustained internal tensile stresses and resulted in stress corrosion cracking in the stringers. This condition, if not addressed, could result in an undetected crack in the stringers,

resulting in the inability of a structural element to sustain limit load which could adversely affect the structural integrity of the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type designs.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022. This service information specifies procedures for repetitive low frequency eddy current (LFEC) and high frequency eddy current (HFEC) inspections of the stringer sidewalls; repetitive detailed inspections of certain stringer assemblies; and applicable on-condition actions. On-condition actions include repair.

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described, except for any differences identified as exceptions in the regulatory text of this proposed AD. For information on the procedures and compliance times, see this service information at *regulations.gov* under Docket No. FAA–2023–0432.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 44 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of stringers.	Up to 110 work-hours × $85 per hour = $9,350 per inspection cycle.	$0	Up to $9,350 per inspection cycle.	Up to $411,400 per inspection cycle.

The FAA estimates the following costs to do any necessary repairs that would be required based on the results of the proposed inspection. The FAA has no way of determining the number of aircraft that might need this repair:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair of a cracked stringer	13 work-hours × $85 per hour = $1,105	$600	$1,705

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2023–0432; Project Identifier AD–2022–01384–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 22, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 747–8 and 747–8F series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code: 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by reports of cracks in the stringers, common to the end fittings, forward and aft of the pressure bulkhead at station (STA) 2360 at multiple stringer locations. The FAA is issuing this AD to address an undetected crack in the stringers. The unsafe condition, if not addressed, could result in the inability of a structural element to sustain limit load which could adversely affect the structural integrity of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 747–53A2910, dated September 21, 2022, which is referred to in Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022, use the phrase ''the original issue date of Requirements Bulletin 747–53A2910 RB,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022, specifies contacting Boeing for repair instructions: This AD requires doing the repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

(j) Related Information

For more information about this AD, contact Stefanie Roesli, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th Street, Des Moines, WA 98198; phone and fax: 206–231–3964; email: *stefanie.n.roesli@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 747–53A2910 RB, dated September 21, 2022.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on March 9, 2023.

Christina Underwood,

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

[FR Doc. 2023–07012 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0436; Project Identifier AD–2022–00395–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all The Boeing Company Model 777–200, 777–200LR, 777–300, 777–300ER, and 777F series airplanes. This proposed AD was prompted by a report of a ''FLAPS DRIVE'' caution message in flight due to the torque trip indicator of the No. 2 trailing edge (TE) flap transmission assembly being in the set position, which resulted in an air turn-back. This proposed AD would require an inspection or records review to determine the serial numbers of the TE flap transmission and gearbox assemblies, and applicable on-condition corrective actions. This proposed AD would also limit the installation of affected parts. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 22, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0436; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2023–0436.

FOR FURTHER INFORMATION CONTACT: Douglas Tsuji, Senior Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3548; email: *douglas.tsuji@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0436; Project Identifier AD–2022–00395–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Douglas Tsuji, Senior Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3548; email: *douglas.tsuji@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report of a ''FLAPS DRIVE'' caution message in flight, which resulted in an air turn-back. Subsequent investigation found that the torque trip indicator of the No. 2 trailing edge (TE) flap transmission assembly was in the set position, which had caused the ''FLAPS DRIVE'' caution message. The TE flap transmission assembly was removed from the airplane and sent for a teardown inspection to find the cause of the problem. The teardown inspection revealed a broken no-back brake ratchet pawl; the broken piece had lodged itself between the housing and a drive gear, which had resulted in a TE flap transmission assembly lock-up condition. A subsequent Boeing analysis of the broken pawl found that the spring guide pin bore did not meet design requirements. The depth of the pawl bore was more than the specified requirement, and its inner diameter was insufficient. Further, the drawing requirement for the pawl bore inner diameter resulted in an undersized spring guide pin bore, which caused an excessive interference fit between the bore and spring guide, which in turn caused the ratchet pawl assembly to break.

From in-service reports, there have been three known incidents of Model 777 TE flap transmission no-back brake ratchet pawls cracking in service from the same supplier since 2018. The same ratchet pawl part number is used on all eight TE flap transmissions. Historically, these pawls have been fabricated by three different sub-tier suppliers. The three broken pawls were manufactured by the same sub-tier supplier, which is no longer in business. The root cause of the unsafe condition has been determined to be the undersized bores in the suspect pawls causing an interference fit with the mating spring guide pin resulting in increased hoop stresses in the pawl. A review of two inspection reports revealed that the sub-tier supplier had misread the bore requirements.

A broken ratchet pawl assembly, in combination with an upstream torque tube disconnect, can cause failure of the no-back brake to hold flap surfaces in a commanded position—a condition referred to as flap ''blowback.'' In addition, a broken ratchet pawl assembly can allow debris in the transmission assembly, which can prevent the pawl from engaging the ratchet plate or cause other damage to the transmission assembly. Both conditions can cause failure of the no-back brake, in combination with an upstream torque tube disconnect, which could lead to uncommanded retraction of the TE flap resulting in asymmetric loss of lift that can affect continued safe flight and landing.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023. This service information specifies procedures for an inspection or records review for affected serial numbers of the TE flap transmission and gearbox assemblies at positions 1 through 8. For affected serial numbers, the service information specifies procedures for either (1) removing the TE flap transmission assembly and installing a new or serviceable assembly, or (2) removing the TE flap transmission and ratchet pawl assemblies, inspecting the ratchet pawl assembly for damage and missing material, and, depending on the findings, either installing a new ratchet pawl assembly and a changed TE flap transmission assembly or replacing the ratchet pawl assembly and TE flap transmission assembly with new or serviceable parts. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described. For information on the procedures and compliance times, see this service information at *regulations.gov* by searching for and locating Docket No. FAA–2023–0436.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 267 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection or records review	1 work-hour × $85 per hour = $85	$0	$85	$22,695

The FAA estimates the following costs to do any necessary replacement(s) that would be required based on the results of the inspection or records review. The FAA has no way of determining the number of aircraft that might need these replacements:

ESTIMATED COSTS FOR ON-CONDITION ACTIONS

Action	Labor cost	Parts cost	Cost per product
Replacement	6 work-hours × $85 per hour = $510	$5,090 per part	$5,600

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2023–0436; Project Identifier AD–2022–00395–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 22, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 777–200, 777–200LR, 777–300, 777–300ER, and 777F series airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a report of a ''FLAPS DRIVE'' caution message in flight due to the torque trip indicator of the No. 2 trailing edge (TE) flap transmission assembly being in the set position, which resulted in an air turn-back. The FAA is issuing this AD to address a broken ratchet pawl assembly in combination with an upstream torque tube disconnect, which can cause failure of the no-back brake to hold flap surfaces in a commanded position, and possible debris in the transmission assembly, which can prevent the pawl from engaging the ratchet plate or cause other damage to the transmission assembly. The unsafe condition, if not addressed, could result in asymmetric loss of the lift that can prevent continued safe flight and landing.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 777–27A0123, Revision 1, dated January 16, 2023, which is referred to in Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023.

(h) Exception to Service Information Specifications

Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023, use the phrase ''the original issue date of Requirements Bulletin 777–27A0123 RB,'' this AD requires using ''the effective date of this AD.''

(i) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Requirements Bulletin 777–27A0123 RB, dated October 11, 2021.

(j) Parts Installation Limitation

As of the effective date of this AD, no person may install, on any airplane, an affected TE flap transmission or gearbox assembly, as identified in Appendix J of Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023, unless the assembly has been inspected and all applicable corrective actions have been performed in accordance with Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

(l) Related Information

For more information about this AD, contact Douglas Tsuji, Senior Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3548; email: *douglas.tsuji@faa.gov.*

(m) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 777–27A0123 RB, Revision 1, dated January 16, 2023.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on March 9, 2023.

Christina Underwood,

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

[FR Doc. 2023–07011 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0659; Project Identifier AD–2022–01404–T]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace Corporation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Gulfstream Aerospace Corporation Model GVII–G600 airplanes. This AD was prompted by a failure that occurred during flight testing of a Gulfstream Model GVII–G500 airplane, when the aircraft was configuring for a steep approach test point, the crew received a flap failure message that was a result of a disconnect of the left hand flap due to structural failure. This AD requires revising the airworthiness limitations section (ALS) of the instructions for continued airworthiness (ICA) or inspection program for the airplane to establish a life limit for certain left-hand and right-hand inboard flap yoke fittings. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 22, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0659; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Jeffrey Johnson, Aerospace Engineer, Airframe Section, FAA, Atlanta ACO Branch, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5554; email: *9-ASO-ATLACO-ADs@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0659; Project Identifier AD–2022–01404–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each

page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Jeffrey Johnson, Aerospace Engineer, Airframe Section, FAA, Atlanta ACO Branch, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5554; email: *9-ASO-ATLACO-ADs@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report that a failure occurred during flight testing of a Gulfstream Model GVII–G500 airplane, which is structurally similar to the GVII–G600 airplane, when the aircraft was configuring for a steep approach test point, the crew received a flap failure message. After an investigation, it was discovered that the left-hand flap track ''B'' yoke became disconnected due to structural failure. Gulfstream's investigation revealed that certain left-hand and right-hand inboard flap yoke fittings have fatigue life design flaws, including insufficient shaft diameter, a small fillet radius detail on the shaft, and rough surface finish. These design flaws attributed to higher stress concentrations which could cause fracture of the flap actuator yoke at the junction of the fitting shaft and yoke clevis. Gulfstream revised the ALS for the applicable airplanes to establish a life limit for the affected inboard flap yoke fittings. The design flaws, if not addressed, could result in the flaps being jammed in the position when the fracture occurred. Additional failures in the flap actuator force limiter, or flap yoke actuator disconnect, could result in asymmetric flap positions leading to a loss of control of the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require revising the ALS of the existing ICA or inspection program for the airplane to establish a life limit of 4,000 flight cycles for the left-hand part number (P/N) 73P5755033M005 and right-hand P/N 73P5755033M006 inboard flap yoke fittings.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 41 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise ALS	1 work-hour × $85 per hour = $85	N/A	$85	$3,485

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Gulfstream Aerospace Corporation: Docket No. FAA–2023–0659; Project Identifier AD–2022–01404–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 22, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Gulfstream Aerospace Corporation Model GVII–G600 airplanes, certificated in any category, serial numbers 73001 through 73051 inclusive.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a failure that occurred during flight testing of a Gulfstream Model GVII–G500 airplane, when the aircraft was configuring for a steep approach test point, the crew received a flap failure message that was a result of a disconnect of the left hand flap due to structural failure. Gulfstream's investigation revealed the need to establish a life limit for the affected inboard flap yoke fittings. The FAA is issuing this AD to address design flaws that cause decreased fatigue life of the yoke fittings and attribute to higher stress concentrations at the junction of the fitting shaft and yoke clevis. The unsafe condition, if not addressed, could result in flaps being jammed in the position when the fracture occurred. Additional

failures in the flap actuator force limiter, or flap yoke actuator disconnect, could result in asymmetric flap positions leading to a loss of control of the airplane.

(f) Compliance

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

(g) Incorporation of ALS Revisions

Within 30 days after the effective date of this AD, revise the existing ALS of the ICA or inspection program for your airplane by establishing a life limit of 4,000 flight cycles for the left-hand part number (P/N) 73P5755033M005 and right-hand P/N 73P5755033M006 inboard flap yoke fittings.

Note 1 to paragraph (g): The life limit in paragraph (g) of this AD is contained in table 2 in Section 05–10–10 of Gulfstream GVII–G600 Aircraft Maintenance Manual, Revision 9, dated November 15, 2022.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(i) Related Information

(1) For more information about this AD, contact Jeffrey Johnson, Aerospace Engineer, Airframe Section, FAA, Atlanta ACO Branch, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5554; email: *9-ASO-ATLACO-ADs@faa.gov.*

(2) For Gulfstream service information identified in this AD that is not incorporated by reference, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402–2206; telephone 800–810–4853; email *pubs@gulfstream.com;* website *gulfstream.com/en/customer-support/.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(j) Material Incorporated by Reference

None.

Issued on March 30, 2023.

Christina Underwood,

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

[FR Doc. 2023–07010 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0816; Project Identifier AD–2022–00355–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) that applied to certain The Boeing Company Model 747–8 and –8F series airplanes. This action revises the NPRM by revising certain compliance times. The FAA is proposing this airworthiness directive (AD) to address the unsafe condition on these products. Since these actions would impose an additional burden over that in the NPRM, the FAA is requesting comments on this SNPRM.

DATES: The comment period for the NPRM published in the **Federal Register** on September 8, 2022 (87 FR 54917), is reopened.

The FAA must receive comments on this SNPRM by May 22, 2023.

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

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

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2022–0816; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this SNPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this SNPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at regulations.gov by searching for and locating Docket No. FAA–2022–0816.

FOR FURTHER INFORMATION CONTACT: Stefanie Roesli, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3964; email: *stefanie.n.roesli@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2022–0816; Project Identifier AD–2022–00355–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may again revise this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to regulations.gov, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this SNPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this SNPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket

of this SNPRM. Submissions containing CBI should be sent to Stefanie Roesli, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3964; email: *stefanie.n.roesli@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 747–8 and –8F series airplanes. The NPRM published in the **Federal Register** on September 8, 2022 (87 FR 54917). The NPRM was prompted by reports of cracking in stringers and splice fittings located at stringer splices at multiple body stations. In the NPRM, the FAA proposed to require an inspection of each free flange of the stringers at the stringer splice for the presence of radius fillers at fastener locations, an inspection for cracking of the stringers and stringer splice fittings at certain stringer splice locations, and applicable on-condition actions.

Actions Since the NPRM Was Issued

Since the FAA issued the NPRM, the FAA has received additional reports of cracked stringers, with a total of 595 cracked stringers reported since the issue was initially evaluated in 2020. In May 2022, cracked stringers were found in a location where the previously repaired stringer location had accumulated zero flight cycles (FC) since the repair. Due to the large number of crack findings and the unknown long-term reliability of repairs, combined with airplanes with low utilization rates that may not reach the initial compliance time in the NPRM (before 12,000 total flight cycles or within 38 months after the effective date of this AD, whichever occurs later) for an extended period of time, the FAA determined that it is necessary to add a calendar-based compliance time for certain actions. The FAA has therefore determined that a more appropriate compliance time for the initial inspections is before 12,000 total FC, or within 8 years after the date of issuance of the original certificate of airworthiness or the original export certificate of airworthiness, whichever occurs first; or within 38 months after the effective date of this AD; whichever occurs later. The FAA has also determined that a calendar-based compliance time should be added to the repeat inspection intervals too.

Comments

The FAA received comments from two commenters, including Air Line Pilots Association, International (ALPA) and Boeing, who supported the NPRM without change.

The FAA received additional comments from a commenter, United Parcel Service (UPS), who supported the NPRM and had additional comments. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request for Revisions in the Costs of Compliance

UPS requested that the Costs of Compliance section be revised to better represent the full economic impact to operators. UPS stated that there are 40 locations on a Model 747–8F airplane where multiple inspections would be performed, and any of those locations could need repair. UPS pointed out that the Estimated Costs table provides a cost estimate as if inspections were required only at one location. UPS suggested revising the Estimated Costs table to, at a minimum, multiply the cost by 40. UPS also suggested revising the On Condition Cost table to clarify that the on-condition cost could happen in multiple locations if cracks or radius fillers are found.

The FAA agrees the Costs of Compliance section could be revised to clarify and better represent the full cost. The Estimated Costs table has been revised to provide an estimate based on up to 40 inspection locations per airplane. The On-condition Costs table has been revised to clarify that those costs are per inspection location or replacement, as applicable.

FAA's Determination

The FAA is proposing this AD after determining the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the NPRM. As a result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022. This service information specifies procedures for an inspection of each free flange of the stringers at the stringer splice for the presence of radius fillers at fastener locations, an inspection for cracking of the stringers and stringer splice fittings at certain stringer splice locations, and applicable on-condition actions. On-condition actions include follow-on detailed inspections for cracking or the presence of radius fillers, removal or installation of radius fillers, and repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This SNPRM

This proposed AD would require accomplishing the actions specified in the service information already described, except for any differences identified as exceptions in the regulatory text. For information on the procedures and compliance times, see this service information at regulations.gov by searching for and locating Docket No. FAA–2022–0816.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 40 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection for radius filler	Up to 124 work-hours × $85 per hour = $10,540.	None	Up to $10,540	Up to $421,600.
Inspection for cracking	Up to 244 work-hours × $85 per hour = $20,740.	None	Up to $20,740	Up to $829,600.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on the results of the proposed inspection. The agency has no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspection for cracking or for radius fillers	1 work-hour × $85 per hour = $85	None	$85 per inspection location.
Removing radius fillers and inspection	7 work-hours × $85 per hour = $595	None	$595 per location.
Replacement of cracked splice channel	300 work-hours × $85 per hour = $25,500	$809	$26,309 per replacement.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2022–0816; Project Identifier AD–2022–00355–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 22, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–8 and –8F series airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by reports of cracking in stringers and splice fittings located at sringer splices at multiple body stations. The FAA is issuing this AD to address such cracking, which could result in the inability of a structural element to sustain limit load and could affect structural integrity of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 747–53A2907, dated March 3, 2022, which is referred to in Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022, use the phrase ''the original issue date of Requirements Bulletin 747–53A2907 RB,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022, specifies contacting Boeing for repair instructions: This AD requires doing the repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(3) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022, use the phrase ''Before 12,000 total flights cycles,'' this AD requires using ''Before 12,000 total flight cycles, or within 8 years after the date of issuance of the original certificate of airworthiness or the original export certificate of airworthiness, whichever occurs first.''

(4) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022, uses the phrase ''Within 9,600 flight cycles after the last detailed inspection,'' this AD requires using ''Within 9,600 flight cycles or 8 years after the last detailed inspection, whichever occurs first.''

(5) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022, uses the phrase ''Within 4,600 flight cycles after the last detailed inspection,'' this AD requires using ''Within 4,600 flight cycles or 8 years

after the last detailed inspection, whichever occurs first.''

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

(j) Related Information

For more information about this AD, contact Stefanie Roesli, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3964; email: *stefanie.n.roesli@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 747–53A2907 RB, dated March 3, 2022.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on March 17, 2023.

Christina Underwood,

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

[FR Doc. 2023–07009 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 910

RIN 3084–AB74

Non-Compete Clause Rule; Extension of Comment Period

AGENCY: Federal Trade Commission.

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

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is extending the deadline for filing comments on its notice of proposed rulemaking (''NPRM'') regarding the Non-Compete Clause Rule.

DATES: For the NPRM published January 19, 2023 (88 FR 3482), the comment deadline is extended from March 20, 2023, to April 19, 2023.

FOR FURTHER INFORMATION CONTACT: Karuna Patel (202–326–2510), *kpatel1@ftc.gov;* Shannon Lane (202–326–2299), *slane@ftc.gov;* or David O. Fisher, (202–341–8605), *dfisher@ftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Comment Period Extension

On January 5, 2023, the Commission announced and made public its notice of proposed rulemaking regarding the Non-Compete Rule, including its request for public comment on all aspects of the proposed rule. The NPRM was subsequently published in the **Federal Register**, with March 20, 2023, established as the deadline for the submission of comments. *See* 88 FR 3482 (January 19, 2023).

Interested parties have requested an extension of the public comment period to give them additional time to respond to the NPRM's request for comment, while others oppose such an extension and any potential delay. While the Commission believes that the current 60-day period—which is 74 days after public release of the notice of proposed rulemaking—is sufficient for meaningful comment and public participation, the Commission agrees to allow the public additional time to prepare and file comments. The Commission has therefore extended the comment period to April 19, 2023, to provide commenters a total of 104 days from the public release of the NPRM on January 5, 2023. This is a 30-day extension of the 60-day comment period from publication in the **Federal Register** on January 19, 2023. Additionally, the Commission requests public comment on a study, authored in part by a Commission economist, on the value that firms attach to enforceability of noncompete agreements. *See* Hiraiwa, Lipsitz, Starr, *Do firms value court enforceability of noncompete agreements? A revealed preference approach,* (February 20, 2023) *available at* SSRN: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4364674.*

II. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 19, 2023. Write ''Non-Compete Clause Rulemaking, Matter No. P201200'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the *https://www.regulations.gov* website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''Non-Compete Clause Rulemaking, Matter No. P201200'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex C), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or

confidential''—as provided by 15 U.S.C. 46(f) and 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *https://www.regulations.gov*—as legally required by 16 CFR 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c) and the General Counsel grants that request.

Visit the Commission's website, *www.ftc.gov,* to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 19, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

By direction of the Commission.

April J. Tabor,

Secretary.

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

Concurring Statement of Commissioner Christine S. Wilson

The Commission received requests to extend the period for public comments on the proposed Non-Compete Clause Rule by 60 days or more. The Commission also received requests that the comment period not be extended. Today, the Commission announces its decision to extend the public comment period by 30 days. Given that the proposed rule is a departure from hundreds of years of precedent and would prohibit conduct that 47 states allow, I would have supported extending the public comment by 60 days.

I continue to encourage all interested parties to comment on all issues and alternatives to the proposed rule that are identified in the Notice of Proposed Rulemaking.

[FR Doc. 2023–07036 Filed 4–5–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 91, 92, 93, 570, 574, 576, 903, and 983

[Docket No. FR–6250–N–02]

RIN 2529–AB05

Affirmatively Furthering Fair Housing; Extension of Comment Period

AGENCY: Office of the Secretary, Department of Housing and Urban Development (HUD).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On February 9, 2023, HUD published in the **Federal Register** a notice of proposed rulemaking entitled ''Affirmatively Furthering Fair Housing'', proposing to implement the obligation to affirmatively further the purposes and policies of the Fair Housing Act, which is title VIII of the Civil Rights Act of 1968, with respect to certain recipients of HUD funds. The proposed rule provided for a 60-day comment period, which would have ended April 10, 2023. HUD has determined that a 14-day extension of the comment period, until April 24, 2023, is appropriate. This extension will allow interested persons additional time to analyze the proposal and prepare their comments.

DATES: The comment period for the proposed rule published on February 9, 2023, at 88 FR 8516, is extended. Comments should be received on or before April 24, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments: Facsimile (FAX) comments are not acceptable.

Public Inspection of Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Tiffany Johnson, Director, Policy and Legislative Initiatives Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street SW, Room 5250, Washington, DC 20410–8000, telephone number 202–402–2881 (this is not a toll-free number). Individuals who are deaf or hard of hearing and individuals with speech impairments may access this number via TTY by calling the toll-free Federal Relay

Service during working hours at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On February 9, 2023, at 88 FR 8516, HUD published a notice of proposed rulemaking entitled ''Affirmatively Furthering Fair Housing'', proposing to implement the obligation to affirmatively further the purposes and policies of the Fair Housing Act with respect to certain recipients of HUD funds (the proposed rule). The Fair Housing Act not only prohibits discrimination, but also directs HUD to ensure that the agency and its program participants will proactively take meaningful actions to overcome patterns of segregation, promote fair housing choice, eliminate disparities in housing-related opportunities, and foster inclusive communities that are free from discrimination.

The proposed rule builds on the steps previously taken in HUD's 2015 Affirmatively Furthering Fair Housing (AFFH) final rule (''2015 AFFH Rule'') [1] to implement the AFFH obligation and ensure that Federal funding is used in a systematic way to further the policies and goals of the Fair Housing Act. HUD proposed to retain much of the 2015 AFFH Rule's core planning process, with certain improvements such as a more robust community engagement requirement, a streamlined required analysis, greater transparency, and an increased emphasis on goal setting and measuring progress. It also includes mechanisms to hold program participants accountable for achieving positive fair housing outcomes and complying with their obligation to affirmatively further fair housing, modeled after those processes under other Federal civil rights statutes that apply to recipients of Federal financial assistance.

While the proposed rule had a 60-day comment period, HUD has received feedback from multiple commenters requesting additional time to review and provide comments on this rule. Therefore, HUD is extending the deadline for comments for an additional 14 days.

Aaron Santa Anna,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2023–07369 Filed 4–4–23; 4:15 pm]

BILLING CODE 4210–67–P

[1] 80 FR 42271.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R4–OAR–2022–0783; FRL–10523–01–R4]

Air Plan Partial Disapproval and Partial Approval; Tennessee; Revisions to Startup, Shutdown, and Malfunction Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove a State Implementation Plan (SIP) revision submitted by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC), on November 19, 2016, as supplemented on January 20, 2023, in response to a finding of substantial inadequacy and SIP call published on June 12, 2015, regarding provisions in the Tennessee SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. Tennessee's January 20, 2023, supplemental SIP revision includes some additional changes related to the 2015 SIP call, plus other changes unrelated to the SIP call, in the affected chapter of Tennessee's regulations. EPA is proposing to approve portions of the November 19, 2016, SIP revision, as supplemented by the January 20, 2023, SIP revision, that the Agency has preliminarily determined correct certain deficiencies identified in the June 12, 2015, SIP SSM call. In addition, EPA is proposing to disapprove portions of the SIP revision that the Agency has preliminarily determined fail to correct other deficiencies identified in the 2015 SIP call.

DATES: Comments must be received on or before May 8, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R4–OAR–2022–0783 at *www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov.* EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information, the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Estelle Bae, Air Permits Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Ms. Bae can be reached by telephone at (404) 562–9143 or via electronic mail at *bae.estelle@epa.gov.*

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I. Background

A. EPA's 2015 SSM SIP Action

On February 22, 2013, EPA issued a **Federal Register** notice of proposed rulemaking (NPRM) outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the Clean Air Act (CAA or Act) with regard

to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed in the 2013 NPRM in light of a United States Court of Appeals for the District of Columbia Circuit decision in which the Court found that the CAA precludes authority of EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate. *See* 79 FR 55920 (September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' hereinafter referred to as the ''2015 SSM SIP Action.'' *See* 80 FR 33839 (June 12, 2015). The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states, including Tennessee, were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[2] Importantly, the 2020 Memorandum stated that it ''did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.'' Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Tennessee in 2015. The 2020 Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy set forth in the 2015 SSM SIP Action (2021 Memorandum).[3] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA.[4] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum regarding EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including Tennessee's November 19, 2016, SIP submittal, as supplemented on January 20, 2023, provided in response to the 2015 SIP call.

B. Tennessee's SIP Provisions Related to Excess Emissions

With regard to the Tennessee SIP, in the 2015 SSM SIP Action, EPA determined that three provisions, Tenn. Comp. R. & Regs. (hereinafter, Rule) 1200–3–5–.02(1), 1200–03–20–.07(1), and 1200–03–20–.07(3), were substantially inadequate to satisfy CAA requirements and issued a SIP call for these provisions. *See* 80 FR 33839, 33965 (June 12, 2015). Rule 1200–3–5–.02, ''Exceptions,'' paragraph (1), provides that ''due allowance may be made for visible emissions in excess of that permitted in this chapter which are necessary or unavoidable due to routine startup and shutdown conditions.'' Rule 1200–03–20–.07, ''Report Required Upon the Issuance of Notice of Violation,'' paragraph (1), provides the Technical Director with the discretion, upon review of a source's excess emissions report, to determine if an event is a violation and whether to pursue enforcement action. Paragraph (3) of Rule 1200–03–20–.07 provides reporting requirements in the event of excess emissions and specifies that failure to submit the required report precludes the admissibility of the report data as an excuse for causing excess emissions during malfunctions, startups, and shutdowns. The rationale underlying EPA's determination that these provisions are substantially inadequate to meet CAA requirements and, therefore, require revisions to remedy the provisions is detailed in the 2015 SSM SIP Action and the accompanying proposals.

On November 19, 2016, Tennessee submitted a SIP revision in response to the SIP call issued in the 2015 SSM SIP Action and requested approval of changes to provisions in Chapter 1200–3–5 (''Visible Emissions Regulations'') and Chapter 1200–3–20 (''Limits On Emissions Due To Malfunctions, Startups, And Shutdowns''). With regard to the Chapter 1200–3–20 provisions, the State requested approval of revisions to Rules 1200–3–20–.06(2), 1200–3–20–.06(4), and 1200–3–20–.06(6) (as numbered in the current state code of regulations) to address deficiencies that EPA identified in the 2015 SSM Action in SIP-approved Rules 1200–03–20–.07(1) and 1200–03–20–.07(3).

On January 20, 2023, Tennessee supplemented its 2016 SIP submission to request removal of Rule 1200–3–20–.06, ''Scheduled Maintenance,'' resulting in the renumbering of Rules 1200–3–20–.07 through .10 to 1200–3–20–.06 through .09 (*i.e.,* .07 is renumbered to .06, and so on), and other changes to Chapter 1200–3–20.[5]

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

[2] October 9, 2020, memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator.

[3] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

[4] *See* 80 FR at 33985.

[5] Tennessee requested that Rule 1200–3–20–.03 and 1200–3–20–.06(5) not be incorporated into the Tennessee SIP. See the document titled ''Transmittal_Letter_SSM SIP Call Chapter 20 Supplemental.doc'' in the docket for this proposed action.

II. Analysis of SIP Submissions

A. Tennessee Chapter 1200–3–5, ''Visible Emission Regulations''

In the 2015 SSM SIP Action, EPA determined that Rule 1200–3–5–.02(1) is substantially inadequate to meet the fundamental requirements of the CAA, as it operates as an impermissible discretionary exemption because it allows a state official to excuse excess visible emissions after giving ''due allowance'' to the fact that they were emitted during startup or shutdown events.[6]

In the November 19, 2016, submission, Tennessee's only revision to Rule 1200–3–5–.02(1) is the addition of a sentence that states, ''However, no visible emission in excess of that permitted in this chapter shall be allowed which can be proved to cause or contribute to any violations of the Ambient Air Quality Standards contained in Chapter 1200–03–03 and the National Ambient Air Quality Standards.'' In its November 19, 2016, SIP revision, TDEC asserts that ''[e]nforcement of the NAAQS fulfills the responsibility of the State of Tennessee to protect and maintain air quality standards.'' Although one possible basis for a SIP call is a finding that a SIP is substantially inadequate to attain or maintain a NAAQS, CAA section 110(k)(5) also authorizes a SIP call when a SIP is substantially inadequate to comply with any other CAA requirement(s), such as the requirement that emission limitations must apply continuously. Rule 1200–3–5–.02(1) was SIP-called because EPA found in the 2015 SSM Action that it was inconsistent with that requirement—specifically, with sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).[7] Thus, since the lone revision to Rule 1200–3–5–.02(1) is the new language prohibiting excess visible emissions which can be proved to cause or contribute to any violations of ambient air quality standards, the specific deficiencies EPA identified in the 2015 SSM SIP Action with respect to Rule 1200–3–5–02(1) have not been corrected.

The revised version of Rule 1200–3–5–.02(1) still operates as an impermissible discretionary exemption from compliance with applicable emission limits in the SIP because it continues to allow a state official to give ''due allowance'' for excess emissions that occur during startup and shutdown events. Though the term ''due allowance'' is not defined in Tennessee's rules, the reference in the next sentence to circumstances under which no excess visible emission ''shall be allowed'' suggests that giving ''due allowance'' to startup and shutdown conditions means that Tennessee is authorized to allow excess emissions during such events.

Pursuant to EPA's SSM policy, emission limitations must apply at all times. Rule 1200–3–5–.02(1) effectively creates an exemption from the SIP-approved opacity requirements of Chapter 1200–3–5 for periods of startup and shutdown at the discretion of the Technical Secretary. As explained in the 2015 SSM SIP Action and corresponding proposal, this provision is impermissible not just because it creates unbounded discretion for a state official to decide whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations but also because it purports to authorize the state official to create exemptions from applicable emission limitations when such exemptions are not permissible in the first instance. *See* 78 FR 12460, 12513 (February 22, 2013). EPA approval of such broad and unbounded discretion to alter the existing legal requirements of the SIP would be tantamount to allowing a revision of the SIP without meeting the applicable procedural and substantive requirements for such a SIP revision. *See* 80 FR 33839, 33928 (June 12, 2015). This type of director's discretion provision undermines the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. For these reasons, EPA is proposing to disapprove the changes to Rule 1200–3–5–.02(1) transmitted in Tennessee's November 19, 2016, SIP revision, as they are not consistent with CAA requirements, specifically CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and therefore do not adequately address the specific deficiencies EPA identified in the 2015 SSM SIP Action with respect to the Tennessee SIP.

B. Tennessee Chapter 1200–3–20, ''Limits on Emissions Due to Malfunctions, Startups, and Shutdowns''

1. Rule 1200–3–20–.01, ''Purpose''

The January 20, 2023, supplemental SIP revision makes minor changes to Rule 1200–3–20–.01 that are not responsive to the 2015 SIP call. Specifically, Tennessee seeks to remove the portion of this rule that lists examples of sources that are considered to be an ''air contaminant source.'' The definition of ''air contaminant source'' is also included in the Tennessee SIP under Rule 1200–03–.02, ''Definitions,'' and examples of sources that are within the scope of this definition are listed within the definition. This revision would remove the redundancy of this term in the Tennessee SIP and does not relax the applicability of the rules in Chapter 1200–3–20. Accordingly, EPA is proposing to approve the requested change to this Rule.

2. Rule 1200–3–20–02, ''Reasonable Measures Required''

The January 20, 2023, supplemental SIP revision contains substantive changes that are not responsive to the 2015 SIP call but that strengthen the Tennessee SIP by expanding the applicability of Rule 1200–3–20–02 by removing a portion of text that limits the Rule to ''sources identified in Tennessee Rule 1200–3–19, or by a permit condition or an order issued by the Board or by the Technical Secretary as being in or significantly affecting a nonattainment area.'' The effect of removing this language is that this Rule would now apply to all air contaminant sources in the State instead of sources that are in or significantly affecting a nonattainment area. Therefore, EPA is proposing to approve this change to the SIP.

3. Rule 1200–3–20–.06, ''Scheduled Maintenance''

In its January 20, 2023, SIP revision, Tennessee is requesting removal of Rule 1200–3–20–.06, ''Scheduled Maintenance,'' although it was not SIP-called in the 2015 SSM SIP Action. Rule 1200–3–20–.06 specifies reporting requirements for any shutdown of air pollution control equipment for necessary scheduled maintenance that will result in excess emissions. Specifically, this rule requires notification to the Technical Secretary within 24 hours of planned maintenance of air pollution control equipment unless the maintenance is routine, in which case the notifications may be made on an annual basis.

[6] *See* 80 FR 33839, 33965 (June 12, 2015); 78 FR 12460, 12512–13 (February 22, 2013) (explaining that ''this provision is impermissible because it creates unbounded discretion that purports to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations'' and because ''the provision purports to authorize the state official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance'').

[7] *See* 80 FR 33839, 33965 (June 12, 2015); 78 FR 12460, 12512–13 (February 22, 2013).

Section 110(l) of the CAA provides that EPA shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. Section 193 of the CAA provides that no control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the CAA amendments of 1990 in a nonattainment area may be modified unless the modification ensures greater or equivalent emission reductions of such air pollutant. EPA proposes to approve the removal of this rule in its entirety because the removal is not expected to cause any increase in emissions. This revision does not remove a prohibition on excess emissions or any specific requirements to minimize those emissions and thus is not a relaxation of a control requirement. Furthermore, as Tennessee notes in its submittal, the routine shutdown of air pollution control equipment described in Rule 1200–3–20–.06 is inappropriate.

EPA also notes that a requirement for sources to identify and report any anticipated excess emissions event resulting from control equipment undergoing scheduled maintenance is not a required element of SIPs. The Tennessee SIP contains other reporting requirements that include the reporting of actual excess emissions events to the State once such events have occurred.[8] Thus, the removal of Rule 1200–3–20–.06 would not prevent TDEC from receiving reports of actual excess emissions. EPA preliminarily finds that removing Rule 1200–3–20–.06 would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA and would not constitute modification of a control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the CAA amendments of 1990 in a nonattainment area. Accordingly, EPA is proposing to approve Tennessee's request to remove Rule 1200–3–20–.06, ''Scheduled Maintenance,'' from the Tennessee SIP.

4. New Rule 1200–3–20–.06, ''Report Required Upon The Issuance of Notice of Violation''

Due to the deletion of Rule 1200–3–20–.06, ''Scheduled Maintenance,'' as discussed above, Tennessee has renumbered existing Rule 1200–3–20–.07, ''Report Required Upon The Issuance of Notice of Violation,'' as Rule 1200–3–20–.06 and is requesting approval of a new version of Rule 1200–3–20–.06 in the Tennessee SIP. The State's SIP revisions submitted on November 19, 2016, and January 20, 2023, make various changes to several paragraphs within this rule, some of which are responsive to the 2015 SIP call. Although the January 20, 2023, SIP revision was transmitted to EPA after the November 19, 2016, SIP revision, it includes regulatory changes that became state-effective prior to the changes made in response to the 2015 SSM SIP Action. Because Tennessee's November 19, 2016, submission relies in part on revisions submitted to EPA in the January 20, 2023, submission,[9] EPA addresses the State's January 20, 2023, SIP revision first.

i. January 20, 2023, Supplemental SIP Revision

Tennessee's January 20, 2023, SIP submission renumbers Rule 1200–3–20–.07, ''Report Required Upon the Issuance of a Notice of Violation,'' to 1200–3–20–.06, consistent with the removal of current SIP-approved Rule 1200–3–20–.06, ''Scheduled Maintenance.'' Tennessee also revises the rule by splitting the requirements of paragraph .07(1) into two paragraphs, now renumbered as .06(1) and .06(2). The text from current SIP-approved paragraph .07(1) that has been moved to new paragraphs .06(1) and (2) includes minor updates to the wording for clarity, consistency with other Tennessee Rules and with the terms defined in Chapter 1200–3–2, ''Definitions,'' and updates internal references to the rules.[10] However, EPA is proposing to disapprove new Rule 1200–3–20–.06(1), as submitted in the January 20, 2023, supplemental SIP revision, because this provision contains a cross-reference to Rule 1200–3–5–.02(1), which EPA is proposing to disapprove, as explained in Section II.A, above. Specifically, Rule 1200–3–20–.06(1) requires automatic issuance of a notice of violation (NOV) for excess emissions except for ''visible emissions levels included as a startup and/or shutdown permit condition under'' 1200–3–5–.02(1). Because EPA SIP-called and is herein proposing to disapprove Rule 1200–3–5–.02(1), the cross-reference to Rule 1200–3–5–.02(1), in itself, warrants disapproval of Rule 1200–3–20–.06(1).

Furthermore, although Rule 1200–3–20–.06(1)'s exception from automatic NOV issuance could be interpreted as a provision of state-only enforcement discretion, it could also be interpreted to constrain, or at least create uncertainty with respect to, EPA and citizen enforcement. Even if interpreted to apply strictly to state enforcement of emission limit exceedances, such provisions of state-only enforcement discretion, because they do not apply to EPA or citizens, are not appropriate for inclusion in the SIP. Thus, whether interpreted as a provision of state-only enforcement discretion or as a constriction of EPA or citizen enforcement, EPA proposes to disapprove new Rule 1200–3–20–.06(1).[11]

EPA is proposing to approve Tennessee's January 20, 2023, revisions to new Rule 1200–3–20–.06(2), (3), and (4). The revisions to new Rule 1200–3–20.06(2) consist of minor updates to the wording for clarification purposes. New Rule 1200–3–20–.06(3) (former Rule 1200–3–20–.07(2), now renumbered to .06(3)) describes the contents of the report required to be submitted to the State when a notice of violation is issued. The only changes made to this paragraph are minor wording and punctuation changes. Next, the revisions to new Rule 1200–3–20–.06(4) (former Rule 1200–3–20–.07(3), now renumbered to .06(4)), include only minor wording changes via the January 20, 2023, supplemental SIP revision. These revisions are not substantive in nature and do not change any underlying requirements.

The January 20, 2023, supplemental SIP submission includes the addition of Rule 1200–3–20–.06(5), which lists various types of sources and ''de minimis'' emission levels, below which no notice of violation(s) of certain

[8] For example, Rule 1200–3–10–.02 requires a source to report any actual excess emissions if the source has a continuous emissions monitoring system.

[9] Tennessee had previously submitted the revisions contained in the January 20, 2023, submission on October 10, 1994, however, EPA never acted on that submission and Tennesse withdrew it from EPA review on July 20, 2016.

[10] The state effective version of Rule 1200–3–20–.06(1) includes the phrase ''or determined to be de minimis under Rule 1200–3–20–.06.'' Tennessee requested that this revision not be incorporated into the Tennessee SIP. Therefore, EPA is proposing to act on only the remainder of Rule 1200–3–20–.06(1) in this NPRM.

[11] EPA considers new Rule 1200–3–20–.06(1) to be separable from the remainder of Rule 1200–3–20–.06 and believes that its disapproval of new paragraph (1) will not result in the portions of Rule 1200–3–20–.06 that EPA proposes to approve being more stringent than Tennessee anticipated or intended. *See Bethlehem Steel Corp.* v. *Gorsuch,* 742 F.2d 1028, 1036–37 (7th Cir. 1984). Although disapproval of (1) would eliminate an exception from automatic NOV issuance, it also would eliminate the requirement for automatic NOV issuance, resulting in no increase in stringency with respect to Tennessee's authority and discretion to issue NOVs.

pollutant limits will be automatically issued and SSM exemptions may apply. However, Tennessee is not requesting that paragraph (5) be incorporated into the SIP.[12]

ii. November 19, 2016, SIP Revision

Regarding former Rule 1200–3–20–.07 paragraph (1) and paragraph (3), EPA determined in the 2015 SSM SIP Action that these paragraphs were substantially inadequate to meet CAA requirements. In response to the 2015 SSM SIP Action, Tennessee's November 19, 2016, SIP revision requests EPA approval of changes to Rules 1200–3–20–.06(2) and .06(4), as renumbered from .07(1) and .07(3), respectively. First, Tennessee's submittal removes the language in former 1200–3–20–.07(1), renumbered in the January 20, 2023, supplemental SIP revision as 1200–3–20–.06(2), which states that the report detailing the circumstances of the excess emissions will be used ''to assist the Technical Secretary in deciding whether to excuse or proceed upon the violation.'' By removing this phrase, the provision will no longer appear to provide a discretionary exemption from SIP emission limits. In addition, Tennessee includes other minor changes to the language in paragraph .06(2) to clarify the requirements and to replace the term ''Technical Secretary'' with ''Technical Secretary or the Technical Secretary's representative.''

Next, regarding former paragraph .07(3), renumbered in the January 20, 2023, supplemental SIP revision as 1200–3–20–.06(4), Tennessee requests removal of the excusal language in this paragraph which states that failure to submit the report required by paragraph .06(3) within the 20-day period following a notice of violation precludes the admissibility of the information ''as an excuse for malfunctions, startups, and shutdowns in causing the excessive emissions'' and replacement with ''for determination of potential enforcement action.'' EPA notes that the term ''potential enforcement action'' in this provision refers specifically to what is considered in Tennessee's determination of a state enforcement action.

The revisions to paragraphs .06(2) and .06(4), as renumbered from .07(1) and .07(3), remove the ambiguous language that EPA SIP-called as functionally an impermissible discretionary exemption. Therefore, TDEC has addressed the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to Chapter 1200–3–20.

In the November 19, 2016, SIP revision to paragraph .06(6), Tennessee adds, ''No emission during periods of malfunction, startup, or shutdown that is in excess of the standards in Division 1200–03 or any permit issued thereto shall be allowed which can be proved to cause or contribute to any violations of the Ambient Air Quality Standards contained in Chapter 1200–03–03 or the National Ambient Air Quality Standards.'' As revised, this paragraph simply notes that excess emissions during periods of SSM which are known to cause or contribute to violations of ambient air quality standards are not allowed. EPA notes that, while this provision does not convey an inaccurate concept, the SIP must specify emission limitations (which must be continuous) to provide for attainment and maintenance of the NAAQS and not merely general prohibitions against emissions that would violate the NAAQS. Any excess emissions that would violate an applicable SIP emission limit are not allowed, regardless of whether they can be proved to cause or contribute to violations of any ambient air quality standards, and regardless of whether they occur during periods of SSM. With Tennessee's November 19, 2016, changes to Chapter 1200–3–20, there are no specific exemptions from applicable SIP emission limits in this Chapter.[13]

For the reasons described in this Section II.B.4, EPA is proposing to partially approve and partially disapprove Tennessee's January 20, 2023, and November 19, 2016, SIP revisions to Rule 1200–3–20–.07, as renumbered to 1200–3–20–.06, which were submitted for incorporation into the SIP. Specifically, EPA is proposing to approve Tennessee's SIP revision with respect to Rule 1200–3–20–.06(2), (3), (4), and (6), and EPA is proposing to disapprove the revision with respect to Rule 1200–3–20–.06(1) and (5).

5. New Rule 1200–3–20–.07, ''Special Reports Required''; New Rule 1200–3–20–.08, ''Rights Reserved''; and New Rule 1200–3–20–.09, ''Additional Sources Covered''

Approving Tennessee's request to remove 1200–3–20–.06, ''Scheduled Maintenance,'' from the Tennessee SIP would necessitate the renumbering of Rules 1200–3–20–.08, 1200–3–20–.09, and 1200–3–20–.10 in the Tennessee SIP to Rules 1200–3–20–.07, 1200–3–20–.08, and 1200–3–20–.09, respectively. Additionally, Rule 1200–3–20–.09, as renumbered from 1200–3–20–.10, includes other minor edits to assign a number to the provision included as paragraph .09(1) and to include a parenthetical around existing text in this provision. EPA is proposing to approve these revisions.

III. Proposed Actions

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Based on the analysis in Section II of this NPRM, EPA is proposing to partially approve and partially disapprove revisions to Chapters 1200–3–5 and 1200–3–20 of the Tennessee SIP, as submitted on November 19, 2016, and supplemented on January 20, 2023. Specifically, EPA is proposing to disapprove the changes to Rule 1200–3–5–.02, ''Exceptions,'' and Rule 1200–3–20–.06, ''Report Required Upon the Issuance of Notice of Violation,'' paragraph (1), renumbered from 1200–3–20–.07; and proposing to approve the changes to Rule 1200–3–20–.01, ''Purpose''; Rule 1200–3–20–.02, ''Reasonable Measured Required''; Rule 1200–3–20–.06, ''Report Required Upon the Issuance of Notice of Violation,'' renumbered from 1200–3–20–.07, except for 1200–3–20–.06(1) and 1200–3–20–.06(5); Rule 1200–3–20–.07, ''Special Reports Required,'' renumbered from 1200–3–20–.08; Rule 1200–3–20–.08, ''Rights Reserved,'' renumbered from 1200–3–20–.09; and Rule 1200–3–20–.09, ''Additional Source Covered,'' renumbered from 1200–3–20–.10. EPA is also proposing to approve the removal of Rule 1200–3–20–.06, ''Scheduled Maintenance.''

EPA is further proposing to find that these SIP revisions only partially correct the deficiencies that were identified in the June 12, 2015, SIP SSM SIP Action. If the Agency finalizes this partial disapproval, CAA section 110(c) would require EPA to promulgate a federal implementation plan (FIP) within 24 months after the effective date of the partial disapproval, unless EPA first approves a SIP revision that corrects the deficiencies identified in the 2015 SSM SIP Action or the deficiencies identified in Section II of this NPRM within such time. In addition, final partial disapproval would trigger mandatory sanctions under CAA section 179 and 40 CFR 52.31 unless the State submits, and EPA approves, a SIP revision that corrects the identified deficiencies

[12] See the document titled ''Transmittal_Letter_SSM SIP Call Chapter 20 Supplemental.doc'' in the docket for this proposed action. Therefore, EPA is not proposing to act on the new Rule 1200–3–20–.06(5) in this NPRM.

[13] As identified in Section II.A of this NPRM, EPA is proposing to disapprove the revision to Chapter 1200–3–5, which still includes an exemption from applicable SIP visible emissions requirements during periods of startup and shutdown.

within 18 months of the effective date of the final partial disapproval action.[14]

EPA is not reopening the 2015 SSM SIP Action nor soliciting comment on the rationale for issuing the 2015 SIP call to Tennessee. EPA is taking comment on whether the proposed revisions to the Tennessee SIP are consistent with CAA requirements and whether these changes remedy the substantial inadequacies in the specific Tennessee SIP provisions identified in the 2015 SSM SIP Action. EPA is also soliciting public comments on the proposed partial disapproval, as explained herein.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, and as discussed in Sections I through III of this preamble, EPA is proposing to incorporate by reference into the Tennessee SIP Rules 1200–3–20–.01, ''Purpose,'' State effective on September 26, 2016; 1200–3–20–.02, ''Reasonable Measured Required,'' State effective on November 11, 1997;[15] 1200–3–20–.06, ''Report Required Upon The Issuance of a Notice of Violation,'' State effective on November 16, 2016, except for 1200–3–20–.06(1) and 1200–3–20–.06(5);[16] [17] 1200–3–20–.07, ''Special Reports Required,'' State effective on September 26, 1994;[18] 1200–3–20–.08, ''Rights Reserved,'' State effective on September 26, 1994;[19] and 1200–3–20–.09, ''Additional Sources Covered,'' State effective on September 26, 1994.[20] Also in this document, EPA is proposing to remove Rule 1200–3–20–.06, ''Scheduled Maintenance,''[21] which is incorporated by reference in accordance with the requirements of 1 CFR part 51. EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

The proposed action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

The proposed action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This action merely proposes to partially approve and partially disapprove a SIP submission from Tennessee as meeting and not meeting the requirements of the CAA, respectively.

D. Unfunded Mandates Reform Act (UMRA)

The proposed action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This proposed action imposes no enforceable duty on any State, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

The proposed action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The proposed action does not have tribal implications as specified in Executive Order 13175. The proposed action does not apply on any Indian reservation land, any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply in this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definitions of ''covered regulatory action'' in section 2–202 of the Executive Order.

Therefore, this proposed action is not subject to Executive Order 13045 because it merely proposes to partially approve and partially disapprove a state action implementing a federal standard.

Furthermore, EPA's Policy on Children's Health does not apply to this action. Information about the applicability of the Policy is available under ''Children's Environmental Health'' in the Supplementary information section of this preamble.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution and Use

The proposed action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This proposed rulemaking does not involve technical standards.

[14] The offset sanction in CAA section 179(b)(2) would be triggered 18 months after the effective date of a final disapproval, and the highway funding sanction in CAA section 179(b)(1) would be triggered 24 months after the effective date of a final disapproval. Although the sanctions clock would begin to run from the effective date of a final disapproval, mandatory sanctions under CAA section 179 generally apply only in designated nonattainment areas. This includes areas designated as nonattainment after the effective date of a final disapproval. As discussed in the 2015 SSM SIP Action, EPA will evaluate the geographic scope of potential sanctions at the time it makes a determination that the air agency has failed to make a complete SIP submission in response to the 2015 SIP call, or at the time it disapproves such a SIP submission. The appropriate geographic scope for sanctions may vary depending upon the SIP provisions at issue. *See* 80 FR 33839, 33930.

[15] The effective date of the change to Rule 1200–3–20–.02, ''Reasonable Measures Required,'' is September 26, 1994. However, for purposes of the state effective date included at 40 CFR 52.570(c), that change to Tennessee's rule is captured and superseded by changes which were state effective on November 11, 1997, and which EPA previously approved on April 7, 2017. *See* 82 FR 16927.

[16] As explained in Section II.B of this NPRM, with the removal of 1200–3–20–.06, 1200–3–20–.07 is being renumbered to 1200–3–20–.06.

[17] EPA is not proposing to incorporate into the Tennessee SIP the following elements of Rule 1200–03–20–.06: 1200–03–20–.06(1) and 1200–03–20–.06(5). If EPA finalizes this proposed action, the Agency will update the SIP table at 40 CFR 52.2220(c) to reflect these exceptions.

[18] As explained in Section II.B of this NPRM, with the removal of 1200–3–20–.06, 1200–3–20–.08 is being renumbered to 1200–3–20–.07.

[19] As explained in Section II.B of this NPRM, with the removal of 1200–3–20–.06, 1200–3–20–.09 is being renumbered to 1200–3–20–.08.

[20] As explained in Section II.B of this NPRM, with the removal of 1200–3–20–.06, 1200–3–20–.10 is being renumbered to 1200–3–20–.09.

[21] As explained in Section II.B of this NPRM, while 1200–3–20–.06, ''Scheduled Maintenance,'' is proposed for removal from the SIP, other rules codified as 1200–3–20–.07 through .10 are proposed to be renumbered as 1200–3–20–.06 through .09.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

Under the CAA, 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, the EPA's role is to review state choices and approve those choices if they meet the minimum criteria of the Act. Accordingly, this proposed action partially approves and partially disapproves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

The air agency did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

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

Dated: March 30, 2023.

Daniel Blackman,

Regional Administrator, Region 4.

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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 8360

[BLM_CO_FRN_MO4500169724]

Notice of Proposed Supplementary Rule for Canyons of the Ancients National Monument in Dolores and Montezuma Counties, CO

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed supplementary rule.

SUMMARY: The Bureau of Land Management (BLM) is proposing a supplementary rule to regulate conduct on public lands within Canyons of the Ancients National Monument (CANM or Monument). This proposed supplementary rule is needed to implement planning decisions in the 2010 CANM Resource Management Plan (RMP). The proposed supplementary rule would provide for the protection of persons, property, and public-land resources administered by the BLM's Tres Rios Field Office and CANM, located in Dolores and Montezuma Counties, Colorado.

DATES: Comments on the proposed supplementary rule must be received or postmarked by June 5, 2023. Comments submitted after the close of the comment period or delivered to an address other than the one listed in this notice may not be considered or included in the administrative record for the development of the final supplementary rule.

ADDRESSES: Please send comments to the Bureau of Land Management, Canyons of the Ancients National Monument, 27501 Highway 184, Dolores, CO 81323; by fax to (970) 385–3228, or email comments to *tfouss@blm.gov.* Please include ''Proposed Supplementary Rule'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Tyler Fouss, Field Staff Ranger, Bureau of Land Management, Tres Rios Field Office, 29211 Hwy. 184, Dolores, CO 81323; telephone (970) 882–1131; email: *tfouss@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Background
III. Discussion
IV. Procedural Matters
V. Proposed Supplementary Rule

I. Public Comment Procedures

Written comments on the proposed supplementary rule should be specific, confined to issues pertinent to the proposed supplementary rule, and should explain the reason for any recommended change. Where possible, comments should reference the specific section or paragraph of the rule that the comment is addressing.

Comments, including names, addresses, and other contact information of respondents, will be available for public review at the BLM CANM address listed (see **ADDRESSES** Section) during regular business hours.

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire comment—including personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

The BLM proposes to establish this supplementary rule under the authority of 43 CFR 8365.1–6, which authorizes BLM State Directors to establish supplementary rules for the protection of persons, property, and public lands and resources.

CANM is part of the BLM's National Conservation Lands and consists of approximately 178,000 acres of BLM-administered public lands located in Dolores and Montezuma Counties in the Four Corners region of southwestern

Colorado. President Clinton established CANM on June 9, 2000, by Presidential Proclamation Number 7317, pursuant to Section 2 of the Antiquities Act of 1906 (34 Stat. 225, 16 U.S.C. 431), to preserve the cultural and natural objects of the Monument. Prior to the Proclamation, CANM was managed as the Anasazi Culture Multiple Use Area of Critical Environmental Concern, established through the 1985 San Juan-San Miguel RMP Record of Decision (ROD).

The BLM developed the CANM RMP with extensive input from the public, Tribes, and elected officials through scoping, opportunities for public comment, and advisory committee meetings.

The BLM signed the CANM RMP and ROD in June 2010, replacing portions of the San Juan-San Miguel RMP/ROD and incorporating the management principles and policies found in the Presidential Proclamation establishing CANM. The CANM RMP identifies specific management actions that restrict certain activities and define allowable uses within CANM. The proposed supplementary rule would implement these management actions and make them enforceable.

This proposed supplementary rule would implement the management decisions in the CANM RMP related to collecting geological and biological materials, recreational sporting activities, camping, and travel management. Within the Sand Canyon-Rock Creek Special Recreation Management Area (SRMA), activities such as hiking, mountain biking, and horseback riding and packing would be allowed only on designated travel routes, as provided in the CANM RMP.

III. Discussion of the Proposed Supplementary Rule

This is the first time the BLM has proposed a supplementary rule for CANM.

The purpose of the proposed supplementary rule is to protect public health and safety and prevent damage to natural and cultural resources, as well as other resources, objects, and values identified in the Proclamation and the CANM RMP. Certain activities, by their very nature, have the potential to adversely impact the resources and objects the Monument was established to protect. The CANM RMP contains management actions directing how the BLM manages those activities, consistent with the Proclamation. Many uses are permissible so long as the objects of the Monument are protected. Additionally, the average user is unlikely to notice changes resulting from the establishment of this supplementary rule implementing the CANM RMP.

The Proclamation established CANM to protect resources, objects, and values including archaeology, geology, raptors and other bird species, and reptiles. CANM contains the highest density of archaeological sites in the United States, with an average of one site eligible for listing on the National Register of Historic Places every 6 acres, or an estimated 30,000 sites on this landscape. The BLM is responsible for protecting all the resources for which the Monument was designated and for avoiding or minimizing impacts to them.

Proposed supplementary rule numbers 1 through 4 address collecting resources on CANM. The Monument Proclamation prohibits appropriating, injuring, destroying, or removing Monument features and withdraws the lands and interests in lands from entry, location, and disposition under the public land laws, including the mining laws, except for certain oil and gas development activities. The CANM RMP more specifically prohibits the recreational collection of paleontological or geological resources, the scientific collection of paleontological or geological resources without a permit, and the cutting or gathering of firewood. Proposed supplementary rule numbers 1 through 3 would allow enforcement of these restrictions.

The CANM RMP restricts pinyon pine nut harvesting to 22.5 pounds for personal or traditional use and prohibits commercial harvesting. Proposed supplementary rule number 4 would allow enforcement of these limitations.

Proposed supplementary rule number 5 addresses recreational target shooting within CANM. The RMP prohibits recreational shooting within CANM due to the potential for damage to archaeological sites, particularly rock art. In the past, shooters have used native vegetation, as well as skeet litter and discarded appliances, for target practice. This proposed supplementary rule would prohibit recreational shooting. Because the Proclamation does not enlarge or diminish the State's jurisdiction over wildlife management, hunting with a valid Colorado hunting license is allowed within the Monument, to the extent permissible under State law.

Proposed supplementary rule number 6 addresses geocaching within CANM. The CANM RMP prohibits geocaching due to the potential for irrevocable harm to objects in the Monument's archaeological sites. A common problem with this activity is geocachers use the Monument's archaeological sites to conceal items, or caches, as part of a quasi-treasure hunt. Geocachers often camouflage their caches by moving rocks or organic material from their original site, which can significantly damage the site's archaeological values. The large number of potential cache sites within the Monument makes this a serious concern. Proposed supplementary rule number 6 would prohibit geocaching and similar activities.

Proposed supplementary rule number 7 addresses rock climbing within CANM. This proposed supplementary rule would prohibit rock climbing, rappelling, and bouldering within the Monument except for areas designated as open to climbing within the Mockingbird Mesa Recreation Area Management Zone. Climbing and bouldering have the potential to adversely affect archaeological sites and nesting raptors in certain locations. Climbing to cliff dwellings on unstable slopes can be dangerous and undermine archaeological features. Scrambling up cliffs also can be a safety issue due to unstable geological formations. Natural oils from hands, climbing chalk, and permanent fixed hardware on climbing routes can cause irreversible impacts to archaeological sites. Furthermore, climbing activities are likely to disturb or displace raptor populations, especially nesting pairs, that reside in the Monument in high densities. Currently, one area within the Mockingbird Mesa Recreation Area Management Zone is designated as open to climbing. The BLM may, consistent with the CANM RMP, consider establishing additional climbing areas within this zone in the future.

Proposed supplementary rule numbers 8 through 14 address camping and campfires within CANM to provide a more enjoyable experience for visitors and to limit impacts from higher visitation in specific management zones and developed recreation sites.

The CANM RMP prohibits camping in or near sensitive resources and areas that experience the highest visitor use in the Monument. This prohibition is necessary to minimize impacts camping could cause to those resources, including the potential for the illegal collecting or moving of artifacts, the compromising of scientific research, and the contamination of the archaeological record. Proposed supplementary rule numbers 8, 9, and 11 would allow enforcement of these prohibitions.

Proposed supplementary rule number 10 would require campsites to be located at least 300 feet away from riparian areas and the Monument's

limited water sources, to reduce stress on the wildlife that rely on them.

Proposed supplementary rule numbers 12 and 13 would prohibit campfires in and near sensitive resources and the Monument's high visitor use areas.

In areas where campfires are allowed, *proposed supplementary rule number 14* would require fires only be built in firepans, or, if available, BLM-provided fire rings.

Proposed supplementary rule numbers 15 through 20 address travel management and access within CANM, consistent with the CANM RMP. Access restrictions and trail designations in the Monument help preserve key scenic, cultural, and wildlife habitat resources that attract visitors to these public lands and minimize conflicts among the different types of users. Proposed supplementary rule number 15 would restrict mechanized travel to designated travel routes.

BLM policy directs Wilderness Study Areas (WSA) be managed to prevent the impairment of their wilderness characteristics, and the CANM RMP designates no routes for motorized or mechanized travel in WSAs.

Proposed supplementary rule number 16 would prohibit motorized or mechanized vehicles in WSAs.

Proposed supplementary rule numbers 17 and 18 would prohibit parking in riparian areas, more than 20 feet from the edge of a designated travel route, or in a manner that would damage Monument resources.

To protect cultural resources in the Sand Canyon-Rock Creek SRMA, which is the most highly visited recreation area in the Monument, the CANM RMP restricts hiking and horseback riding/packing to designated travel routes approved for their use.

Proposed supplementary rule numbers 19 and 20 would allow enforcement of these restrictions. Horses, pack animals, and hikers would be allowed both on and off designated travel routes on the remaining 169,000 acres of the Monument outside of the SRMA.

IV. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

This proposed supplementary rule is not a significant regulatory action and is not subject to review by the Office of Management and Budget under Executive Order 12866. This proposed supplementary rule would not have an annual effect of $100 million or more on the economy. It is not intended to affect commercial activity, but rather to impose rules of conduct for public use on a limited area of public lands. It would not adversely affect, in a material way, the economy, productivity, competition, jobs, environment, public health or safety, State, local, or Tribal governments, or communities. This proposed supplementary rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

The rule would not materially alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; nor would it raise novel legal or policy issues. It merely strives to protect public safety and the environment.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act (RFA) of 1980, as amended (5 U.S.C. 601–612), to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. This proposed supplementary rule would merely establish rules of conduct for public use of a limited area of public lands. Therefore, the BLM has determined under the RFA this proposed supplementary rule would not have a significant economic impact on a substantial number of small entities.

Congressional Review Act

This proposed supplementary rule does not constitute a ''major rule'' as defined at 5 U.S.C. 804(2). It would not have an annual effect on the economy of $100 million or more. This proposed supplementary rule would merely establish rules of conduct for public use of a limited area of public lands.

Unfunded Mandates Reform Act

This proposed supplementary rule would not impose an unfunded mandate on State, local, or Tribal governments in the aggregate, or the private sector, of more than $100 million per year, nor would they have a significant or unique effect on small governments. This proposed supplementary rule would merely impose reasonable rules of conduct on public lands in Colorado to protect natural resources and public safety. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

This proposed supplementary rule is not a government action capable of interfering with constitutionally protected property rights. This proposed supplementary rule does not address property rights in any form and would not cause the impairment of constitutionally protected property rights. Therefore, the BLM has determined this proposed supplementary rule would not cause a ''taking'' of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

This proposed supplementary rule would not have a substantial direct effect 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. This proposed supplementary rule would not conflict with any State law or regulation. Therefore, in accordance with Executive Order 13132, the BLM has determined this proposed supplementary rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the BLM has determined this proposed supplementary rule would not unduly burden the judicial system and the requirements of sections 3(a) and 3(b)(2) of the Order are met.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, the BLM has determined this proposed supplementary rule does not include policies that have tribal implications and would have no bearing on trust lands or on lands for which title is held in fee status by American Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs. Since this supplementary rule would not involve Indian reservation lands or resources, the BLM has determined government-to-government relationships remain unaffected. This proposed supplementary rule would merely establish rules of conduct for public use of a limited area of public lands.

Paperwork Reduction Act

This proposed supplementary rule does not contain information collection requirements the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

National Environmental Policy Act

The BLM published its CANM Draft RMP/Draft Environmental Impact Statement (EIS) in October 2007, which incorporated analysis and input provided by the public; local, State, and other Federal agencies and organizations; Native American tribes; cooperating agencies; and BLM staff. After considering public comments and additional input, analysis, and review, the BLM published its CANM Proposed RMP/Final EIS in July 2009. The BLM signed the CANM RMP and ROD in June 2010, after full consideration of alternatives and analysis of public input. The CANM RMP seeks to provide an optimal balance between authorized resource uses and the protection and long-term sustainability of sensitive cultural and natural resource values within the planning area, consistent with the Proclamation. This proposed supplementary rule would allow the BLM to implement the measures approved in the CANM RMP and to enforce decisions developed to protect public health and safety and public lands within CANM. This proposed supplementary rule would not change the decisions set forth in the CANM RMP.

On November 18, 2020, the BLM completed a Determination of NEPA Adequacy for the proposed CANM supplementary rule. The BLM confirmed the NEPA analysis contained in the Final EIS for the CANM RMP was sufficient to inform its consideration of the proposed supplementary rule.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed supplementary rule does not comprise a significant energy action. This proposed supplementary rule would not have an adverse effect on energy supply, production, or consumption and have no connection with energy policy.

Information Quality Act

In developing this proposed supplementary rule, the BLM did not conduct or use a study, experiment or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554).

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM has determined this proposed supplementary rule would not impede facilitating cooperative conservation; would take appropriate account of and consider the interests of persons with ownership or other legally recognized interests in land or other natural resources; would properly accommodate local participation in the Federal decision-making process; and would provide that the programs, projects, and activities are consistent with protecting public health and safety.

Clarity of This Supplementary Rule

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. The BLM invites your comments on how to make this proposed supplementary rule easier to understand, including answers to questions, such as the following:

1. Are the requirements in the proposed supplementary rule clearly stated?

2. Does the proposed supplementary rule contain technical language or jargon that interferes with their clarity?

3. Does the format of the proposed supplementary rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

4. Would the proposed supplementary rule be easier to understand if it were divided into more (but shorter) sections?

5. Is the description of the proposed supplementary rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed supplementary rule? How could this description be more helpful in making the proposed supplementary rule easier to understand?

Please send any comments you may have on the clarity of the proposed supplementary rule to the address specified in the **ADDRESSES** section.

Author

The principal author of this proposed supplementary rule is Tyler Fouss, Field Staff Ranger, Tres Rios Field Office, Colorado.

V. Proposed Supplementary Rule

For the reasons stated in the preamble, and under the authority for supplementary rules at 43 U.S.C. 1733a and 1740, 43 U.S.C. 315a, and 43 CFR 8365.1–6, the BLM Colorado State Director proposes a supplementary rule for public lands managed by the BLM in CANM, to read as follows:

Proposed Supplementary Rule for Canyons of the Ancients National Monument (CANM)

Definitions

Archaeological Site is a physical context and location containing material remains that evince past human activity and allow for its interpretation. Within CANM, these material remains may include, but are not limited to, historic and prehistoric structures, features, rock art, shrines, burials, quarries, artifact concentrations, and occupied rock alcoves.

Bouldering means any style of rock climbing undertaken without a rope.

Campfire means any outdoor fire used for warmth or cooking.

Camping means the erecting of a tent or shelter of natural or synthetic material, preparing a sleeping bag or other bedding material for use, parking of a motor vehicle, motor home or trailer, or mooring of a vessel, for the apparent purpose of overnight occupancy.

Commercial use means for the purpose of financial gain.

Designated travel route means roads, primitive roads, and trails open to specified modes of travel and identified on a map of designated roads, primitive roads, and trails that is maintained and available for public inspection at the BLM. Designated roads, primitive roads, and trails are open to public use in accordance with such limits and restrictions as are, or may be, specified in the CANM RMP or travel management plan, or in future decisions implementing the RMP. This definition excludes any road or trail with BLM-authorized restrictions that prevent use of the road or trail. Restrictions may include signs or physical barriers such as gates, fences, posts, branches, or rocks.

Geocaching means an outdoor recreational activity in which the participants use a Global Positioning System receiver or other navigational techniques to hide and seek containers called ''geocaches'' or ''caches.''

Mechanized vehicle means any device propelled solely by human power, upon which a person, or persons, may ride on land, having any wheels and/or tracks with the exception of a wheelchair.

Public lands means any land or interest in land owned by the United States and administered by the Secretary of the Interior through the BLM without regard to how the United States acquired ownership.

Riparian area means lands that are located along watercourses and water bodies. Typical examples include flood plains and streambanks. They are

distinctly different from surrounding lands because of unique soil and vegetation characteristics that are strongly influenced by the presence of water.

Special Recreation Management Area (SRMA) means an administrative unit where the existing or proposed recreation opportunities and recreation setting characteristics are recognized for their unique value, importance, or distinctiveness, especially as compared to other areas used for recreation.

Target shooting means discharging a weapon for recreational purposes when game animals are not being legally hunted.

Weapon means any firearm, cross bow, bow and arrow, paint gun, fireworks, or explosive device capable of propelling a projectile either by means of an explosion, compressed gas, or by string or spring.

Wilderness Study Area (WSA) means an area inventoried, found to have wilderness characteristics, and managed to preserve those characteristics under authority of (a) the land use planning direction found in Section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), or (b) the review of public lands required by Section 603 of FLPMA. WSAs identified during the land use planning process (Section 202 of FLPMA) and prior to 1993 were forwarded to Congress; those identified during or after 1993 were not.

Prohibited Acts

Unless otherwise authorized, the following acts are prohibited on all public lands, roads, trails, and waterways administered by the BLM within CANM:

Collection of Resources

1. You must not collect fossils of any kind, including vertebrate, invertebrate, plant, or trace fossils, unless authorized by permit.

2. Unless otherwise permitted under applicable law, you must not collect or remove any rock, mineral specimen, semiprecious gemstone, or petrified wood.

3. You must not cut or collect live, dead, or downed wood.

4. You must not harvest more than 22.5 pounds of pinyon pine nuts for personal use. You must not harvest pinyon pine nuts for commercial use.

Target Shooting

5. You must not discharge any weapon within the Monument, except in accordance with State law when hunting with a valid Colorado hunting license.

Geocaching

6. You must not engage in any cache-type activities (including geocaching and earth caching).

Climbing and Bouldering

7. You must not participate in climbing, including rock climbing, rappelling, or bouldering outside of designated climbing areas.

Camping and Campfires

8. You must not camp in the Pueblo Sites SRMA (Painted Hand Pueblo, Lowry Pueblo, and Sand Canyon Pueblo), in the Sand Canyon-Rock Creek SRMA, or in the Anasazi Heritage Center SRMA.

9. You must not camp within 300 feet of a developed recreation site/area.

10. You must not camp within 300 feet of a riparian area or water source.

11. You must not camp in archaeological sites, rock shelters, or alcoves.

12. You must not ignite or maintain a campfire in the Pueblo Sites SRMA (Painted Hand Pueblo, Lowry Pueblo, and Sand Canyon Pueblo), Sand Canyon-Rock Creek SRMA, or Anasazi Heritage Center SRMA.

13. You must not ignite or maintain a campfire in archaeological sites, rock shelters, or alcoves.

14. You must use a fire pan for campfires or charcoal fires when a metal fire ring is not provided or unless using a mechanical stove or other appliance fueled by gas and equipped with a valve that allows the operator to control the flame.

Travel Management

15. You must not operate or possess a mechanized vehicle on any route, trail, or area that is not designated as open to such use by a BLM sign, map, or the appropriate travel management plan, unless you have specific authorization from the BLM.

16. You must not operate or possess a motorized or mechanized vehicle in any Wilderness Study Area.

17. You must not park more than 20 feet from the edge of a designated travel route or in a manner that causes resource damage.

18. You must not park in riparian areas.

19. Within the Sand Canyon-Rock Creek SRMA (as defined in the CANM RMP), you must not ride or be in possession of horses or other pack animals on any route, trail, or area not designated as open to such use by a BLM sign, map, or the appropriate travel management plan. Horses and pack animals are allowed both on and off designated travel routes throughout the remainder of the Monument.

20. Within the Sand Canyon-Rock Creek SRMA (as defined in the CANM RMP), you must not hike on any route, trail, or area not designated as open to such use by a BLM sign, map, or the appropriate travel management plan. Hiking is allowed both on and off designated travel routes throughout the remainder of the Monument.

Exemptions

The following persons are exempt from this supplementary rule: Federal, State, local or military employees acting within the scope of their duties; members of any organized law enforcement, rescue, or fire-fighting force in performance of an official duty; and any person, agency, or municipality whose activities are authorized in writing by the Canyons of the Ancients National Monument Manager.

Enforcement

Any person who violates any part of this supplementary rule may be tried before a United States Magistrate and fined up to $1,000, imprisoned no more than 12 months, or both, in accordance with 43 U.S.C. 1733(a), 18 U.S.C. 3571, and 43 CFR 8360.0–7. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Colorado or local law.

Douglas Vilsack,

Colorado State Director, Bureau of Land Management.

[FR Doc. 2023–06806 Filed 4–5–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BL56

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Fishery Management Plans of Puerto Rico, St. Croix, and St. Thomas and St. John; Amendments 1

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

ACTION: Announcement of availability of fishery management plan amendments; request for comments.

SUMMARY: The Caribbean Fishery Management Council (Council) has submitted Amendment 1 to the Puerto

Rico Fishery Management Plan (FMP), Amendment 1 to the St. Croix FMP, and Amendment 1 to the St. Thomas and St. John FMP (jointly Amendments 1) for review, approval, and implementation by NMFS. If approved by the Secretary of Commerce, Amendments 1 would modify the authorized gear types to prohibit the use of buoy gear by the recreational sector in U.S. Caribbean Federal waters and modify the regulatory definition of buoy gear to increase the maximum number of hooks from 10 to 25 in U.S. Caribbean Federal waters for fisheries where buoy gear is authorized. The purpose of Amendments 1 is to allow commercial fishermen targeting deep-water fish, including snappers and groupers, in the U.S. Caribbean Federal waters to use buoy gear with up to 25 hooks, while protecting deep-water reef fish resources and habitats and minimizing user conflicts.

DATES: Written comments on Amendments 1 must be received on or before June 5, 2023.

ADDRESSES: You may submit comments on Amendments 1 identified by ''NOAA–NMFS–2023–0032'' by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter ''NOAA–NMFS–2023–0032'', in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Maria Lopez-Mercer, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://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).

Electronic copies of Amendments 1, which includes a fishery impact statement and a regulatory impact review, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/generic-amendment-1-island-based-fishery-management-plans-modification-buoy-gear-definition.*

FOR FURTHER INFORMATION CONTACT: Maria Lopez-Mercer, telephone: 727–824–5305, or email: *maria.lopez@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any FMP or FMP amendment to the Secretary of Commerce for review and approval, partial approval, or disapproval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or amendment, publish an announcement in the **Federal Register** notifying the public that the FMP or amendment is available for review and comment.

The Council prepared the Puerto Rico FMP, St. Croix FMP, and St. Thomas and St. John FMP (collectively the island-based FMPs) that are being revised by Amendments 1. If approved, Amendments 1 would be implemented by NMFS through regulations at 50 CFR part 600 and 50 CFR part 622 under the authority of the Magnuson-Stevens Act.

Background

The Council manages reef fish and pelagic stocks and stock complexes in the U.S. Caribbean Exclusive Economic Zone (EEZ) under the island-based FMPs. The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and to achieve, on a continuing basis, the optimum yield from federally managed fish stocks to ensure that fishery resources are managed for the greatest overall benefit to the Nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. The Magnuson-Stevens Act also authorizes the Council and NMFS to regulate fishing activity to support the conservation and management of fisheries, which may include regulations that pertain to fishing for non-managed species.

On September 22, 2020, the Secretary of Commerce approved the island-based FMPs under section 304(a)(3) of the Magnuson-Stevens Act. For Puerto Rico and the U.S. Virgin Islands (USVI), the Council and NMFS manage fisheries under the island-based FMPs. NMFS published the final rule to implement the island-based FMPs on September 13, 2022 (87 FR 56204). The island-based FMPs contain management measures applicable for Federal waters off each respective island group. Among other measures, for reef fish and pelagic species managed in each island management area, these include allowable fishing gear and methods for harvest. Federal waters around Puerto Rico extend seaward from 9 nautical miles (nmi; 16.7 km) from shore to the offshore boundary of the EEZ. Federal waters around St. Croix, and St. Thomas and St. John extend seaward from 3 nmi (5.6 km) from shore to the offshore boundary of the EEZ. Federal regulations at 50 CFR 600.725(v)(V) describe the authorized fishing gear for each of the Council-managed fisheries and non-managed fisheries in each island management area.

In the U.S. Caribbean, small-scale commercial fishermen harvesting deep-water reef fish, particularly snappers (*e.g.,* queen and cardinal snappers) and groupers, typically use a specific type of hook-and-line gear. This hook-and-line gear is known locally as vertical bottom line or ''cala'' in Puerto Rico and as vertical setline or deep-drop gear in the USVI. Fishing gear configurations and methods used by commercial fisherman to harvest these deep-water snappers and groupers, which includes buoy gear, varies in terms of vessel fishing equipment and materials used, hook type, size and number, number of lines used, types of bait, soaking time, and fishing grounds. Vertical bottom line fishing gear and deep-drop fishing gear can be either attached to the vessel while deployed and retrieved with an electrical reel or unattached to the vessel when rigged and deployed as buoy gear and retrieved with an electrical reel. Buoy gear, known as ''cala con boya'' in Puerto Rico and deep-drop buoy gear in the USVI, is typically used to harvest deep-water snappers and groupers in waters up to 1,500 ft (457 m), by commercial fishermen in Puerto Rico and to a lesser extent in the USVI.

Buoy gear is defined in 50 CFR 622.2 as fishing gear that fishes vertically in the water column that consists of a single drop line suspended from a float, from which no more than 10 hooks can be connected between the buoy and the terminal end, and the terminal end contains a weight that is no more than 10 lb (4.5 kg). This current definition of buoy gear applies in Federal waters of the Gulf of Mexico, South Atlantic, and U.S. Caribbean. In addition, buoy gear is listed as an authorized hook-and-line gear type in 50 CFR 600.725(v)(V) for those fishing commercially and recreationally for species that are not managed by the Council (*i.e.,* non-FMP species) in Federal waters around Puerto Rico, St. Croix, and St. Thomas and St. John and for those fishing

commercially for managed reef fish and managed pelagic species in Federal waters around Puerto Rico, St. Croix, and St. Thomas and St. John. As described in Amendments 1, although buoy gear is currently listed as an authorized gear for recreational fishing of species that are not managed under the island-based FMPs, there is no evidence that the recreational sector operating in U.S. Caribbean Federal waters uses or has used buoy gear. Use of buoy gear by the recreational sector is unlikely because it is a very specialized commercial gear type that is expensive and difficult to use by anyone other than a professional commercial fisherman.

In December 2021, commercial fishermen fishing for deep-water snapper and grouper in Puerto Rico and the USVI have commented to the Council that they would like to increase the maximum number of hooks that are allowed while using buoy gear to reflect how the gear is currently used in state waters in both Puerto Rico and the USVI. Under the current definition of buoy gear that applies in Federal waters of the Gulf of Mexico, South Atlantic, and U.S. Caribbean, no more than 10 hooks may be connected between the buoy and the terminal end. Puerto Rico and USVI territorial regulations, on the other hand, do not limit the number of hooks allowed on deep-water reef fish buoy gear.

In Amendments 1, the Council decided to limit the use of buoy gear in U.S. Caribbean Federal waters to those fishing commercially and to prohibit the use of buoy gear by those fishing recreationally. By prohibiting the use of buoy gear by the recreational sector in U.S. Caribbean Federal waters, the Council sought to eliminate (1) potential future conflicts between commercial and recreational user groups at the subject fishing grounds, (2) additional ecological, biological, and physical effects that might result from recreational fishing for deep-water snapper and grouper, including risks to managed species that may result from misuse of buoy gear and bycatch of managed species by the recreational sector, and (3) any safety concerns potentially associated with the recreational use of buoy gear at the deep-water reef fish fishing grounds. In Amendments 1, the Council also decided to modify the definition of buoy gear to allow commercial fishermen in U.S. Caribbean Federal waters to use a maximum of 25 hooks with buoy gear to reflect how the gear is commonly used by commercial fishermen in state waters in Puerto Rico and the USVI.

Actions Contained in Amendments 1

Amendments 1 would prohibit the use of buoy gear by the recreational sector in the U.S. Caribbean and would modify the buoy gear definition to increase the maximum number of allowable hooks used by the commercial sector in the U.S. Caribbean.

Recreational Buoy Gear Prohibition

Buoy gear is currently an authorized gear type for those fishing recreationally for species that are not managed by the Council (*i.e.,* non-FMP species) in Federal waters around Puerto Rico, St. Croix, and St. Thomas and St. John. As described in Amendments 1, although the use of buoy gear by the recreational sector currently appears unlikely, the Council took a precautionary approach to prevent any future use of buoy gear by the recreational sector to fish for any species (*i.e.,* managed and non-managed species) in Federal waters around Puerto Rico, St. Croix, and St. Thomas and St. John. NMFS notes that with respect to non-managed species, the Magnuson-Stevens Act gives the Council and NMFS the authority to regulate fishing activity to support the conservation and management of fisheries. This can include regulations that pertain to fishing for non-managed species.

By limiting the use of buoy gear to the commercial sector, the Council seeks to prevent any potential future conflicts between commercial and recreational user groups resulting from the use of buoy gear. These potential conflicts could include competition for fishing grounds. The Council also seeks to eliminate any additional ecological, biological and physical effects that might occur through additional recreational fishing-related pressure at those grounds and to those resources. Specifically, the Council was concerned about overfishing the deep-water snapper and grouper resources, risks to managed species resulting from the misuse of the buoy gear, and increased bycatch of managed species that might result through the recreational use of buoy gear. Finally, the Council seeks to eliminate any safety concerns potentially associated with the presence of an emerging recreational fleet at the deep-water reef fish fishing grounds that could occur because of the specialized characteristics of the buoy gear operations.

Revision of Buoy Gear Definition

The current buoy gear definition, which applies in Federal waters of the Gulf of Mexico, South Atlantic, and U.S. Caribbean, specifies, among other measures, that this gear type may have no more than 10 hooks connected between the buoy and the terminal end.

In Amendments 1, the Council seeks to change the buoy gear definition to increase the maximum number of hooks allowed between the buoy and the terminal end from 10 to 25 hooks in the EEZ around Puerto Rico, St. Croix, and St. Thomas and St. John. This change in the buoy gear definition would apply only where buoy gear is authorized in the U.S. Caribbean EEZ, and would apply only to the commercial sector as a result of Action 1 in Amendments 1. NMFS notes that this change would apply to the commercial harvest of both Council-managed fisheries and non-managed fisheries. The increased number of authorized buoy gear hooks would allow commercial fishermen fishing in Federal waters off Puerto Rico, St. Croix, and St. Thomas and St. John to legally use the same gear configuration that is commonly used by some commercial fisherman in state waters.

This action to revise the buoy gear definition in the U.S. Caribbean would also avoid enforcement complications for commercial fishermen harvesting multiple species on a trip because it would allow the use of the buoy gear with up to 25 hooks to harvest managed and non-managed deep-water fish. The change to the buoy gear definition would not change any other part of the buoy gear definition such as weight, construction materials for the drop line, and length of the drop line. Additionally, the current buoy gear definition, as it applies to the Gulf of Mexico and South Atlantic, would not change as a result of Amendments 1.

Proposed Rule for Amendments 1

A proposed rule to implement Amendments 1 has been drafted. In accordance with the Magnuson-Stevens Act, NMFS is evaluating the proposed rule to determine whether it is consistent with the FMPs, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Council has submitted Amendments 1 for Secretarial review, approval, and implementation. Comments on Amendments 1 must be received by June 5, 2023. Comments received during the respective comment periods, whether specifically directed to Amendments 1 or the proposed rule will be considered by NMFS in the decision to approve, disapprove, or

partially approve Amendments 1. Comments received after the comment periods will not be considered by NMFS in this decision. All comments received by NMFS on the amendments or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: March 30, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–07008 Filed 4–5–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 230327–0085]

RIN 0648–BM14

Fisheries Off West Coast States; Pelagic Species Fisheries; Amendment 20 to the Coastal Pelagic Species Fishery Management Plan

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

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule would implement two minor changes to Federal regulations, prompted by the proposed Amendment 20 to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). Amendment 20 would remove management category terminology from use in the FMP, but not to revise the manner in which the CPS stocks are managed. The Pacific Fishery Management Council (Council) recommended Amendment 20 for clarity and consistency with other Council FMPs. Specifically, this proposed rule would remove the definition for ''Actively Managed Species'' and a reference to ''monitored stocks'' from Federal regulations. Because this action does not change the manner in which CPS stocks are managed, this action is administrative in nature.

DATES: Comments on the proposed rule must be received by May 8, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0036, by the following method:

• *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0036 in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments must be submitted by the above method to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Taylor Debevec at (562) 980–4066 or *taylor.debevec@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The CPS FMP implemented the use of Management Categories with Amendment 8. Originally, the management categories included ''Active'' (or Actively) and ''Monitored.'' With Amendment 12 and the incorporation of krill into the CPS FMP, ''Prohibited Harvest'' was added as a management category. The primary function of the ''Active'' and ''Monitored'' management categories was to effectively and efficiently direct available agency and Council resources, in recognition that not all stocks require as intensive management as others, *e.g.,* frequency of assessments and changes to harvest levels. Stocks that supported intensive fisheries typically fell in the ''Active'' management category, meaning they were assessed on a regular schedule with associated regular updates to harvest specifications. In contrast, stocks that were less intensively fished were ''Monitored'' and utilized long-term conservative harvest strategies deemed sufficient for their conservation and management. The category designations did not relieve stocks from the requirements of Magnuson-Stevens Fishery Conservation and Management Act (MSA) or National Standard 1 guidelines. Nor did they characterize the type of stock assessment or scientific information available to inform assessments, or strictly prescribe the frequency of assessment or harvest policy specification. Additionally, the FMP allowed for stocks to be moved from the ''Monitored'' category to the ''Active'' category if deemed necessary for their conservation and management.

In November 2018, the Council initiated an effort to address a perceived lack of clarity regarding the meaning and use of these terms in the FMP and to promote consistency with other Council FMPs. The Council directed its CPS Management Team to explore ways to remove the naming distinction of management categories, while maintaining existing stock management. The Council considered the issue at its June 2019 and November 2021 meetings, with final action taking place at its April 2022 meeting. The proposed Amendment 20 would remove management category terms from the FMP and incorporate additional modifications in place of those terms to ensure flow and readability of the FMP. ''Prohibited Harvest Species'' would remain defined (krill), but references to it being a management category would be removed.

To align with the proposed Amendment, NMFS is proposing this rule to remove the management category terms from Federal regulations, and make some small additional modifications in place of where those terms were removed to ensure flow and readability of the regulations. This proposed rule would remove the two places in Federal CPS regulations that reference these management category terms by: removing ''Actively Managed Species'' from definitions in 50 CFR 660.502, and removing a reference to ''monitored stocks'' from 50 CFR 660.511(k). These regulatory changes are administrative in nature and do not change management of CPS stocks.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, the Assistant Administrator, NMFS, has determined that this proposed rule is consistent with the CPS FMP, other provisions of the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law, subject to further consideration after public comment.

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 that this

proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, for the following reasons.

For Regulatory Flexibility Act (RFA) purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (North American Industry Classification System (NAICS) code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

The small entities that would be affected by the proposed action are the vessels that harvest coastal pelagic species as part of the West Coast CPS finfish fleet and are all considered small businesses under the above size standards. Currently, there are 55 vessels permitted in the Federal CPS limited entry fishery. For these vessels that catch CPS, the average annual per vessel revenue has not exceeded $1.25 million in the last 5 years. The individual vessel revenue for these vessels is well below the threshold level of $11 million; therefore, all of these vessels are considered small businesses under the RFA. Because each affected vessel is a small business, this proposed rule is considered to equally affect all of these small entities in the same manner.

This proposed action removes terms that categorize CPS stocks, but the management of CPS stocks remains unchanged. Therefore, this action is not expected to have significant direct or indirect socioeconomic impacts because the proposed action is administrative.

Based on the disproportionality and profitability analysis above, the proposed action, if adopted, will 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.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indians—lands, Recreation and recreation areas, Reporting and recordkeeping requirements, Treaties.

Dated: March 31, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 660 as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

§ 660.502 [Amended]

■ 2. In § 660.502, remove the definition for ''Actively Managed Species''.

■ 3. In § 660.511, revise paragraph (k) to read as follows:

§ 660.511 Catch restrictions.

* * * * *

(k) The following annual catch limit applies to fishing for Northern Anchovy (Central Subpopulation): 25,000 mt.

[FR Doc. 2023–07121 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 230331–0088]

RIN 0648–BM07

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2023 Harvest Specifications for Pacific Whiting, and 2023 Pacific Whiting Tribal Allocation

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule for the 2023 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan, the Magnuson-Stevens Fishery Conservation and Management Act, the Pacific Whiting Act of 2006 (Whiting Act), and other applicable laws. This proposed rule would establish the domestic 2023 harvest specifications for Pacific whiting including the 2023 tribal allocation for the Pacific whiting fishery, the non-tribal sector allocations, and set-asides for incidental mortality in research activities and non-groundfish fisheries. The proposed measures are intended to help prevent overfishing, achieve optimum yield, ensure that management measures are based on the best scientific information available, and provide for the implementation of tribal treaty fishing rights.

DATES: Comments on this proposed rule must be received no later than April 21, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0033 by any of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0033 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 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).

Electronic Access

This proposed rule is accessible via the internet at the Office of the Federal Register website at *https://www.federalregister.gov.* Background information and documents are available at the NMFS website at *https://www.fisheries.noaa.gov* and at the Pacific Fishery Management Council's website at *http://www.pcouncil.org/.*

FOR FURTHER INFORMATION CONTACT: Colin Sayre, phone: 206–526–4656, and email: *Colin.Sayre@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

This proposed rule announces the adjusted coastwide whiting Total Allowable Catch (TAC) of 625,000 mt, the U.S. adjusted TAC of 461,750 mt, and proposes domestic 2023 Pacific whiting harvest specifications, including, the 2023 tribal allocation of 80,806 mt, announces the preliminary allocations for three non-tribal commercial whiting sectors, and

proposes set-asides for incidental mortality in research activities and the state-managed pink shrimp (non-groundfish) fishery. The tribal and non-tribal allocations for Pacific whiting, as well as set-asides, would be effective until December 31, 2023.

Pacific Whiting Agreement

The transboundary stock of Pacific whiting is managed through the Agreement Between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting of 2003 (Agreement). The Agreement establishes bilateral management bodies to implement the terms of the Agreement, including the Joint Management Committee (JMC), which recommends the annual catch level for Pacific whiting.

In addition to the JMC, the Agreement establishes several other bilateral management bodies to set whiting catch levels: the Joint Technical Committee (JTC), which conducts the Pacific whiting stock assessment; the Scientific Review Group (SRG), which reviews the stock assessment; and the Advisory Panel (AP), which provides stakeholder input to the JMC.

The Agreement establishes a default harvest policy of F–40 percent, which means a fishing mortality rate that would reduce the spawning biomass to 40 percent of the estimated unfished level. The Agreement also allocates 73.88 percent of the Pacific whiting TAC to the United States and 26.12 percent of the TAC to Canada. Based on recommendations from the JTC, SRG, and AP, the JMC determines the overall Pacific whiting TAC by March 25th of each year. NMFS, under the delegation of authority from the Secretary of Commerce, in consultation with the Secretary of State, has the authority to accept or reject this recommendation.

2023 Stock Assessment and Scientific Review

The JTC completed a stock assessment for Pacific whiting in February 2023 (see **ADDRESSES**). The assessment was reviewed by the SRG during a 4 day meeting held in person and online on February 07–10, 2023 (see **ADDRESSES** for the report; Status of the Pacific Hake (whiting) stock in U.S. and Canadian waters in 2023). The SRG considered the 2023 assessment report and appendices to represent the best scientific information available for Pacific hake/whiting.

The 2023 assessment model uses the same structure as the 2022 stock assessment model. The model is fit to an acoustic survey index of abundance, an index of age-1 fish, annual commercial catch data, mean weight-at-age data, and age composition data from acoustic surveys and commercial fisheries.

Age-composition data provide information to estimate relative year-class strength. Updates to the data in the 2022 assessment include: fishery catch and age-composition data from 2022, weight-at-age data for 2022, and minor changes to pre-2022 data.

The median estimate of the 2023 relative spawning biomass (female spawning biomass at the start of 2023 divided by that at unfished equilibrium) is 104 percent, but is highly uncertain. The median relative spawning biomass has increased since 2021, due to the estimated above average 2020 cohort entering maturity. The large, but uncertain, size of the 2020 cohort is based on the 2021 age-1 index estimate and the 2022 fishery age-composition data.

The median estimate of female spawning biomass at the start of 2023 is 1,909,550 mt. This is 34 percent higher than the median estimate for the 2022 female spawning biomass of 1,423,665 mt.

The estimated probability that the spawning biomass at the start of 2023 is below the Agreement's F–40 percent default harvest rate (40 percent of unfished levels), is 1.9 percent, and the probability that relative fishing intensity exceeded the spawning potential ratio at 40 percent unfished levels in 2022 is 0.1 percent. The joint probability that the relative spawning stock biomass is both below 40 percent of unfished levels, and that fishing mortality is above the relative fishing intensity of the Agreement's F–40 percent default harvest rate is estimated to be 0.1 percent.

2023 Pacific Whiting Coastwide and U.S. TAC Recommendation

The AP and JMC met in Vancouver, British Columbia, Canada February 28–March 1, 2023, to develop advice on a 2023 coastwide TAC. The AP provided its 2023 TAC recommendation to the JMC on March 1, 2023. The JMC reviewed the advice of the JTC, the SRG, and the AP, and agreed on a TAC recommendation for transmittal to the United States and Canadian Governments.

The Agreement directs the JMC to base the catch limit recommendation on the default harvest rate unless scientific evidence demonstrates that a different rate is necessary to sustain the offshore Pacific whiting resource. After consideration of the 2023 stock assessment and other relevant scientific information, the JMC did not use the default harvest rate, and instead agreed on a more conservative approach. There were two primary reasons for choosing a TAC well below the level of F–40 percent. First, the JMC noted aging of the 2010, 2014, and 2016 year classes and wished to extend access to these stocks as long as possible, which a lower TAC would accomplish by lowering the rate of removal of these year-classes. Second, there is uncertainty regarding the current size of the apparent large 2020 year class because there has not yet been a post-recruitment observation of this cohort by an acoustic survey. The JMC recommended a moderate increase in the TAC, rather than a large increase up to the full F–40 percent harvest rate until a more certain estimate of the year class's size is available after one more year of fishing data, and conclusion of the 2023 acoustic survey. This conservative TAC-setting process, endorsed by the AP, resulted in a TAC that is less than what it would be using the default harvest rate under the Agreement and is consistent with Article II 5(b) of the Agreement.

An adjusted TAC is recommended when either country's catch is less than its TAC in the prior year, and the shortfall is carried over into following year. In 2022, both countries did not attain their respective TACs; the U.S. attainment for 2022 is detailed in the Initial Regulatory Flexibility Analysis included in this preamble. Under the Agreement, carryover adjustments cannot not exceed 15 percent of a party country's unadjusted for TAC for the year in which the shortfall occurred. For the 2023 whiting fishery, the JMC recommended a coastwide TAC of 543,250 mt prior to adjustment. Based on Article III(2) of the Agreement, the 73.88 percent U.S. share of the coastwide TAC is 401,353 mt. Consistent with Article II(5)(b) of the Agreement, a carryover of 60,397 mt was added to the U.S. share for an adjusted U.S. TAC of 461,750 mt. The 26.12 percent Canadian share of the coastwide TAC consistent with Article III(2) of the Agreement is 141,897 mt, and a carryover of 21,353 mt was added to the Canadian share, for an adjusted Canadian TAC of 163,250. The total coastwide adjusted TAC is 625,000 mt for 2023.

This recommendation is consistent with the best available scientific information, and provisions of the Agreement and the Whiting Act. The recommendation was transmitted via letter to the United States and Canadian Governments on March 01, 2023. NMFS, under delegation of authority from the Secretary of Commerce, approved the TAC recommendation of

461,750 mt for U.S. fisheries on March 23, 2023.

Tribal Allocation

The regulations at 50 CFR 660.50(d) identify the procedures for implementing the treaty rights that Pacific Coast treaty Indian tribes have to harvest groundfish in their usual and accustomed fishing areas in U.S. waters. Tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request allocations, set-asides, or regulations specific to the tribes during the Council's biennial harvest specifications and management measures process. The regulations state that the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

NMFS allocates a portion of the U.S. TAC of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

Four Washington coastal treaty Indian tribes including the Makah Indian Tribe, Quileute Indian Tribe, Quinault Indian Nation, and the Hoh Indian Tribe (collectively, the ''Treaty Tribes''), can participate in the tribal Pacific whiting fishery. Tribal allocations of Pacific whiting have been based on discussions with the Treaty Tribes regarding their intent for those fishing years. The Hoh Tribe has not expressed an interest in participating in the Pacific whiting fishery to date. The Quileute Tribe and Quinault Indian Nation have expressed interest in beginning to participate in the Pacific whiting fishery at a future date. To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting, and has harvested Pacific whiting since 1996 using midwater trawl gear. Table 1 below provides a recent history of U.S. TACs and annual tribal allocation in metric tons (mt).

TABLE 1—U.S. TOTAL ALLOWABLE CATCH AND ANNUAL TRIBAL ALLOCATION IN METRIC TONS

[mt]

Year	U.S. TAC [1] (mt)	Tribal allocation (mt)
2010 ..	193,935	49,939
2011 ..	290,903	66,908
2012 ..	186,037	48,556
2013 ..	269,745	63,205
2014 ..	316,206	55,336
2015 ..	325,072	56,888
2016 ..	367,553	64,322
2017 ..	441,433	77,251
2018 ..	441,433	77,251
2019 ..	441,433	77,251
2020 ..	424,810	74,342
2021 ..	369,400	64,645
2022 ..	402,646	70,463

[1] Beginning in 2012, the United States started using the term Total Allowable Catch, or TAC, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. Prior to 2012, the terms Optimal Yield (OY) and Annual Catch Limit (ACL) were used.

In 2009, NMFS, the states of Washington and Oregon, and the Treaty Tribes started a process to determine the long-term tribal allocation for Pacific whiting. However, they have not yet determined a long-term allocation. This rule proposes the 2023 tribal allocation of Pacific whiting. This allocation does not represent a long-term allocation and is not intended to set precedent for future allocations.

In exchanges between NMFS and the Treaty Tribes during September 2022, the Makah Tribe indicated their intent to participate in the tribal Pacific whiting fishery in 2023 and requested 17.5 percent of the U.S. TAC. The Quinault Indian Nation, Quileute Indian Tribe and Hoh Indian Tribe informed NMFS in September 2022 that they will not participate in the 2023 fishery. NMFS proposes a tribal allocation that accommodates the tribal request, specifically 17.5 percent of the U.S. TAC. The proposed 2023 adjusted U.S. TAC is 461,750 mt, and therefore the proposed 2023 tribal allocation is 80,806 mt. NMFS has determined that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock indicates the 17.5 percent is within the range of the tribal treaty right to Pacific whiting.

Non-Tribal Research and Bycatch Set-Asides

The U.S. non-tribal whiting fishery is managed under the Council's Pacific Coast Groundfish FMP. Each year, the Council recommends a set-aside of Pacific whiting to accommodate incidental mortality of the fish in research activities and the state-managed pink shrimp fishery based on estimates of scientific research catch and estimated bycatch mortality in non-groundfish fisheries. At its November 2022 meeting, the Council recommended an incidental mortality set-aside of 750 mt for 2023. This set-aside is unchanged from the 750 mt set-aside amount for incidental mortality in 2022. This rule proposes the Council's recommendations.

Non-Tribal Harvest Guidelines and Allocations

In addition to the tribal allocation, this proposed rule establishes the fishery harvest guideline (HG), also called the non-tribal allocation. The proposed 2023 fishery HG for Pacific whiting is 380,194 mt. This amount was determined by deducting the 80,806 mt tribal allocation and the 750 mt allocation for scientific research catch and fishing mortality in non-groundfish fisheries from the U.S. adjusted TAC of 461,750 mt. Federal regulations further allocate the fishery HG among the three non-tribal sectors of the Pacific whiting fishery: The catcher/processor (C/P) Co-op Program, the Mothership (MS) Co-op Program, and the Shorebased Individual Fishing Quota (IFQ) Program. The C/P Co-op Program is allocated 34 percent (129,265 mt for 2023), the MS Co-op Program is allocated 24 percent (91,246 mt for 2023), and the Shorebased IFQ Program is allocated 42 percent (159,681 mt for 2023). The fishery south of 42° N lat. may not take more than 7,984 mt (5 percent of the Shorebased IFQ Program allocation) prior to May 1, the start of the primary Pacific whiting season north of 42° N lat.

TABLE 2—2023 PROPOSED PACIFIC WHITING ALLOCATIONS IN METRIC TONS

Sector	2023 Pacific whiting allocation (mt)
Tribal	80,806
Catcher/Processor (C/P) Co-op Program	129,266
Mothership (MS) Co-op Program	91,247
Shorebased IFQ Program	159,681

This proposed rule would be implemented under the statutory and regulatory authority of sections 304(b) and 305(d) of the Magnuson-Stevens Act, the Pacific Whiting Act of 2006, the regulations governing the groundfish fishery at 50 CFR 660.5–660.360, and other applicable laws. Additionally, with this proposed rule, NMFS would ensure that the fishery is managed in a manner consistent with treaty rights of four Treaty Tribes to fish in their ''usual and accustomed grounds and stations'' in common with non-tribal citizens.

United States v. *Washington,* 384 F. Supp. 313 (W.D. 1974).

Classification

NMFS notes that the public comment period for this proposed rule is 15 days. Finalizing the Pacific whiting harvest specifications close to the start of the Pacific whiting fishing season on May 1st provides the industry with more time to plan and execute the fishery and gives them earlier access to the finalized allocations of Pacific whiting. Given the considerably short timeframe between the JMC meeting in late February–early March and the start of the primary whiting season on May 1, NMFS has determined there is good cause for a 15-day comment period to best balance the interest in allowing the public adequate time to comment on the proposed measures while implementing the management measures, including finalizing the Pacific whiting allocations, in a timely manner. The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pacific Coast Groundfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making its final determination, NMFS will take into account the complete record, including comments received during the comment period.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the Pacific Coast Groundfish FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, regulations implementing the Pacific Coast Groundfish FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish FMP request allocations or regulations specific to the Tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. The regulations at 50 CFR 660.50(d) further state that the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. The tribal management measures in this proposed rule have been developed following these procedures.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

A range of potential total harvest levels for Pacific whiting have been considered under the Final Environmental Impact Statement for Harvest Specifications and Management Measures for 2015–2016 and Biennial Periods thereafter (2015/16 FEIS) and in the Amendment 30 to the Pacific Coast Groundfish Fishery Management Plan, 2023–2024 Harvest Specifications, and Management Measures Environmental Assessment (EA) and Regulatory Impact Review (RIR) and is available from NMFS (see **ADDRESSES**). The 2015/16 FEIS examined the harvest specifications and management measures for 2015–16 and 10 year projections for routinely adjusted harvest specifications and management measures. The 10 year projections were produced to evaluate the impacts of the ongoing implementation of harvest specifications and management measures and to evaluate the impacts of the routine adjustments that are the main component of each biennial cycle. The EA for the 2023–24 cycle tiers from the 2015/16 FEIS and focuses on the harvest specifications and management measures that were not within the scope of the 10 year projections in the 2015/16 FEIS.

An Initial Regulatory Flexibility Analysis (IRFA) was prepared for this action, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action is contained in the **SUMMARY** section and at the beginning of the **SUPPLEMENTARY INFORMATION** section of the preamble. A summary of the IRFA follows. Copies of the IRFA are available from NMFS (see **ADDRESSES**).

Under the RFA, the term ''small entities'' includes small businesses, small organizations, and small governmental jurisdictions. For purposes of complying with the RFA, NMFS has established size criteria for entities involved in the fishing industry that qualify as small businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of $11 million for all its affiliated operations worldwide (80 FR 81194, December 29, 2015). In addition, the Small Business Administration has established size criteria for other entities that may be affected by this proposed rule. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A small organization is any nonprofit enterprise that is independently owned and operated and is not dominant in its field. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (See NAICS 311710 at 13 CFR 121.201). For purposes of rulemaking, NMFS is also applying the seafood processor standard to C/Ps because whiting C/Ps earn the majority of the revenue from processed seafood product.

Description and Estimate of the Number of Small Entities To Which the Rule Applies, and Estimate of Economic Impacts by Entity Size and Industry

This proposed rule affects how Pacific whiting is allocated to the following sectors/programs: Tribal, Shorebased IFQ Program Trawl Fishery, MS Co-op Program Whiting At-sea Trawl Fishery, and C/P Co-op Program Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the U.S. TAC, which is developed and approved through the process set out in the Agreement and the Whiting Act.

We expect one tribal entity to fish for Pacific whiting in 2023. Tribes are not considered small entities for the purposes of RFA. Impacts to tribes are nevertheless considered in this analysis.

As of January 2023, the Shorebased IFQ Program is composed of 164 Quota Share permits/accounts (134 of which were allocated whiting quota pounds), and 35 first receivers, one of which is designated as whiting-only receivers and 11 that may receive both whiting and non-whiting.

These regulations also directly affect participants in the MS Co-op Program, a general term to describe the limited access program that applies to eligible harvesters and processors in the MS sector of the Pacific whiting at-sea trawl fishery. This program consists of six MS processor permits, and a catcher vessel fleet currently composed of a single co-op, with 34 Mothership/Catcher Vessel (MS/CV) endorsed permits (with three permits each having two catch history assignments).

These regulations also directly affect the C/P Co-op Program, composed of 10 C/P endorsed permits owned by three companies that have formed a single

coop. These co-ops are considered large entities both because they have participants that are large entities and because they have in total more than 750 employees worldwide including affiliates.

Although there are three non-tribal sectors, many companies participate in two sectors and some participate in all three sectors. As part of the permit application processes for the non-tribal fisheries, based on a review of the Small Business Administration size criteria, permit applicants are asked if they considered themselves a ''small'' business, and they are asked to provide detailed ownership information. Data on employment worldwide, including affiliates, are not available for these companies, which generally operate in Alaska as well as the West Coast and may have operations in other countries as well. NMFS requests that limited entry permit holders self-report their size status. For 2023, all 10 C/P permits reported that they are not small businesses, as did 8 mothership catcher vessels. There is substantial, but not complete, overlap between permit ownership and vessel ownership so there may be a small number of additional small entity vessel owners who will be impacted by this rule. After accounting for cross participation, multiple Quota Share account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered small businesses.

This rule will allocate Pacific whiting between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests may be delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportionment process. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2022 NMFS reapportioned 40,000 mt of the original 70,463 mt tribal allocation. This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. The reapportioning process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2022 following the reapportionment were: Tribal 30,463 mt, C/P Co-op 126,287 mt; MS Co-op 89,144 mt; and Shorebased IFQ Program 156,002 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the United States is exported. The U.S. Pacific whiting TAC is highly variable, as have subsequent harvests and ex-vessel revenues. For the years 2016 to 2020, the total Pacific whiting fishery (tribal and non-tribal) averaged harvests of approximately 303,782 mt annually. The 2022 U.S. non-tribal fishery had a Pacific whiting catch of approximately 291,337 mt, and the tribal fishery landed less than 11,100 mt.

Impacts to the U.S. non-tribal fishery are measured with an estimate of ex-vessel revenue. The proposed adjusted coastwide TAC of 625,000 mt would result in an adjusted U.S. TAC of 461,750 mt and, after deduction of the tribal allocation and the incidental catch set-aside, a U.S. non-tribal harvest guideline of 380,194 mt. Using the 2022 weighted-average non-tribal price per metric ton (*e.g.,* $233.5 per metric ton), the proposed TAC is estimated to result in an ex-vessel revenue of $88.8 million for the U.S. non-tribal fishing fleet.

Impacts to tribal catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2022 average ex-vessel price of Pacific whiting, which was $233.50 per mt. At that price, the proposed 2022 tribal allocation of 80,806.25 mt would have an ex-vessel value of $18.87 million.

A Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

For the allocations to the non-tribal commercial sectors, the Pacific whiting tribal allocation, and set-asides for research and incidental mortality NMFS considered two alternatives: ''No Action'' and the ''Proposed Action.''

For allocations to non-tribal commercial sectors, the no action alternative would be mean that NMFS would not implement allocations to the non-tribal sectors based on the JMC recommended U.S. TAC, which would not fulfill NMFS' responsibility to manage the U.S. fishery. This is contrary to the Whiting Act and Agreement, which requires sustainable management of the Pacific whiting resource, therefore the no action alternative for allocations to non-tribal commercial sectors received no further consideration.

For set-asides for research and incidental mortality, the no action alternative would mean that NMFS would not implement the set-aside amount of 750 mt recommended by the Council. Not implementing set-asides of the US whiting TAC would mean incidental mortality of the fish in research activities and non-groundfish fisheries would not be accommodated. This would be inconsistent with the Council's recommendation, the Pacific Coast Groundfish Fishery Management Plan, the regulations setting the framework governing the groundfish fishery, and NMFS' responsibility to manage the fishery. Therefore, the no action alternative for set-asides received no further consideration.

NMFS did not consider a broader range of alternatives to the proposed tribal allocation because the tribal allocation is a percentage of the U.S. TAC and is based primarily on the requests of the Tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting. Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5 percent, as requested by the Tribes. This would yield a tribal allocation of 80,806.25 mt for 2023. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the Tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the no action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no action alternative would result in no allocation of Pacific whiting to the tribal sector in 2023, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the Tribes' treaty rights. Given that there is a tribal request for allocation in 2023, this no-action alternative for allocation to the

triable sector received no further consideration.

Regulatory Flexibility Act Determination of No Significant Impact

NMFS determined this proposed rule would not adversely affect small entities. The reapportioning process allows unharvested tribal allocations of Pacific whiting, fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities.

NMFS has prepared an IRFA and is requesting comments on this conclusion. See **ADDRESSES**.

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

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: March 31, 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 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.50, revise paragraph (f)(4) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(4) *Pacific whiting.* The tribal allocation for 2023 is 80,806 mt.

* * * * *

■ 3. Revise Table 1a to part 660, subpart C–2023, to read as follows:

TABLE 1a TO PART 660, SUBPART C—2023, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES (WEIGHTS IN METRIC TONS)

[Capitalized stocks are overfished]

Stocks	Area	OFL	ABC	ACL [a]	Fishery HG [b]
YELLOWEYE ROCKFISH [c]	Coastwide	123	103	66	55.3
Arrowtooth Flounder [d]	Coastwide	26,391	18,632	18,632	16,537
Big Skate [e]	Coastwide	1,541	1,320	1,320	1,260.2
Black Rockfish [f]	California (S of 42° N lat.)	368	334	334	332.1
Black Rockfish [g]	Washington (N of 46°16′ N lat.)	319	290	290	271.8
Bocaccio [h]	S of 40°10′ N lat	2,009	1,842	1,842	1,793.9
Cabezon [i]	California (S of 42° N lat.)	197	182	182	180.4
California Scorpionfish [j]	S of 34°27′ N lat	290	262	262	258.4
Canary Rockfish [k]	Coastwide	1,413	1,284	1,284	1,215.1
Chilipepper [l]	S of 40°10′ N lat	2,401	2,183	2,183	2,085
Cowcod [m]	S of 40°10′ N lat	113	80	80	68.8
Cowcod	(Conception)	94	69	NA	NA
Cowcod	(Monterey)	19	11	NA	NA
Darkblotched Rockfish [n]	Coastwide	856	785	785	761.2
Dover Sole [o]	Coastwide	63,834	59,685	50,000	48,402.9
English Sole [p]	Coastwide	11,133	9,018	9,018	8,758.5
Lingcod [q]	N of 40°10′ N lat	5,010	4,378	4,378	4,098.4
Lingcod [r]	S of 40°10′ N lat	846	739	726	710.5
Longnose Skate [s]	Coastwide	1,993	1,708	1,708	1,456.7
Longspine Thornyhead [t]	N of 34°27′ N lat	4,616	3,019	2,295	2,241.3
Longspine Thornyhead [u]	S of 34°27′ N lat			725	722.8
Pacific Cod [v]	Coastwide	3,200	1,926	1,600	1,094
Pacific Ocean Perch [w]	N of 40°10′ N lat				
Pacific Whiting [x]	Coastwide	778,008	([x])	([x])	380,194
Petrale Sole [y]	Coastwide	3,763	3,485	3,485	3,098.8
Sablefish [z]	Coastwide	11,577	10,825		
Sablefish [z]	N of 36° N lat			8,486	See Table 1c
Sablefish [aa]	S of 36° N lat	2,338		2,310.6	
Shortspine Thornyhead	Coastwide	3,177	2,078		
Shortspine Thornyhead [bb]	N of 34°27′ N lat			1,359	1,280.7
Shortspine Thornyhead [cc]	S of 34°27′ N lat			719	712.3
Spiny Dogfish [dd]	Coastwide	1,911	1,456	1,456	1,104.5
Splitnose [ee]	S of 40°10′ N lat	1,803	1,592	1,592	1,573.4
Starry Flounder [ff]	Coastwide	652	392	392	343.7
Widow Rockfish [gg]	Coastwide	13,633	12,624	12,624	12,385.7
Yellowtail Rockfish [hh]	N of 40°10′ N lat	6,178	5,666	5,666	4,638.5
Stock Complexes					
Blue/Deacon/Black Rockfish [ii]	Oregon	679	597	597	595.2
Cabezon/Kelp Greenling [jj]	Washington	202	185	185	184.2
Cabezon/Kelp Greenling [kk]	Oregon	25	20	20	18.0
Nearshore Rockfish North [ll]	N of 40°10′ N lat	110	93	93	89.7
Nearshore Rockfish South [mm]	S of 40°10′ N lat	1,089	897	887	882.5
Other Fish [nn]	Coastwide	286	223	223	201.8
Other Flatfish [oo]	Coastwide	7,887	4,862	4,862	4,641
Shelf Rockfish North [pp]	N of 40°10′ N lat	1,614	1,283	1,283	1,212.1

TABLE 1a TO PART 660, SUBPART C—2023, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES (WEIGHTS IN METRIC TONS)—Continued

[Capitalized stocks are overfished]

Stocks	Area	OFL	ABC	ACL [a]	Fishery HG [b]
Shelf Rockfish South [qq]	S of 40°10′ N lat	1,835	1,469	1,469	1,336.2
Slope Rockfish North [rr]	N of 40°10′ N lat	1,819	1,540	1,540	1,474.6
Slope Rockfish South [ss]	S of 40°10′ N lat	870	701	701	662.1

[a] Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

[b] Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

[c] Yelloweye rockfish. The 66 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 10.7 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.12 mt), research catch (2.92 mt), and incidental open access mortality (2.66 mt) resulting in a fishery HG of 55.3 mt. The non-trawl HG is 50.9 mt. The combined non-nearshore/nearshore HG is 10.7 mt. Recreational HGs are: 13.2 mt (Washington); 11.7 mt (Oregon); and 15.3 mt (California). In addition, the non-trawl ACT is 39.9 mt, and the combined non-nearshore/nearshore ACT is 8.4 mt. Recreational ACTs are: 10.4 mt (Washington), 9.2 mt (Oregon), and 12.0 mt (California).

[d] Arrowtooth flounder. 2,094.98 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), research catch (12.98 mt) and incidental open access mortality (41 mt), resulting in a fishery HG of 16,537 mt.

[e] Big skate. 59.8 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), research catch (5.49 mt), and incidental open access mortality (39.31 mt), resulting in a fishery HG of 1,260.2 mt.

[f] Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research catch (0.08 mt), and incidental open access mortality (1.18 mt), resulting in a fishery HG of 332.1 mt.

[g] Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 271.8 mt.

[h] Bocaccio south of 40°10′ N lat. Bocaccio are managed with stock-specific harvest specifications south of 40°10′ N lat and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 48.12 mt is deducted from the ACL to accommodate EFP fishing (40 mt), research catch (5.6 mt), and incidental open access mortality (2.52 mt), resulting in a fishery HG of 1,793.9 mt. The California recreational fishery south of 40°10′ N lat. has an HG of 755.6 mt.

[i] Cabezon (California). 1.63 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (0.02 mt), and incidental open access fishery mortality (0.61 mt), resulting in a fishery HG of 180.4 mt.

[j] California scorpionfish south of 34°27′ N lat. 3.89 mt is deducted from the ACL to accommodate research (0.18 mt) and the incidental open access fishery (3.71 mt), resulting in a fishery HG of 258.4 mt.

[k] Canary rockfish. 68.91 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP fishing (6 mt), and research catch (10.08 mt), and incidental open access mortality (2.83 mt), resulting in a fishery HG of 1,215.1 mt. The combined nearshore/non-nearshore HG is 121.2 mt. Recreational HGs are: 41.4 mt (Washington); 62.3 mt (Oregon); and 111.7 mt (California).

[l] Chilipepper rockfish south of 40°10′ N lat. Chilipepper are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research catch (14.04 mt), incidental open access fishery mortality (13.66 mt), resulting in a fishery HG of 2,085 mt.

[m] Cowcod south of 40°10′ N lat. Cowcod are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (10 mt), and incidental open access mortality (0.17 mt), resulting in a fishery HG of 68.8 mt.

[n] Darkblotched rockfish. 23.76 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.5 mt), research catch (8.46 mt), and incidental open access mortality (9.8 mt) resulting in a fishery HG of 761.2 mt.

[o] Dover sole. 1,597.11 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), research catch (50.84 mt), and incidental open access mortality (49.27 mt), resulting in a fishery HG of 48,402.9 mt.

[p] English sole. 259.52 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), research catch (17 mt), and incidental open access mortality (42.52 mt), resulting in a fishery HG of 8,758.5 mt.

[q] Lingcod north of 40°10′ N lat. 279.63 mt is deducted from the ACL for the Tribal fishery (250 mt), research catch (17.71 mt), and incidental open access mortality (11.92 mt) resulting in a fishery HG of 4,098.4 mt.

[r] Lingcod south of 40°10′ N lat. 15.5 mt is deducted from the ACL to accommodate EFP fishing (4 mt), research catch (3.19 mt), and incidental open access mortality (8.31 mt), resulting in a fishery HG of 710.5 mt.

[s] Longnose skate. 251.3 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), research catch (12.46 mt), and incidental open access mortality (18.84 mt), resulting in a fishery HG of 1,456.7 mt.

[t] Longspine thornyhead north of 34°27′ N lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and incidental open access mortality (6.22 mt), resulting in a fishery HG of 2,241.3 mt.

[u] Longspine thornyhead south of 34°27′ N lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and incidental open access mortality (0.83 mt), resulting in a fishery HG of 722.8 mt.

[v] Pacific cod. 506 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), research catch (5.47 mt), and incidental open access mortality (0.53 mt), resulting in a fishery HG of 1,094 mt.

[w] Pacific ocean perch north of 40°10′ N lat. Pacific ocean perch are managed with stock-specific harvest specifications north of 40°10′ N lat. and within the Minor Slope Rockfish complex south of 40°10′ N lat. 145.48 mt is deducted from the ACL to accommodate the Tribal fishery (130 mt), research catch (5.39 mt), and incidental open access mortality (10.09 mt), resulting in a fishery HG of 3,427.5 mt.

[x] Pacific hake/whiting. The 2023 OFL of 778,008 mt is based on the 2023 assessment with an F40 percent of FMSY proxy. The 2023 coastwide adjusted Total Allowable Catch (TAC) is 625,000 mt. The U.S. TAC is 73.88 percent of the coastwide TAC. The 2023 adjusted U.S. TAC is 461,750 mt. From the U.S. TAC, 80,806 mt is deducted to accommodate the Tribal fishery, and 750 mt is deducted to accommodate research and bycatch in other fisheries, resulting in a 2022 fishery HG of 380,194-mt. The TAC for Pacific whiting is established under the provisions of the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting of 2003 and the Pacific Whiting Act of 2006, 16 U.S.C. 7001–7010, and the international exception applies. Therefore, no ABC or ACL values are provided for Pacific whiting.

[y] Petrale sole. 386.24 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP fishing (1 mt), research catch (24.14 mt), and incidental open access mortality (11.1 mt), resulting in a fishery HG of 3,098.8 mt.

[z] Sablefish north of 36° N lat. The sablefish coastwide ACL value is not specified in regulations. The coastwide sablefish ACL value is apportioned north and south of 36° N lat., using the rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 78.4 percent apportioned north of 36° N lat. and 21.6 percent apportioned south of 36° N lat. The northern ACL is 8,486 mt and is reduced by 849 mt for the Tribal allocation (10 percent of the ACL north of 36° N lat.). The 849 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in Table 1c.

[aa] Sablefish south of 36° N lat. The ACL for the area south of 36° N lat. is 2,338 mt (21.6 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research catch (2.40 mt) and incidental open access mortality (25 mt), resulting in a fishery HG of 2,310.6 mt.

[bb] Shortspine thornyhead north of 34°27′ N lat. 78.3 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), research catch (10.48 mt), and incidental open access mortality (17.82 mt), resulting in a fishery HG of 1,280.7 mt for the area north of 34°27′ N lat.

[cc] Shortspine thornyhead south of 34°27′ N lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and incidental open access mortality (6 mt), resulting in a fishery HG of 712.3 mt for the area south of 34°27′ N lat.

[dd] Spiny dogfish. 351.48 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP fishing (1 mt), research catch (41.85 mt), and incidental open access mortality (33.63 mt), resulting in a fishery HG of 1,104.5 mt.

[ee] Splitnose rockfish south of 40°10′ N lat. 18.42 mt is deducted from the ACL to accommodate EFP fishing (1.5 mt), research catch (11.17 mt), and incidental open access mortality (5.75 mt), resulting in a fishery HG of 1,573.4 mt.

[ff] Starry flounder. 48.28 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), research catch (0.57 mt), and incidental open access mortality (45.71 mt), resulting in a fishery HG of 343.7 mt.

[gg] Widow rockfish. 238.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (18 mt), research catch (17.27 mt), and incidental open access mortality (3.05 mt), resulting in a fishery HG of 12,385.7 mt.

[hh] Yellowtail rockfish north of 40°10′ N lat. Yellowtail rockfish are managed with stock-specific harvest specifications north of 40°10′ N lat. and within the Minor Shelf Rockfish complex south of 40°10′ N lat. 1,027.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), research catch (20.55 mt), and incidental open access mortality (7 mt), resulting in a fishery HG of 4,638.5 mt.

[ii] Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 1.82 mt is deducted from the ACL to accommodate research catch (0.08 mt) and incidental open access mortality (1.74 mt), resulting in a fishery HG of 595.2 mt.

[jj] Cabezon/kelp greenling (Oregon). 0.79 mt is deducted from the ACL to accommodate research catch (0.05 mt), and incidental open access mortality (0.74 mt), resulting in a fishery HG of 184.2 mt.

[kk] Cabezon/kelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, resulting in a fishery HG is 18 mt.

[ll] Nearshore Rockfish north of 40°10′ N lat. 3.27 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), research catch (0.47 mt), and incidental open access mortality (1.3 mt), resulting in a fishery HG of 89.7 mt. State specific HGs are Washington (17.7 mt), Oregon (32.0 mt), and California (39.6 mt). The ACT for copper rockfish (California) is 6.93 mt. The ACT for quillback rockfish (California) is 0.87 mt.

[mm] Nearshore Rockfish south of 40°10′ N lat. 4.54 mt is deducted from the ACL to accommodate research catch (2.68 mt) and incidental open access mortality (1.86 mt), resulting in a fishery HG of 882.5 mt. The ACT for copper rockfish is 84.61 mt. The ACT for quillback rockfish is 0.89 mt.

[nn] Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.24 mt is deducted from the ACL to accommodate research catch (6.29 mt) and incidental open access mortality (14.95 mt), resulting in a fishery HG of 201.8 mt.

[oo] Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.79 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), research catch (23.63 mt), and incidental open access mortality (137.16 mt), resulting in a fishery HG of 4,641.2 mt.

[pp] Shelf Rockfish north of 40°10′ N lat. 70.94 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (15.32 mt), and incidental open access mortality (25.62 mt), resulting in a fishery HG of 1,212.1 mt.

[qq] Shelf Rockfish south of 40°10′ N lat. 132.77 mt is deducted from the ACL to accommodate EFP fishing (50 mt), research catch (15.1 mt), and incidental open access mortality (67.67 mt) resulting in a fishery HG of 1,336.2 mt.

[rr] Slope Rockfish north of 40°10′ N lat. 65.39 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), and research catch (10.51 mt), and incidental open access mortality (18.88 mt), resulting in a fishery HG of 1,474.6 mt.

[ss] Slope Rockfish south of 40°10′ N lat. 38.94 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (18.21 mt), and incidental open access mortality (19.73 mt), resulting in a fishery HG of 662.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10′ N lat. set equal to the species' contribution to the ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10′ N lat. counts against this HG of 172.4 mt.

* * * * *

■ 4. Revise Table 1b to part 660, subpart C—2023, to read as follows:

TABLE 1b. TO PART 660, SUBPART C—2023, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP

[Weight In metric tons]

Stocks/stock complexes	Area	Fishery HG or ACT [a b]	Trawl		Non-trawl	
			%	Mt	%	Mt
YELLOWEYE ROCKFISH [a]	Coastwide	55.3	8	4.4	92	50.9
Arrowtooth flounder	Coastwide	16,537	95	15,710.2	5	826.9
Big skate [a]	Coastwide	1,260.2	95	1,197.2	5	63
Bocaccio [a]	S of 40°10′ N lat	1,793.9	39	700.3	61	1,093.5
Canary rockfish [a]	Coastwide	1,215.1	72.3	878.5	27.7	336.6
Chilipepper rockfish	S of 40°10′ N lat	2,085	75	1,563.8	25	521.3
Cowcod [a]	S of 40°10′ N lat	68.8	36	24.8	64	44.1
Darkblotched rockfish	Coastwide	761.2	95	723.2	5	38.1
Dover sole	Coastwide	48,402.8	95	45,982.7	5	2,420.1
English sole	Coastwide	8,758.5	95	8,320.6	5	437.9
Lingcod	N of 40′10° N lat	4,098.4	45	1,844.3	55	2,254.1
Lingcod [a]	S of 40′10° N lat	710.5	40	284.2	60	426.3
Longnose skate [a]	Coastwide	1,456.7	90	1,311	10	145.7
Longspine thornyhead	N of 34°27′ N lat	2,241.3	95	2,129.2	5	112.1
Pacific cod	Coastwide	1,094	95	1,039.3	5	54.7
Pacific ocean perch	N of 40°10′ N lat	3,427.5	95	3,256.1	5	171.4
Pacific whiting [c]	Coastwide	380,194	100	380,194	0	0
Petrale sole [a]	Coastwide	3,098.8	.....	3,068.8	.....	30
Sablefish	N of 36° N lat	NA	See Table 1c			
Sablefish	S of 36° N lat	2,310.6	42	970.5	58	1,340.1
Shortspine thornyhead	N of 34°27′ N lat	1,280.7	95	1,216.7	5	64
Shortspine thornyhead	S of 34°27′ N lat	712.3	.....	50	.....	662.3
Splitnose rockfish	S of 40°10′ N lat	1,572.4	95	1,494.7	5	78.7
Starry flounder	Coastwide	343.7	50	171.9	50	171.9
Widow rockfish [a]	Coastwide	12,385.7	.....	11,985.7	.....	400
Yellowtail rockfish	N of 40°10′ N lat	4,638.5	88	4,081.8	12	556.6

TABLE 1b. TO PART 660, SUBPART C—2023, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP—Continued

[Weight In metric tons]

Stocks/stock complexes	Area	Fishery HG or ACT [a b]	Trawl		Non-trawl	
			%	Mt	%	Mt
Other Flatfish	Coastwide	4,641.2	90	4,177.1	10	464.1
Shelf Rockfish [a]	N of 40°10′ N lat	1,212.1	60.2	729.7	39.8	482.4
Shelf Rockfish [a]	S of 40°10′ N lat	1,336.2	12.2	163	87.8	1,173.2
Slope Rockfish	N of 40°10′ N lat	1,474.6	81	1,194.4	19	280.2
Slope Rockfish [a]	S of 40°10′ N lat	662.1	63	417.1	37	245

[a] Allocations decided through the biennial specification process.

[b] The cowcod non-trawl allocation is further split 50:50 between the commercial and recreational sectors. This results in a sector-specific ACT of 22 mt for the commercial sector and 22 mt for the recreational sector.

[c] Consistent with regulations at § 660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.

■ 5. In § 660.140, revise paragraph (d)(1)(ii)(D) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(D) *Shorebased trawl allocations.* For the trawl fishery, NMFS will issue QP based on the following shorebased trawl allocations:

TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)

IFQ species	Area	2023 Shorebased trawl allocation (mt)	2024 Shorebased trawl allocation (mt)
YELLOWEYE ROCKFISH	Coastwide	4.42	4.42
Arrowtooth flounder	Coastwide	15,640.17	11,408.87
Bocaccio	South of 40°10′ N lat	700.33	694.87
Canary rockfish	Coastwide	842.50	830.22
Chilipepper	South of 40°10′ N lat	1,563.80	1,517.60
Cowcod	South of 40°10′ N lat	24.80	24.42
Darkblotched rockfish	Coastwide	646.78	613.53
Dover sole	Coastwide	45,972.75	45,972.75
English sole	Coastwide	8,320.56	8,265.46
Lingcod	North of 40°10′ N lat	1,829.27	1,593.47
Lingcod	South of 40°10′ N lat	284.20	282.60
Longspine thornyhead	North of 34°27′ N lat	2,129.23	2,002.88
Pacific cod	Coastwide	1,039.30	1,039.30
Pacific halibut (IBQ)	North of 40°10′ N lat	TBD	TBD
Pacific ocean perch	North of 40°10′ N lat	2,956.14	2,832.64
Pacific whiting	Coastwide	159,681.38	TBD
Petrale sole	Coastwide	3,063.76	2,863.76
Sablefish	North of 36° N lat.	3,893.50	3,559.38
Sablefish	South of 36° N lat.	970.00	889.00
Shortspine thornyhead	North of 34°27′ N lat	1,146.67	1,117.22
Shortspine thornyhead	South of 34°27′ N lat	50	50
Splitnose rockfish	South of 40°10′ N lat	1,494.70	1,457.60
Starry flounder	Coastwide	171.86	171.86
Widow rockfish	Coastwide	11,509.68	10,367.68
Yellowtail rockfish	North of 40°10′ N lat	3,761.84	3,668.56
Other Flatfish complex	Coastwide	4,142.09	4,152.89
Shelf Rockfish complex	North of 40°10′ N lat	694.70	691.65
Shelf Rockfish complex	South of 40°10′ N lat	163.02	163.02
Slope Rockfish complex	North of 40°10′ N lat	894.43	874.99
Slope Rockfish complex	South of 40°10′ N lat	417.1	414.58

* * * * *

[FR Doc. 2023–07097 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 66
Thursday, April 6, 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

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Pesticide Residues

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 May 25, 2023. 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 54th Session of the Codex Committee on Pesticide Residues (CCPR) of the Codex Alimentarius Commission (CAC), which will convene in Beijing, China from June 26–July 1, 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 54th Session of the CCPR and to address items on the agenda.

DATES: The public meeting is scheduled for May 25, 2023, from 2–4 p.m. EDT.

ADDRESSES: The public meeting will take place via Video Teleconference only. Documents related to the 54th Session of the CCPR will be accessible via the internet at the following address: *https://www.fao.org/fao-who-codexalimentarius/meetings/detail/en/?meeting=CCPR&session=54.* Mr. Aaron Niman, U.S. Delegate to the 54th Session of the CCPR, invites interested U.S. parties to submit their comments electronically to the following email address: *niman.aaron@epa.gov.*

Registration: Attendees must register to attend the public meeting at the following link: *https://www.zoomgov.com/meeting/register/vJItdOurpz8vEw74qzY2IOC-3PUkfxxyf2w.*

After registering, you will receive a confirmation email containing information about joining the meeting.

For further information about the 54th Session of the CCPR, contact U.S. Delegate, Mr. Aaron Niman, *niman.aaron@epa.gov,* (202) 566–2177. 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 Pesticide Residues (CCPR) are:

(a) to establish maximum limits for pesticide residues in specific food items or in groups of food;

(b) to establish maximum limits for pesticide residues in certain animal feeding stuffs moving in international trade where this is justified for reasons of protection of human health;

(c) to prepare priority lists of pesticides for evaluation by the Joint FAO/WHO Meeting on Pesticide Residues (JMPR);

(d) to consider methods of sampling and analysis for the determination of pesticide residues in food and feed;

(e) to consider other matters in relation to the safety of food and feed containing pesticide residues; and,

(f) to establish maximum limits for environmental and industrial contaminants showing chemical or other similarity to pesticides, in specific food items or groups of food.

The CCPR is hosted by China. The United States attends the CCPR as a member country of Codex.

Issues To Be Discussed at the Public Meeting

The following items from the forthcoming Agenda for the 54th Session of the CCPR will be discussed during the public meeting:

- Adoption of the Agenda
- Appointment of Rapporteurs
- Matters referred to CCPR by CAC and/or other subsidiary bodies
- Matters of interest arising from FAO and WHO
- Matters of interest arising from other international organizations
- Report on items of general consideration arising from the 2022 JMPR regular meeting
- Report on responses to specific concerns raised by CCPR arising from the 2022 JMPR regular meeting
- Maximum Residue Limits (MRLs) for pesticides in food and feed
- Revision of the *Classification of Food and Feed* (CXM 4/1989) on the following:

(i) Class B—Primary Food Commodities of Animal Origin and Class E—Processed Foods of Animal Origin (All Types)

(ii) Tables on examples of representative commodities for commodity groups in different types under Class B and Class E (for inclusion in the Principles and Guidance for the Selection of Representative Commodities for the Extrapolation of MRLs for Pesticides to Commodity Group (CXG 84–2012))

(iii) Portion of the commodity to which the MRLs apply, and which is analyzed for Group 006 Assorted tropical and sub-tropical fruits—inedible peel and Group 023 Oilseeds (Australia)

(iv) Review the Guidelines on portion of commodities to which MRLs apply and which is analyzed (CXG 41–1993)

- Coordination of work between CCPR and CCRVDF: Joint CCPR/CCRVDF Working Group on Compounds for Dual Use—Status of work
- Management of unsupported compounds without public health concern scheduled for periodic review
- National registrations of pesticides (National Registration Database for Pesticides for Periodic Review by JMPR)
- Establishment of Codex Schedules and Priority Lists of Pesticides for Evaluation/Re-Evaluation by JMPR
- Discussion paper on monitoring the purity and stability of certified reference material of multi-class pesticides during prolonged storage
- Discussion Paper on the Enhancement of the Operational Procedures of CCPR and JMPR

- Other Business and Future Work

Public Meeting

At the May 25, 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 Mr. Aaron Niman, U.S. Delegate for the 54th Session of the CCPR (see **ADDRESSES**). Written comments should state that they relate to activities of the 54th Session of the CCPR.

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: *https://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.

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Done at Washington, DC.

Mary Frances Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2023–07170 Filed 4–5–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0007]

Retail Exemptions Adjusted Dollar Limitations

AGENCY: Food Safety and Inspection Service (FSIS), Department of Agriculture (USDA).

ACTION: Notice.

SUMMARY: FSIS is announcing the dollar limitations on the amount of meat and meat products and poultry and poultry products that a retail store can sell to hotels, restaurants, and similar institutions without disqualifying itself for exemption from Federal inspection requirements.

DATES: *Applicable* May 8, 2023.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 937–4272.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) provide a comprehensive statutory framework to ensure that meat and meat products and poultry and poultry products prepared for commerce are wholesome, not adulterated, and properly labeled and packaged. Statutory provisions requiring inspection of the processing of meat and meat products and poultry and poultry products do not apply to operations of types traditionally and usually conducted at retail stores and restaurants in regard to products offered for sale to consumers in normal retail quantities (21 U.S.C. 661(c)(2) and 454(c)(2)). FSIS' regulations (9 CFR 303.1(d) and 381.10(d)) elaborate on the conditions under which requirements for inspection do not apply to retail operations involving the preparation of meat and meat products and the processing of poultry and poultry products.

Sales to Hotels, Restaurants, and Similar Institutions

Under the aforementioned regulations, sales to hotels, restaurants, and similar institutions (other than household consumers) disqualify a retail store from exemption if the retail product sales of amenable products exceed either of two maximum limits: 25 percent of the dollar value of the total retail product sales or the calendar year retail dollar limitation set by the FSIS Administrator. The retail dollar limitation is adjusted automatically during the first quarter of the year if the Consumer Price Index (CPI), published by the Bureau of Labor Statistics, shows an increase or decrease of more than $500 in the price of the same volume of product for the previous year. FSIS publishes a notice of the adjusted retail dollar limitations in the **Federal Register**. (See 9 CFR 303.1(d)(2)(iii)(*b*) and 381.10(d)(2)(iii)(*b*).)

The CPI for 2022 reveals an annual average price increase for meat and meat products of 8.20 percent, an average annual price increase for Siluriformes fish and fish products of 9.15 percent, and an annual average price increase for poultry and poultry products of 14.58 percent. When rounded to the nearest $100 dollar, the retail dollar limitation for meat and meat products, including Siluriformes fish and fish products, increased by $7,500 [1] and the retail dollar limitation for poultry and poultry products increased by $9,200.[2] In accordance with 9 CFR 303.1(d)(2)(iii)(*b*) and 381.10(d)(2)(iii)(*b*), because the retail dollar limitations for meat and meat products and poultry and poultry products increased by more than $500, FSIS is increasing the dollar limitation on sales to hotels, restaurants, and similar institutions to $98,900 for meat and meat products and to $72,000 for

[1] The base value for meat and meat products in 2022 was $91,390 rounded to the nearest $100 dollar to $91,400. The base value included $88,669 for meat and meat products and $2,721 to account for Siluriformes fish and fish products. The meat and meat products prices increased by 8.20 percent, or $7,271 ($88,669 × 0.0820 = $7,271), during 2022. The Siluriformes fish and fish products prices increased by 9.15 percent, or $249 ($2,721 × 0.0915 = $249), during 2022. Combined, the value for meat and meat products that includes Siluriformes fish and fish products increased by $7,520 ($7,271 + $249). Since this change is more than $500, the retail dollar limitation is adjusted to $98,900 [($88,669 + $7,271) + ($2,721 + $249) = $98,910 which is rounded to $98,900].

[2] The base value for poultry and poultry products in 2022 was $62,824 rounded to the nearest $100 dollar to $62,800. The poultry and poultry products prices increased by 14.58 percent, or $9,160 ($62,824 × 0.1458 = $9,160), during 2022. Since this change is more than $500, the retail dollar limitation is adjusted to $72,000 ($62,824 + $9,160 = $71,984 rounded to $72,000.)

poultry and poultry products for calendar year 2023.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

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(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Paul Kiecker,

Administrator.

[FR Doc. 2023–07098 Filed 4–5–23; 8:45 am]

BILLING CODE 3410–DM–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Texas 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 Texas Advisory Committee (Committee) will hold a meeting via ZoomGov on Wednesday, April 5, 2023, from 2:00 p.m.–3:00 p.m. Central. The purpose of the meeting is to discuss their response to a recent development in their project on mental health care in the Texas Juvenile Justice Department.

DATES: These meeting will take place on:

- Wednesday, April 5, 2023, from 2:00 p.m.–3:00 p.m. CT.

ZOOM Link To Join:

- Wednesday, April 5th: *https://www.zoomgov.com/meeting/register/vJIsf-GsrzMoHsUiCjAu6_wSiIgbKkFoZ60.*

FOR FURTHER INFORMATION CONTACT: Brooke Peery, Designated Federal Officer (DFO) at *bpeery@usccr.gov* or by phone at (202) 701–1376.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the videoconference 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. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. 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 for individuals who are deaf, deafblind, or hard of hearing. To request additional accommodations, please email *bpeery@usccr.gov* at least 10 business days prior to the meeting.

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=a10t0000001gzkoAAA.*

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. Approval of Minutes
III. Committee Discussion
IV. Public Comment
V. 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 due to a recent development in the Committee's

current project on mental health care in the Texas Juvenile Justice Department.

Dated: April 3, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–07193 Filed 4–5–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Hawai'i Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of a 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 a meeting of the Hawai'i Advisory Committee to the Commission will convene by ZoomGov on Friday, April 21, 2023, from 3:00 p.m. to 4:00 p.m. HST, to discuss the draft Project Proposal on the Committee's chosen topic ''Overrepresentation of Native Hawaiian Families in the Child Welfare System in the State of Hawaii.''

DATES: The meeting will take place on Friday, April 21, 2023, from 3:00 p.m.–4:00 p.m. HST.

Zoom Link (Audio/Visual): https://www.zoomgov.com/j/1609544727?pwd=eHFkQ3RTcVIyTEFDbERGNjFabHRvQT09.

Audio: (833) 568–8864; Meeting ID: 160 954 4727.

FOR FURTHER INFORMATION CONTACT: Kayla Fajota, Designated Federal Officer (DFO) at *kfajota@usccr.gov* or by phone at (434) 515–2395.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the videoconference 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. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. 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 for individuals who are deaf, deafblind, or hard of hearing. To request additional accommodations, please email *kfajota@usccr.gov* at least 10 business days prior to the meeting.

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 Kayla Fajota at *kfajota@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=a10t0000001gzl0AAA.*

Please click on ''Committee Meetings'' tab. 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 phone number or email address.

Agenda

I. Welcome and Roll Call
II. Announcements and Updates
III. Approval of March 2, 2023, Meeting Minutes
IV. Discussion: Draft Project Proposal
V. Public Comment
VI. Adjournment

Dated: April 3, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–07190 Filed 4–5–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Survey of State Government Research and Development

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on October 31, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: U.S. Census Bureau, Department of Commerce.

Title: Survey of State Government Research and Development.

OMB Control Number: 0607–0933.

Form Number(s): SRD–1.

Type of Request: Regular submission, request for an extension, without change, of a currently approved collection.

Number of Respondents: 51 governors, 1 mayor, 52 state coordinators, and approximately 700 State government agencies.

Average Hours per Response: 5 minutes for each governor or mayor, 1 hour for each state coordinator, and 2 hours for each State agency surveyed.

Burden Hours: 1,456.

Needs and Uses: The Census Bureau conducts the Survey of State Government Research and Development (SGRD) to measure research and development performed and funded by State government agencies in the United States. The Census Bureau conducts the survey on behalf of the National Center for Science and Engineering Statistics (NCSES) within the National Science Foundation.

The National Science Foundation Act of 1950, as amended, includes a statutory charge to ''provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources and to provide a source of information for policy formulation by other agencies in the Federal Government.'' This mandate was further codified in the America COMPETES Reauthorization Act of 2010 section 505, which requires NCSES to ''collect, acquire, analyze, report, and disseminate . . . statistical data on (A) research and development trends . . .'' Under the aegis of these legislative mandates, NCSES has sponsored surveys of research and development (R&D) since 1951, including the SGRD since 2006. The Census Bureau's authorization to undertake this work is found at 13 U.S.C. 8(b) which provides that the Census Bureau ''may make special statistical compilations and surveys for departments, agencies, and establishments of the Federal government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) . . . State or local agencies, or other public and private persons and agencies.''

The SGRD is the only comprehensive source of State government research and development expenditure data collected

on a nationwide scale using uniform definitions, concepts, and procedures. The collection covers the expenditures of all agencies in the fifty State governments, the District of Columbia, and Puerto Rico that perform or fund R&D. The NCSES coordinates with the Census Bureau for the data collection. The NCSES uses this collection to satisfy, in part, its need to collect research and development expenditures data.

Fiscal data provided by respondents aid data users in measuring the effectiveness of resource allocation. The products of this data collection make it possible for data users to obtain information on such things as expenditures according to source of funding (*e.g.,* Federal funds or State funds), by performer of the work (*e.g.,* intramural and extramural to State agencies), by function (*e.g.,* agriculture, energy, health, transportation, etc.), by type of work (*e.g.,* basic research, applied research, or experimental development) for intramural performance of R&D, and by R&D plant (*e.g.,* construction projects). Final results produced by NCSES contain state and national estimates useful to a variety of data users interested in research and development performance including: The National Science Board; the Office of Management and Budget; the Office of Science and Technology Policy and other science policy makers; institutional researchers; and private organizations.

We have analyzed responses to a question about burden which appears on the instrument. That analysis indicates that the average burden for agency respondents should be 2 hours rather than the current estimate of 3 hours. We are adjusting the burden of the collection downward accordingly.

The survey announcements and forms used in the SGRD are:

Survey Announcement. An introductory email from the Directors of the NCSES and the Census Bureau is sent to Chief of Staff of Governor's Office to announce the survey collection and to solicit assignment of a State Coordinator. The State Coordinator's Announcement is sent electronically at the beginning of each survey period to solicit assistance in identifying State agencies which may perform or fund R&D activities.

Form SRD–1. This form contains item descriptions and definitions of the research and development items collected by the Census Bureau on behalf of the NCSES. All states supply their data by electronic means.

The Census Bureau emails Chief of Staff for the 50 state governors, the mayor of DC, and the governor of Puerto Rico requesting that they appoint a state coordinator for the survey. The Census Bureau then emails the state coordinators a spreadsheet asking them to identify State agencies that may have the capacity to perform or fund R&D. The Census Bureau subsequently emails the survey form to each State agency identified by the respective state coordinators. The form contains embedded data checks and auto-summing functionality. Agencies are asked to complete and email back the form. Alternatively, agencies can report to the Census Bureau by telephone.

Frequency: Annually.

Respondent's Obligation: Voluntary.

Legal Authority: National Science Foundation Act of 1950 as amended and the America COMPETES Reauthorization Act of 2010, title 42 U.S.C. 1861–76; title 13, U.S.C. 8(b).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

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 and entering either the title of the collection or the OMB Control Number 0607–0933.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–07241 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–58–2022]

Foreign-Trade Zone (FTZ) 151; Authorization of Production Activity; Procter & Gamble Manufacturing Company; (Industrial Perfumes/Fragrance Mixtures); Lima, Ohio

On December 2, 2022, Procter & Gamble Manufacturing Company submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 151 in Lima, Ohio.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (87 FR 76459, December 14, 2022). On April 3, 2023, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: April 3, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023–07251 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Emerging Technology Technical Advisory Committee; Notice of Partially Closed Meeting

The Emerging Technology Technical Advisory Committee (ETTAC) will meet on April 21, 2023, at 9:30 a.m., Eastern Daylight Time, via hybrid, in the Herbert C. Hoover Building, Room 3884, 1401 Constitution Avenue NW, Washington, DC (enter through Main Entrance on 14th Street between Constitution and Pennsylvania Avenues). The Committee advises the Office of the Assistant Secretary for Export Administration on the identification of emerging and foundational technologies with potential dual-use applications as early as possible in their developmental stages both within the United States and abroad.

Agenda

Closed Session: 9:30 a.m.–2:30 p.m.

1. Discussion of matters determined to be exempt from the open meeting and public participation requirements found in Sections 1009(a)(1) and 1009(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001–1014).

Open Session: 2:40 p.m.

2. Welcome and Introductions.
3. Introduction by the Bureau of Industry and Security Leadership.
4. NIST's Fundamental Research and Emerging Technology: Impact on Society.
5. Questions and Answers.
6. Public Comments/Announcements.

The exemption is authorized by section 1009(d) of the FACA, which permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines

such meetings may be closed to the public in accordance with subsection (c) of the Government in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(4), which permits closure to protect trade secrets and commercial or financial information that is privileged or confidential, and subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed prematurely. The closed session of the meeting will involve committee discussions and guidance regarding U.S. Government strategies and policies.

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than April 14, 2023.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 20, 2022, pursuant to 5 U.S.C. chapter 10 of the FACA, (5 U.S.C. 1009(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2023–07180 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–869]

Certain New Pneumatic Off-the-Road Tires From India: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that certain producers/exporters subject to this administrative review made sales of subject merchandise at less than normal value (NV) during the period of review (POR), March 1, 2021, through February 28, 2022. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Caroline Carroll or Lilit Astvatsatrian, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4948 or (202) 482–6412, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 6, 2017, Commerce published in the **Federal Register** the order on certain new pneumatic off-the-road (OTR) tires from India.[1] On May 13, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the *Order.*[2] On November 4, 2022, we extended the preliminary results of this review to no later than March 31, 2023.[3] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[4]

Scope of the Order

The merchandise subject to the *Order* is certain new pneumatic off-the-road tires, which are tires with an off road tires size designation.[5] The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.20.1025, 4011.20.1035, 4011.20.5030, 4011.20.5050, 4011.70.0010, 4011.62.0000, 4011.80.1010, 4011.80.1020, 4011.90.1050, 4011.70.0050, 4011.80.2010, 4011.80.8010, 4011.80.2020, 4011.80.8020, 8431.49.9038, 8431.49.9090, 8709.90.0020, and 8716.90.1020. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.2050, 4011.90.8050, 8424.90.9080, 8431.20.0000, 8431.39.0010, 8431.49.1090, 8431.49.9030, 8432.90.0020, 8432.90.0040, 8432.90.0050, 8432.90.0060, 8432.90.0081, 8433.90.5010, 8503.00.9560, 8708.70.0500, 8708.70.2500, 8708.70.4530, 8716.90.5035, 8716.90.5056 and 8716.90.5059. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the subject merchandise is dispositive.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Export price and constructed export price are calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is attached 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 *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

[1] *See Certain Now Pneumatic Off-the-Road Tires from India: Antidumping Duty Order,* 82 FR 12553 (March 6, 2017) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280 (May 13, 2022).

[3] *See* Memorandum, ''Certain New Pneumatic Off-the-Road Tires from India: Extension of Deadline for the Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated November 4, 2022.

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from India,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Preliminary Results of Review

As a result of this review, we preliminarily determine the following weighted-average dumping margins exist for the period March 1, 2021, through February 28, 2022:

Producer or exporter	Weighted-average dumping margin (percent)
ATC Tires Private Limited	1.32
Asian Tire Factory Ltd	8.91
Companies Not Selected for Individual Review [6]	1.65

Review-Specific Average Rate for Companies Not Selected for Individual Review

The exporters or producers not selected for individual review are listed in Appendix II.

Assessment Rates

Upon issuing the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.[7] Pursuant to 19 CFR 351.212(b)(1), because both respondents reported the entered value for all of their U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, we will assign an assessment rate based on the weighted average of the cash deposit rates calculated for ATC Tires Private Limited (ATC) and Asian Tire Factory Ltd. (ATF) excluding any which are zero, *de minimis,* or determined entirely on adverse facts available. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[8]

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by ATC or ATF for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the 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).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated or reviewed companies not covered in this review, the cash deposit rate will continue to be the company-specific cash deposit rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recent segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be zero percent, the all-others rate established in the LTFV investigation.[9] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Verification

On August 17, 2022, Titan Tire Corporation, the petitioner in this proceeding, requested that Commerce conduct verification of the factual information submitted by the respondents in this administrative review.[10] Accordingly, as provided in section 782(i)(3) of the Act, Commerce intends to verify the information relied upon in determining its final results.

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.[11] Interested parties may submit case briefs to Commerce no later than seven days after the date on which the last verification report is issued in this administrative review. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the time limit for filing case briefs.[12] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13] Case and rebuttal briefs should be filed using ACCESS.[14] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice.[16] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral

[6] Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any margins that are zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' For these preliminary results, we have preliminarily calculated a weighted-average dumping margin for these companies using the calculated rates of the mandatory respondents which are not zero or *de minimis,* or determined entirely on the basis of facts available.

[7] *See* 19 CFR 351.106(c)(2).

[8] *See* section 751(a)(2)(C) of the Act.

[9] *See Order,* 82 FR at 12554 (the dumping margin of 3.67 percent assigned to all other producers/exporters was adjusted for export subsidies found in the companion countervailing duty investigation).

[10] *See* Petitioner's Letter, ''Request for Verification,'' dated August 17, 2022.

[11] *See* 19 CFR 351.224(b).

[12] Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

[13] *See* 19 CFR 351.309(c)(2) and (d)(2).

[14] *See* 19 CFR 351.303.

[15] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[16] *See* 19 CFR 351.310(c).

presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing.[17]

Final Results

Commerce intends to issue the final results of this administrative review, including the results of its analysis raised in any written briefs, not later than 120 days after the publication of these preliminary results in the **Federal Register**, unless otherwise extended.[18]

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. 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 results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 31, 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. Scope of the *Order*
IV. Discussion of the Methodology
V. Recommendation

Appendix II

Review-Specific Average Rate Applicable to Companies Not Selected for Individual Review

1. Apollo Tyres Ltd.
2. Balkrishna Industries Ltd.[19]
3. Cavendish Industries Ltd.
4. CEAT Ltd.
5. Celle Tyre Corporation
6. Emerald Resilient Tyre Manufacturer
7. Forech India Private Limited
8. HRI Tires India
9. Innovative Tyres & Tubes Limited
10. JK Tyres and Industries Ltd.
11. K.R.M. Tyres
12. M/S. Caroline Furnishers Pvt. Ltd.
13. Mahansaria Tyres Private Limited
14. MRF Limited
15. MRL Tyres Limited (Malhotra Rubbers Ltd.)
16. OTR Laminated Tyres (I) Pvt. Ltd.
17. Rubberman Enterprises Pvt. Ltd.
18. Speedways Rubber Company
19. Sun Tyres & Wheel Systems
20. Sundaram Industries Private Limited
21. Superking Manufacturers (Tyre) Pvt., Ltd.
22. TVS Srichakra Limited

[17] *See* 19 CFR 351.310(d).

[18] *See* section 751(a)(3)(A) of the Act.

[19] Subject merchandise produced and exported by Balkrishna Industries Ltd. (BKT) was excluded from the *Order. See Certain New Pneumatic Off-the-Road Tires from India: Notice of Correction to Antidumping Duty Order,* 82 FR 25598 (June 2, 2017). Accordingly, BKT is only covered by this administrative review for subject merchandise produced in India where BKT acted as either the manufacturer or exporter (but not both).

[FR Doc. 2023–07249 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–121]

Difluoromethane From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission, and Preliminary Intent To Rescind, in Part, of Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that the sole mandatory respondent under review made sales of difluoromethane (R–32) from the People's Republic of China (China) below normal value (NV) during the period of review (POR). Additionally, we are rescinding this review with respect to Huantai Dongyue International Trade Co., Ltd. (Huantai Dongyue) and preliminarily rescinding this review with respect to Zhejiang Sanmei Chemical Ind. Co., Ltd. (Zhejiang Sanmei). Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Paul Gill, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5673.

SUPPLEMENTARY INFORMATION:

Background

On May 13, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the antidumping duty order on R–32 from China.[1] The POR is August 27, 2020, through February 28, 2022. On November 2, 2022, we extended the preliminary results of this review to no later than March 31, 2023.[2] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[3]

Scope of the Order

The merchandise covered by the *Order* is difluoromethane (R–32), or its chemical equivalent, regardless of form, type, or purity level.[4] R–32 is classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2903.39.2035. Other merchandise subject to the scope may be classified under 2903.39.2045 and 3824.78.0020. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the subject merchandise is dispositive.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. On July 20, 2022, Huantai Dongyue timely withdrew its request for an administrative review.[5] Because no other party requested a review of Huantai Dongyue, we are rescinding the administrative review for this company in accordance with 19 CFR 351.213(d)(1).

Preliminary Intent To Rescind, in Part

It is Commerce's practice to rescind an administrative review pursuant to 19 CFR 351.213(d)(3) when there are no reviewable entries of subject merchandise during the POR subject to

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280 (May 13, 2022); *see also Difluoromethane (R–32) from the People's Republic of China: Antidumping Duty Order,* 86 FR 13886 (March 11, 2021) (*Order*).

[2] *See* Memorandum, ''Difluoromethane (R–32) from the People's Republic of China: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review, 2020–2022,'' dated November 2, 2022.

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Difluoromethane (R–32) from the People's Republic of China; 2020–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] For a complete description of the scope of the order, *see* Preliminary Decision Memorandum.

[5] *See* Huantai Dongyue's Letter, ''Withdrawal of Request for Administrative Review'' dated July 20, 2022.

the antidumping duty order and for which liquidation is suspended.[6] At the end of an administrative review, suspended entries are liquidated at the assessment rate computed for the review period.[7] Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry to be liquidated at the newly calculated assessment rate.

While Zhejiang Sanmei requested an administrative review of itself,[8] the U.S. Customs and Border Protection Data (CBP) data on the record of this review show no evidence that Zhejiang Sanmei had suspended entries of subject merchandise during the POR,[9] and we received confirmation of this from CBP.[10] As the record contains no evidence of reviewable entries for Zhejiang Sanmei, we are preliminarily rescinding the review with respect to Zhejiang Sanmei in accordance with 19 CFR 351.213(d)(3).[11]

Preliminary Affiliation and Single Entity Determination

Based on record evidence in this review, 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): Taizhou Qingsong Refrigerant New Material Co., Ltd. (Taizhou Qingsong), Taixing Meilan New Materials Co., Ltd. (Taixing Meilan), and Jiangsu Meilan Chemical Co., Ltd. Furthermore, pursuant to 19 CFR 351.401(f)(1)–(2), we find that Taizhou Qingsong and Taixing Meilan should be treated as a single entity (collectively, Qingsong). For additional information, *see* the Affiliation and Collapsing Memorandum.[12]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. Export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. 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, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of the topics discussed in the Preliminary Decision Memorandum is attached as an Appendix to this notice.

Preliminary Results of the Review

We preliminarily determine that the following weighted-average dumping margin exists for the period August 27, 2020, through February 28, 2022:

Producer or exporter	Weighted-average dumping margin (percent)
Taizhou Qingsong Refrigerant New Material Co., Ltd.; Taixing Meilan New Materials Co., Ltd	160.65

Assessment Rates

Upon issuing the final results, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[13]

Pursuant to 19 CFR 351.212(b)(1), Commerce calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[14]

Pursuant to Commerce's assessment practice,[15] for entries that were not reported in the U.S. sales data submitted by Qingsong, we will instruct CBP to liquidate such entries at the China-wide rate. For Zhejiang Sanmei, if Commerce rescinds the review for this company in the final results, then antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the POR, in accordance with 19 CFR 351.212(c)(1)(i).

Finally, for Huantai Dongyue, the respondent for which we are rescinding the review, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the POR, in accordance with 19 CFR 351.212(c)(1)(i).

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.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the 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).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of administrative review for all shipments of subject merchandise entered, or

[6] *See, e.g., Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation: Notice of Rescission of Antidumping Duty Administrative Review*, 77 FR 65532 (October 29, 2012); *see also Forged Steel Fittings from Taiwan: Preliminary Intent To Rescind the Antidumping Duty Administrative Review; 2018–2019,* 85 FR 44503 (July 23, 2020), unchanged in *Forged Steel Fittings from Taiwan: Rescission of Antidumping Duty Administrative Review; 2018–2019*, 85 FR 71317 (November 9, 2020).

[7] *See* 19 CFR 351.212(b)(l).

[8] *See* Zhejiang Sanmei's Letter, ''Request for Administrative Review,'' dated March 31, 2022.

[9] *See* Memorandum, ''Release of Customs Entry Data from U.S. Customs and Border Protection (CBP),'' dated May 16, 2022.

[10] *See* Memorandum, ''No Shipment Inquiry with Respect to {Zhejiang Sanmei} During the Period 08/27/2020 Through 02/28/2022,'' dated March 20, 2023.

[11] For additional information regarding this preliminary intent to rescind, *see* the Preliminary Decision Memorandum.

[12] *See* Memorandum, ''Affiliation and Single Entity Status—Taizhou Qingsong Refrigerant New Materials Co., Ltd. and Taixing Meilan New Materials Co., Ltd.,'' dated concurrently with this memorandum (Affiliation and Collapsing Memorandum).

[13] *See* 19 CFR 351.106(c)(2).

[14] *Id.*

[15] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

withdrawn from warehouse, for consumption on, or after, the publication date of the final results of review, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Qingsong will be equal to the weighted-average dumping margin established in the final results of this review (except, if the dumping margin is zero or *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 Chinese exporters of subject merchandise that do not have a separate rate, the cash deposit rate will be the cash deposit rate established for the China-wide entity, 221.06 percent; [16] and (4) for all exporters of subject merchandise that are not located in China and that are not eligible for a separate rate, the cash deposit rate will be the rate applicable to the China exporter(s) that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.[17]

Public Comment

Interested parties may submit case briefs to Commerce no later than seven days after the date of the verification report issued in this administrative review.[18] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the time limit for filing case briefs.[19] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[20] Case and rebuttal briefs should be filed using ACCESS.[21]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice.[22] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing.[23]

Verification

As provided in section 782(i)(3) of the Act, Commerce intends to verify the information relied upon for its final results.

Final Results

Commerce intends to issue the final results of this administrative review, including the results of its analysis raised in any written briefs, not later than 120 days after the publication of these preliminary results in the **Federal Register**, unless otherwise extended.[24]

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 duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213, and 19 CFR 351.221(b)(4).

Dated: March 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Review
IV. Scope of the *Order*
V. Preliminary Intent to Rescind, in Part
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

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[16] *See Common Alloy Aluminum Sheet from the People's Republic of China: Antidumping Duty Order,* 84 FR 2813 (February 8, 2019).

[17] *See* 19 CFR 351.224(b).

[18] *See* 19 CFR 351.309(c).

[19] Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

[20] *See* 19 CFR 351.309(c)(2) and (d)(2).

[21] *See* 19 CFR 351.303.

[22] *See* 19 CFR 351.310(c).

[23] *See* 19 CFR 351.310(d).

[24] *See* section 751(a)(3)(A) of the Act.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–123]

Certain Corrosion Inhibitors From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2020–2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain corrosion inhibitors (corrosion inhibitors) from the People's Republic of China (China). The period of review is July 13, 2020, through December 31, 2021. In addition, we are rescinding the review with respect to 27 companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Brontee George or Theodore Pearson, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4656 or (202) 482–2631, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 19, 2021, Commerce published in the **Federal Register** the countervailing duty (CVD) order on certain corrosion inhibitors from China.[1] On May 13, 2022, Commerce published the notice of initiation of an administrative review of the *Order* for the period July 13, 2020, through December 31, 2021.[2] On July 19, 2022,

[1] *See Certain Corrosion Inhibitors from the People's Republic of China: Antidumping Duty and Countervailing Duty Orders,* 86 FR 14869 (March 19, 2021) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280 (May 13, 2022).

Commerce selected Anhui Trust Chem Co., Ltd. and Nantong Botao Chemical Co., Ltd. as mandatory respondents in this administrative review.[3] On October 24, 2022, Commerce exercised its discretion to extend the preliminary results of this administrative review by 120 days, until March 31, 2023.[4]

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[5] A list of topics discussed 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 *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The product covered by the *Order* are corrosion inhibitors from China. For a complete description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce preliminarily finds 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).[6]

In making these findings, Commerce relied, in part, on facts available and, because it finds that one or more respondents, including the Government of China, did not act to the best of their ability to respond to Commerce's requests for information, it drew an adverse inference where appropriate in selecting from among the facts otherwise available.[7] For further information, *see* ''Use of Facts Otherwise Available and Adverse Inferences'' in the Preliminary Decision Memorandum.

Rescission of Administrative Review, in Part

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation. Commerce received a timely-filed withdrawal of review request from Wincom Incorporated (the petitioner) with respect to 29 companies, pursuant to 19 CFR 351.213(d)(1). However, two of the companies for which the petitioner withdrew its review request are subject to review requests that were not withdrawn. For the other 27 companies, because the withdrawal request was timely filed, and no other parties requested a review of these companies, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding this administrative review with respect to these 27 companies. For a list of companies, *see* Appendix II.

Preliminary Results of Review

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate—2020 (percent *ad valorem*)	Subsidy rate—2021 (percent *ad valorem*)
Anhui Trust Chem Co., Ltd[8]	140.61	51.17
Nantong Botao Chemical Co., Ltd[9]	52.12	10.77
Review-Specific Average Rate Applicable to the Following Companies[10]		
Gold Chemical Limited	83.41	33.89
Jiangyin Delian Chemical Co., Ltd	83.41	33.89
Nantong Kanghua Chemical Co., Ltd	83.41	33.89

Preliminary Rate for Non-Selected Companies Under Review

There are three companies for which a review was requested and not rescinded, and which were not selected as mandatory respondents or found to be cross-owned with a mandatory respondent. The statute and Commerce's regulations do not directly address the establishment of rates to be applied to companies not selected for individual examination where Commerce limits its examination in an administrative review pursuant to section 777A(e)(2) of the Act. However, Commerce normally determines the rates for non-selected companies in reviews in a manner that is consistent with section 705(c)(5) of the Act, which provides the basis for calculating the all-others rate in an investigation.

Section 705(c)(5)(A)(i) of the Act instructs Commerce, as a general rule, to calculate an all-others rate equal to the weighted average of the countervailable subsidy rates established for exporters and/or producers individually examined, excluding any rates that are zero, *de minimis,* or based entirely on facts available. In this review, the preliminary rates calculated for Anhui Trust Chem Co., Ltd. (ATC) and Nantong Botao Chemical Co., Ltd. (Botao) were above *de minimis* and not based entirely on facts available. Therefore, we are applying to the non-selected companies the average of the net subsidy rates calculated for ATC and

[3] *See* Memorandum, ''Respondent Selection,'' dated July 19, 2022.

[4] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review; 2020–2021,'' dated October 24, 2022.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Countervailing Duty Administrative Review and Rescission in Part; 2020—2021: Certain Corrosion Inhibitors from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* sections 776(a) and (b) of the Act.

[8] As discussed in the Preliminary Decision Memorandum, Commerce preliminarily finds the following companies to be cross-owned with ATC: Nanjing Trust Chem Co., Ltd. and Jiangsu Trust Chem Co., Ltd.

[9] As discussed in the Preliminary Decision Memorandum, Commerce preliminarily finds the following companies to be cross-owned with Botao: Rugao Connect Chemical Co., Ltd.; Rugao Jinling Chemical Co., Ltd.; and Nantong Yutu Group Co., Ltd.

[10] This rate is based on the rate for the respondent that was selected for individual review, excluding rates that are zero, *de minimis,* or based entirely on facts available. *See* section 735(c)(5)(A) of the Act.

Botao, which we calculated using the publicly-ranged sales data submitted by ATC and Botao.[11] This methodology to establish the rate for the non-selected companies uses section 705(c)(5)(A) of the Act, which governs the calculation of the ''all-others'' rate in an investigation, as guidance. For further information on the calculation of the non-selected respondent rate, refer to the section in the Preliminary Decision Memorandum entitled ''Non-Selected Companies Under Review.''

Cash Deposit Requirements

Pursuant to section 751(a)(2)(C) of the Act, Commerce intends, upon publication of the final results, to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts indicated above for 2021 for each of the respondents listed above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. If the rate calculated in the final results is zero or *de minimis*, no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this 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.

Assessment Rates

In accordance with 19 CFR 351.221(b)(4)(i), we preliminarily assigned subsidy rates in the amounts shown above for the producers/exporters shown above. Consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), upon issuance of the final results, Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue assessment instructions to CBP no earlier than 35 days after the 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).

For the companies for which this review is rescinded with these preliminary results, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period July 13, 2020, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i).

Disclosure and Public Comment

We will disclose to parties in this review, the calculations performed for these preliminary results within five days after the date of publication of this notice.[12] Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review.[13] Rebuttals to case briefs may be filed no later than seven days after the case briefs are filed, and all rebuttal comments must be limited to comments raised in the case briefs.[14] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information until further notice.[15] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this review are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically using ACCESS. An electronically-filed request must be received successfully, and in its entirety, by ACCESS by 5:00 p.m. Eastern Time, within 30 days after the date of publication of this notice. Hearing requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, parties will be notified of the date and time for the hearing to be determined.

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Notification to Interested Parties

These preliminary results and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 30, 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. Scope of the Order
IV. Non-Selected Companies Under Review
V. Partial Rescission of Administrative Review
VI. Diversification of China's Economy
VII. Use of Facts Otherwise Available and Application of Adverse Inferences
VIII. Subsidies Valuation
IX. Interest Rate, Discount Rate, Input, Electricity, and Land Benchmarks
X. Analysis of Programs
XI. Recommendation

Appendix II

Companies Rescinded From Review

1. Dandee Hong Kong Holdings Ltd
2. Alvarez Schaer S.A.
3. Bollore Logistics Le Havre
4. CAC Shanghai Chemical Co., Ltd.
5. Dalsem Greenhouse Technology B.V.
6. Gooyer International Co., Ltd. (Hk)
7. Haruno Sangyo Kaisha Ltd.
8. Jiangsu Bohan Industry Trade Co., Ltd.
9. Jiangsu Yangnong Chemical Group Co., Ltd.
10. Jiangyin Gold Fuda Chemical Co., Ltd.
11. Johoku Chemical Co., Ltd.
12. K. Uttamlal Exports Private Limited
13. Nanjing Hengrun Hogsu Import & Export Company
14. Nanjing Innochem Co., Ltd.

[11] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated subsidy rates calculated for the examined respondents; (B) a simple average of the estimated subsidy rates calculated for the examined respondents; and (C) a weighted-average of the estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[12] *See* 19 CFR 351.224(b).

[13] *See* 19 CFR 351.309(c)(1)(ii).

[14] *See* 19 CFR 351.309(d).

[15] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 29615 (May 18, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

15. Nanjing Singchem Co., Ltd.
16. Nantong Bestime Chemical Co., Ltd.
17. Sagar Speciality Chemicals Pvt., Ltd.
18. Sinochem Pharmaceutical Co., Ltd.
19. Solenis Especialidades Quimicas Ltda
20. Techwell Technology Holding Limited
21. Tianjin Jinbin Iternational Trade
22. Vcare Medicines
23. Wuxi Base International Trade Co., Ltd.
24. Wuxi Connect Chemicals Co., Ltd.
25. Xingji Xi Chen Re Neng Co., Ltd.
26. Yasho Industries Pvt. Ltd.
27. Zaozhuang Kerui Chemicals Co., Ltd.

[FR Doc. 2023–07246 Filed 4–5–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–842]

Certain Uncoated Paper From Brazil: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty order on certain uncoated paper (uncoated paper) from Brazil with respect to two exporters/producers of subject merchandise. The period of review (POR) is March 1, 2021, through February 28, 2022. Commerce preliminarily finds that certain sales of uncoated paper from Brazil were made at less than normal value. We invite interested parties to comment on these preliminary results.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher Maciuba or Nathan James, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0413 or (202) 482–5305, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 13, 2022, Commerce initiated an administrative review of the antidumping duty order on uncoated paper from Brazil,[1] in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[2] This review covers two producers/exporters of subject merchandise, Suzano S.A. (Suzano)[3] and Sylvamo do Brasil Ltda. (SVBR)/Sylvamo Exports Ltda. (SVEX) (collectively, Sylvamo).[4]

On November 15, 2022, Commerce extended the deadline for these preliminary results until March 31, 2023.[5] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[6]

Scope of the Order

The merchandise subject to the *Order* is uncoated paper. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. We calculated export price and constructed export price in accordance with section 772 of the Act. We calculated normal value in accordance with section 773 of the Act.

For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is included as an appendix 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, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Preliminary Results of the Review

We preliminarily determine that the following weighted-average dumping margins exist for the period March 1, 2021, through February 28, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
Suzano S.A	7.17
Sylvamo do Brasil Ltda./ Sylvamo Exports Ltda	0.00

Assessment Rates

Upon completion of the final results of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Pursuant to 19 CFR 351.212(b)(1), if the weighted-average dumping margin for Suzano or Sylvamo is not zero or *de minimis* (*i.e.,* less than 0.50 percent) in the final results of this review, we will calculate importer-specific assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales. If either respondent's weighted-average dumping margin is zero or *de minimis* in the final results of review, or if an importer-specific assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review, and for future deposits of estimated duties, where applicable.[7]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Suzano or Sylvamo for which the company did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate established in the original less-than-fair-value (LTFV) investigation (*i.e.,* 27.11 percent)[8] if there is no rate for the intermediate company(ies) involved in the transaction.[9]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of

[1] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Amended Final Affirmative Antidumping Determinations for Brazil and Indonesia and Antidumping Duty Orders,* 81 FR 11174 (March 3, 2016) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280 (May 13, 2022).

[3] Commerce previously determined that Suzano is the successor-in-interest to Suzano Papel e Celulose S.A. *See Certain Uncoated Paper from Brazil: Final Results of Antidumping Duty Administrative Review; 2019–2020,* 86 FR 55820 (October 7, 2021).

[4] Commerce previously determined that SVBR is the successor-in-interest to International Paper do Brasil Ltda. and that SVEX is the successor-in-interest to International Paper Exportadora Ltda. *See Certain Uncoated Paper from Brazil: Final Results of Antidumping Duty Changed Circumstances Review,* 87 FR 1395 (January 11, 2022).

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated November 15, 2022.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Certain Uncoated Paper from Brazil; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* section 751(a)(2)(C) of the Act.

[8] *See Order,* 81 FR at 11176.

[9] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

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

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies listed above will be equal to the weighted-average dumping margins established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by a company not covered in this review, but covered in a prior segment of the proceeding, the cash deposit rate will be the company-specific rate published for the most recently completed segment in which they were reviewed; (3) if the exporter is not a firm covered in this review or in the original LTFV investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 27.11 percent, the all-others rate established in the LTFV investigation.[10] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results or, if there is no public announcement, within five days of the date of publication of this notice.[11] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[12] Parties who submit case or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13] Executive summaries should be limited to five pages total, including footnotes. Case and rebuttal briefs should be filed using ACCESS and must be served on interested parties.[14] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS.[16] Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in case and rebuttal briefs.[17] If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. A hearing request must be filed electronically using ACCESS and received in its entirety by 5:00 p.m. Eastern Time within 30 days after the publication of this notice.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, no later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice 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 duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: March 31, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

[FR Doc. 2023–07248 Filed 4–5–23; 8:45 am]

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[10] *See Order.*

[11] *See* 19 CFR 351.224(b).

[12] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

[13] *See* 19 CFR 351.309(c)(2) and (d)(2); *see also* 19 CFR 351.303 (for general filing requirements).

[14] *See* 19 CFR 351.303(f).

[15] *See Temporary Rule.*

[16] *See* 19 CFR 351.310(c).

[17] *See* 19 CFR 351.310.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–857]

Certain Softwood Lumber Products From Canada: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of this expedited sunset review, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) order on certain softwood lumber products (softwood lumber) from Canada would likely lead to the continuation or recurrence of dumping at the levels indicated in the ''Final Results of Sunset Review'' section of this notice.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Zachary Shaykin, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2638.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2018, Commerce published the AD order on imports of softwood lumber from Canada.[1] On December 1, 2022, Commerce published the notice of initiation of the first sunset review of the *Order* pursuant to section

[1] *See Certain Softwood Lumber Products from Canada: Antidumping Duty Order and Partial Amended Final Determination,* 83 FR 350 (January 3, 2018) (*Order*).

751(c) of the Tariff Act of 1930, as amended (the Act).[2]

On December 5 and 16, 2022, Commerce received notices of intent to participate within the 15-day deadline specified in 19 CFR 351.218(d)(1)(i) from, respectively, the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION) and Sierra Pacific Industries and its subsidiary (Sierra Pacific) (collectively, the domestic interested parties).[3] The domestic interested parties claimed interested party status under sections 771(9)(C) and (F) of the Act, as a manufacturer in the United States of the domestic like product and as an association of interested parties described in sections 771(9)(C) through (E) of the Act, respectively.[4]

On December 30, 2022 and January 3, 2023, Commerce received timely and adequate substantive responses to the notice of initiation from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3).[5] On January 5, 2023, one respondent interested party, Resolute FP Canada Inc. (Resolute) submitted a timely yet inadequate[6] substantive response to the notice of initiation.[7] On January 10, 2023, we received rebuttal comments to Resolute's substantive response from a domestic interested party.[8] On January 25, 2023, Commerce notified the U.S. International Trade Commission that we did not receive an adequate substantive response from respondent interested parties.[9] As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited (120-day) sunset reviews of the *Order.*

On January 26, 2023, Resolute submitted a request that Commerce provide interested parties an opportunity to submit a case brief commenting on the final results of the instant sunset review.[10] On March 3, 2023, Resolute submitted a case brief.[11] On March 6, 2023, the COALITION submitted a request that Commerce provide interested parties an opportunity to submit rebuttal briefs.[12] On March 7, 2023, Resolute submitted rebuttal comments to the COALITION's request for a deadline for interested parties to submit rebuttal briefs in the instant sunset review.[13] On March 8, 2023, Commerce provided interested parties an opportunity to submit case and rebuttal briefs with respect to this sunset review.[14] On March 13, 2023, Sierra Pacific submitted a case brief with respect to the final results of the sunset review.[15] On March 17, 2023, the domestic interested parties and Resolute submitted rebuttal briefs with respect to the issues raised in the interested parties' case briefs.[16]

Scope of the Order

The merchandise covered by this investigation is softwood lumber. For a complete description of the scope of the *Order, see* Appendix I.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the accompanying Issues and Decision Memorandum.[17] The issues discussed in the Issues and Decision Memorandum are listed in Appendix II. The Issues and 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, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Order* would be likely to lead to the continuation or recurrence of dumping, and the magnitude of the weighted-average dumping margin likely to prevail is up to 7.28 percent.

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing the final results and this notice in accordance with sections 751(c), 752(c), 771(i)(1) of the Act, and 19 CFR 351.218(e)(1)(II)(C)(2) and 351.221(c)(5).

Dated: March 31, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Order

The merchandise covered by this *Order* is softwood lumber, siding, flooring and certain

[2] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 73757 (December 1, 2022).

[3] *See* COALITION's Letter, ''Five-Year (''Sunset'') Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada: Notice of Intent to Participate,'' dated December 5, 2022 (COALITION's Notice of Intent to Participate); *see also* Sierra Pacific's Letter, ''Certain Softwood Lumber Products from Canada: Notice of Intent to Participate in Sunset Review,'' dated December 16, 2022 (Sierra Pacific's Notice of Intent to Participate).

[4] *See* COALITION's Notice of Intent to Participate at 2–4; *see also* Sierra Pacific's Notice of Intent to Participate at 1–2.

[5] *See* COALITION's Letter, ''Five-Year (''Sunset'') Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada: Substantive Response to Notice of Initiation,'' dated December 30, 2022; *see* Sierra Pacific's Letter, ''Certain Softwood Lumber Products from Canada: Substantive Response to the Notice of Initiation,'' dated January 3, 2023.

[6] Resolute failed to show that it accounts for 50 percent or more of total exports of subject merchandise to the United States from Canada during the five years preceding the year of the initiation of these sunset reviews, pursuant to 19 CFR 351.218(e)(1)(ii)(A).

[7] *See* Resolute's Letter, ''Initiation of Five-Year (Sunset) Reviews, Certain Softwood Lumber from Canada, 87 FR 73,757 (Dep't of Commerce Dec. 1, 2022),'' dated January 5, 2023.

[8] *See* COALITION's Letter, ''Five-Year (''Sunset'') Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada: Rebuttal to Resolute's Substantive Response,'' dated January 10, 2023.

[9] *See* Commerce's Letter, ''Sunset Reviews Initiated December 1, 2022,'' dated January 25, 2023.

[10] *See* Resolute's Letter, ''Softwood Lumber from Canada: First Sunset Review; Resolute's Request For Briefing Schedule In Expedited Sunset Review Pursuant To 19 CFR 351.309(c)(1)(iii),'' dated January 26, 2023.

[11] *See* Resolute's Letter, ''Certain Softwood Lumber from Canada, Five-Year (Sunset) Review: Resolute's Case Brief,'' dated March 3, 2023.

[12] *See* COALITION's Letter, ''Five-Year (''Sunset'') Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada: Request for Rebuttal Brief Deadline,'' dated March 6, 2023.

[13] *See* Resolute's Letter, ''Certain Softwood Lumber from Canada, Five-Year (Sunset) Review: Response to Petitioner's Request for Rebuttal Brief Deadline,'' dated March 7, 2023.

[14] *See* Memorandum, ''Certain Softwood Lumber Products from Canada, First Expedited Sunset Review; Briefing Schedule,'' dated March 8, 2023.

[15] *See* Sierra Pacific's Letter, ''Certain Softwood Lumber Products From Canada: Case Brief,'' dated March 13, 2023.

[16] *See* COALITION's Letter, ''Five-Year (''Sunset'') Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada: Rebuttal Brief,'' dated March 17, 2023; *see also* Sierra Pacific's Letter, ''Certain Softwood Lumber Products from Canada: Rebuttal Brief,'' dated March 17 2023; and Resolute's Letter, ''Certain Softwood Lumber from Canada, Five-Year (Sunset) Review: Resolute's Rebuttal Brief,'' dated March 17, 2023.

[17] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

other coniferous wood (softwood lumber products). The scope includes:

• Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.

• Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.

• Coniferous drilled and notched lumber and angle cut lumber.

• Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.

• Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.

Finished products are not covered by the scope of this *Order.* For the purposes of this scope, finished products contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to this *Order* at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the type of merchandise that is considered ''finished'' for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

The following items are excluded from the scope of this *Order:*

• Softwood lumber products certified by the Atlantic Lumber Board as being first produced in the Provinces of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island from logs harvested in Newfoundland and Labrador, Nova Scotia, or Prince Edward Island.

• U.S.-origin lumber shipped to Canada for processing and imported into the United States if the processing occurring in Canada is limited to one or more of the following: (1) kiln drying; (2) planing to create smooth-to-size board; or (3) sanding.

• Box-spring frame kits if they contain the following wooden pieces—two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails must be radius-cut at both ends. The kits must be individually packaged and must contain the exact number of wooden components needed to make a particular box-spring frame, with no further processing required. None of the components exceeds 1'' in actual thickness or 83'' in length.

• Radius-cut box-spring-frame components, not exceeding 1'' in actual thickness or 83'' in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantially cut so as to completely round one corner.

Softwood lumber product imports are generally entered under Chapter 44 of the Harmonized Tariff Schedule of the United States (HTSUS). This chapter of the HTSUS covers ''Wood and articles of wood.'' Softwood lumber products that are subject to this *Order* are currently classifiable under the following ten-digit HTSUS subheadings in Chapter 44:

4406.11.0000; 4406.91.0000; 4407.10.01.01; 4407.10.01.02; 4407.10.01.15; 4407.10.01.16; 4407.10.01.17; 4407.10.01.18; 4407.10.01.19; 4407.10.01.20; 4407.10.01.42; 4407.10.01.43; 4407.10.01.44; 4407.10.01.45; 4407.10.01.46; 4407.10.01.47; 4407.10.01.48; 4407.10.01.49; 4407.10.01.52; 4407.10.01.53; 4407.10.01.54; 4407.10.01.55; 4407.10.01.56; 4407.10.01.57; 4407.10.01.58; 4407.10.01.59; 4407.10.01.64; 4407.10.01.65; 4407.10.01.66; 4407.10.01.67; 4407.10.01.68; 4407.10.01.69; 4407.10.01.74; 4407.10.01.75; 4407.10.01.76; 4407.10.01.77; 4407.10.01.82; 4407.10.01.83; 4407.10.01.92; 4407.10.01.93; 4407.11.00.01; 4407.11.00.02; 4407.11.00.42; 4407.11.00.43; 4407.11.00.44; 4407.11.00.45; 4407.11.00.46; 4407.11.00.47; 4407.11.00.48; 4407.11.00.49; 4407.11.00.52; 4407.11.00.53; 4407.12.00.01; 4407.12.00.02; 4407.12.00.17; 4407.12.00.18; 4407.12.00.19; 4407.12.00.20; 4407.12.00.58; 4407.12.00.59; 4407.19.05.00; 4407.19.06.00; 4407.19.10.01; 4407.19.10.02; 4407.19.10.54; 4407.19.10.55; 4407.19.10.56; 4407.19.10.57; 4407.19.10.64; 4407.19.10.65; 4407.19.10.66; 4407.19.10.67; 4407.19.10.68; 4407.19.10.69; 4407.19.10.74; 4407.19.10.75; 4407.19.10.76; 4407.19.10.77; 4407.19.10.82; 4407.19.10.83; 4407.19.10.92; 4407.19.10.93; 4409.10.05.00; 4409.10.10.20; 4409.10.10.40; 4409.10.10.60; 4409.10.10.80; 4409.10.20.00; 4409.10.90.20; 4409.10.90.40; 4418.50.0010; 4418.50.0030; 4418.50.0050 and 4418.99.10.00.

Subject merchandise as described above might be identified on entry documentation as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts. Items so identified might be entered under the following ten-digit HTSUS subheadings in Chapter 44:

4415.20.40.00; 4415.20.80.00; 4418.99.90.05; 4418.99.90.20; 4418.99.90.40; 4418.99.90.95; 4421.99.70.40; and 4421.99.97.80.

Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this *Order* is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. History of the *Order*
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of Dumping
  2. Magnitude of the Dumping Margin Likely to Prevail
VII. Final Results of Sunset Review
VIII. Recommendation

[FR Doc. 2023–07250 Filed 4–5–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–831]

Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that sales of stainless steel sheet and strip in coils (SSSSC) from Taiwan have been made at less than normal value during the period of review (POR), July 1, 2021, through June 30, 2022. Additionally, Commerce preliminarily determines that four companies for which we initiated a review had no shipments during the POR. Interested parties are invited to comment on these preliminary results.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Hart or Alice Maldonado, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1058 or (202) 482–4682, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce is conducting an administrative review of the antidumping duty order on SSSSC from Taiwan.[1] On July 1, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order.*[2] The notice of initiation of this administrative review was published on September 6, 2022.[3] This review covers 61 producers and/or exporters of the subject merchandise. Commerce selected two companies, Lien Kuo Metal Industries Co., Ltd. (Lien Kuo) and S More Steel Materials Co., Ltd. (S More) for individual examination.[4] The producers

[1] *See Notice of Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils from United Kingdom, Taiwan, and South Korea,* 64 FR 40555 (July 27, 1999) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Service List,* 87 FR 39461 (July 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 54463 (September 6, 2022) (*Initiation Notice*).

[4] *See* Memorandum, ''Respondent Selection,'' dated October 7, 2022.

and/or exporters not selected for individual examination are listed in the ''Preliminary Results of the Review'' section of this notice.

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[5]

Scope of the Order

The merchandise subject to the *Order* are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.,* cold-rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing. The products subject to the *Order* are classified in the Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7219.13.00.31, 7219.13.00.51, 7219.13.00.71, 7219.13.00.81, 7219.14.00.30, 7219.14.00.65, 7219.14.00.90, 7219.32.00.05, 7219.32.00.20, 7219.32.00.25, 7219.32.00.35, 7219.32.00.36, 7219.32.00.38, 7219.32.00.42, 7219.32.00.44, 7219.33.00.05, 7219.33.00.20, 7219.33.00.25, 7219.33.00.35, 7219.33.00.36, 7219.33.00.38, 7219.33.00.42, 7219.33.00.44, 7219.34.00.05, 7219.34.00.20, 7219.34.00.25, 7219.34.00.30, 7219.34.00.35, 7219.35.00.05, 7219.35.00.15, 7219.35.00.30, 7219.35.00.35, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.12.10.00, 7220.12.50.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.20.70.05, 7220.20.70.10, 7220.20.70.15, 7220.20.70.60, 7220.20.70.80, 7220.20.80.00, 7220.20.90.30, 7220.20.90.60, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS numbers are provided for convenience and for customs purposes, Commerce's written description of the merchandise is dispositive.[6]

Methodology

Commerce is conducting this review in accordance with sections 751(a)(1)(B) and (2) of the Tariff Act of 1930, as amended (the Act). Commerce has preliminarily relied entirely upon facts otherwise available with adverse inferences for Lien Kuo and S More.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix 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, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Preliminary Determination of No Shipments

Four companies under review, Yieh Mau Corporation (Yieh Mau); Yieh Phui Enterprise Co., Ltd. (Yieh Phui); Yieh United Steel Corporation (YUSCO); and Yuen Chang Stainless Steel Co., Ltd. (Yuen Chang), filed statements reporting that they made no sales or exports of subject merchandise to the United States during the POR.[7] We were able to confirm Yieh Mau's, Yieh Phui's, and Yuen Chang's claims with U.S. Customs and Border Protection (CBP).[8] Consequently, we preliminarily determine that Yieh Mau, Yieh Phui, and Yuen Chang had no shipments during the POR. Consistent with Commerce's practice, we find that it is not appropriate to rescind the review with respect to these companies, but rather to complete the review and issue appropriate instructions to CBP based on the final results of this review.[9]

We also attempted to confirm YUSCO's claim with CBP; however, after review of the CBP data on the record of this case, we requested additional information from CBP related to certain POR entries of merchandise that may have been produced by YUSCO. In December 2022, Commerce placed these entry documents on the record.[10] In January 2023, we requested that YUSCO provide additional information related to its no-shipments claim, and we requested additional information from YUSCO's counsel related to the entry documents on the record.[11] In this same month, YUSCO and its counsel, respectively, responded to these requests.[12] Based on our analysis of the information on the record of this review, we also preliminarily determine that YUSCO had no shipments of subject merchandise during the POR because there is no information on the record to contradict YUSCO's no shipments certification. Therefore, consistent with our practice, we also will not rescind the review with respect to YUSCO; rather, we will complete the review and issue appropriate instructions to CBP based on the final results of this review. For further discussion, *see* the Preliminary Decision Memorandum at ''Preliminary Determination of No Shipments.''

Rate for Non-Selected Companies

The Act and Commerce's regulations do not address the rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies that were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Taiwan,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] For a full description of the scope of the *Order, see* Preliminary Decision Memorandum.

[7] *See* Yieh Mau's Letter, ''No Shipment Certification,'' dated October 4, 2022; *see also* Yieh Phui's Letter, ''No Shipment Certification,'' dated October 4, 2022; Yuen Chang's Letter, ''No Shipment Certification,'' dated October 4, 2022; and YUSCO's Letter, ''No Shipment Certification,'' dated October 4, 2022.

[8] *See* Memorandum, ''No Shipment Inquiry with Respect to the Companies Below During the Period 07/01/2021 through 06/30/2022,'' dated January 30, 2023.

[9] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[10] *See* Memorandum, ''Release of U.S. Customs and Border Protection Information,'' dated December 13, 2022.

[11] *See* Commerce's Letters, ''2021–2022 Administrative Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils, from Taiwan,'' both dated January 6, 2023.

[12] *See* YUSCO's Letters, ''Supplemental Response Re: CBP Entry Documentation,'' and ''Response to the Department's January 6, 2023 Letter,'' both dated January 20, 2023.

average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

Section 735(c)(5)(B) further provides if the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero, *de minimis,* or are determined entirely by application of facts available, Commerce may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated. The SAA further states that, ''{t}he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.'' [13] However, the SAA also instructs that, ''if this {expected} method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods'' to calculate the rate for the companies not selected for individual examination in this review.[14]

We preliminarily based the weighted-average dumping margins for Lien Kuo and S More, the mandatory respondents in this review, entirely on facts otherwise available with adverse inferences (AFA), as discussed in the Preliminary Decision Memorandum. Further, we preliminarily find that the mandatory respondents' total AFA dumping margin of 21.10 percent is not reasonably reflective of the non-selected companies' potential dumping margins during the POR because, in the most recently completed segment of this proceeding, the rate assigned to the mandatory respondent was 0.00 percent and the rate assigned to the non-selected companies was 4.30 percent.[15] Therefore, we preliminarily assigned the rate most recently assigned to the non-selected companies in this proceeding (*i.e.,* 4.30 percent) to the non-selected companies in this review. For additional information, *see* the Preliminary Decision Memorandum at ''Companies Not Selected for Individual Examination.''

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following estimated weighted-average dumping margins exist for the period July 1, 2021, through June 30, 2021:

Exporter/producer	Weighted-average dumping margin (percent)
Lien Kuo Metal Industries Co., Ltd	21.10
S More Steel Materials Co., Ltd	21.10
Companies Not Individually Examined [16]	4.30

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with a preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of preliminary determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because Commerce preliminarily applied total AFA to the individually examined companies, Lien Kuo and S More, in this administrative review, and the applied AFA rate is based on a rate calculated for a respondent in a prior segment of this proceeding, there are no calculations to disclose.

Public Comment

Interested parties may submit case briefs or other written comments to Commerce no later than 30 days after the date of publication of this notice.[17] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the time limit for filing case briefs.[18] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[19] Case and rebuttal briefs should be filed using ACCESS.[20] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[21]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Acting Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS within 30 days after publication of this notice.[22] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined.[23] Parties should confirm by telephone the date and time of the hearing two days before the scheduled date. An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline.

Commerce intends to issue the final results of this administrative review, including the results of its analysis raised in any written briefs, not later than 120 days after the publication date of this notice, pursuant to section 751(a)(3)(A) of the Act, unless otherwise extended.[24]

Assessment Rates

Upon completion of the administrative review, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[25]

For the companies that were not selected for individual review, we intend to assign an assessment rate based on the methodology described in the ''Rate for Non-Selected Companies'' section, above. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[26]

[13] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, vol. 1 (1994) (SAA) at 873.

[14] *Id.; see also Albemarle Corp.* v. *United States,* 821 F.3d 1345, 1352 (Fed. Cir. 2016) (explaining that if the ''expected method'' is ''not feasible'' or the method ''results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers,'' Commerce may, instead, ''use other reasonable methods.'').

[15] *See Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results of Antidumping Duty Administrative Review,* 75 FR 76700 (December 9, 2010).

[16] *See* Appendix II for a full list of companies not individually examined in this review.

[17] *See* 19 CFR 351.309(c).

[18] *See Temporary Rule Modifying AD/CVD Service Requirements Due to Covid–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

[19] *See* 19 CFR 351.309(c)(2) and (d)(2).

[20] *See* 19 CFR 351.303.

[21] *See Temporary Rule.*

[22] *See* 19 CFR 351.310(c).

[23] *See* 19 CFR 351.310(d).

[24] *See* section 751(a)(3)(A) of the Act.

[25] *See* 19 CFR 351.212(b).

[26] *See* section 751(a)(2)(C) of the Act.

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[27]

Further, if we continue to find in the final results that Yieh Mau, Yieh Phui, Yuen Chang, and YUSCO had no shipments of subject merchandise during the POR, we will instruct CBP to liquidate any suspended entries that entered under their AD case number (*i.e.,* at that exporter's rate) at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the 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).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the exporters listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which the company was reviewed; (3) if the exporter is not a firm covered in this review or previous segment, but the manufacturer is, then the cash deposit rate will be the rate established for the most recently-completed segment for the manufacturer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 12.61 percent, the all-others rate established in the less-than-fair-value investigation.[28] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 31, 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. Scope of the *Order*
IV. Preliminary Determination of No Shipments
V. Companies Not Selected for Individual Examination
VI. Discussion of the Methodology: Application of Facts Available and Use of Adverse Inference
  A. Application of Facts Available
  B. Application of Facts Available With an Adverse Inference
  C. Selection and Corroboration of the AFA Rate
VII. Recommendation

Appendix II

List of Companies Not Selected for Individual Examination

1. Broad International Resources Ltd.
2. Chain Chon Industrial Co., Ltd.
3. Cheng Feng Plastic Co., Ltd.
4. Chia Far Industrial Factory Co., Ltd.
5. Chien Shing Stainless Co.
6. China Steel Corporation
7. Chung Hung Steel Corp
8. Chyang Dah Stainless Co., Ltd.
9. Dah Shi Metal Industrial Co., Ltd.
10. Da-Tsai Stainless Steel Co., Ltd.
11. DB Schenker (HK) Ltd. Taiwan Branch.
12. DHV Technical Information Co., Ltd.
13. Froch Enterprises Co., Ltd.
14. Gang Jou Enterprise Co., Ltd.
15. Genn Hann Stainless Steel Enterprise Co., Ltd.
16. Goang Jau Shing Enterprise Co., Ltd.
17. Goldioceans International Co., Ltd.
18. Gotosteel Ltd.
19. Grace Alloy Corp.
20. Hung Shuh Enterprises Co., Ltd.
21. Hwang Dah Steel Inc.
22. Jie Jin Stainless Steel Industry Co., Ltd.
23. JJSE Co., Ltd.
24. KNS Enterprise Co., Ltd.
25. Lancer Ent. Co., Ltd.
26. Lien Chy Laminated Metal Co., Ltd.
27. Lih Chan Steel Co., Ltd.
28. Lung An Stainless Steel Ind. Co., Ltd.
29. Master United Corp.
30. Maytun International Corp.
31. NKS Steel Ind. Ltd.
32. PFP Taiwan Co., Ltd.
33. Po Chwen Metal.
34. Prime Rocks Co., Ltd.
35. Shih Yuan Stainless Steel Enterprise Co., Ltd.
36. Silineal Enterprises Co., Ltd.
37. Stanch Stainless Steel Co., Ltd.
38. Ta Chen Stainless Pipe Co., Ltd.
39. Tah Lee Special Steel Co., Ltd.
40. Taiwan Nippon Steel Stainless.
41. Tang Eng Iron Works.
42. Teng Yao Hardware Industrial Co., Ltd.
43. Tibest International Inc.
44. Ton Yi Industrial Corp
45. Tsai See Enterprise Co., Ltd.
46. Tung Mung Development Co., Ltd.[29]
47. Vasteel Enterprises Co., Ltd.
48. Vulcan Industrial Corporation.
49. Wuu Jing Enterprise Co., Ltd.
50. Yc Inox Co., Ltd.
51. Yes Stainless International Co., Ltd.
52. Yieh Trading Corp.
53. Yu Ting Industries Co., Ltd.
54. Yue Seng Industrial Co., Ltd.
55. Yung Fa Steel & Iron Industry Co., Ltd.

[FR Doc. 2023–07247 Filed 4–5–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–471–807]

Certain Uncoated Paper From Portugal: Preliminary Results of Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

[27] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[28] *See Order.*

[29] Stainless steel sheet and strip in coils produced and exported by Tung Mung Development Co., Ltd. were excluded from the *Order,* effective October 16, 2002. *See Notice of Amended Final Determination in Accordance with Court Decision of the Antidumping Duty Investigation of Stainless Steel Sheet and Strip in Coils from Taiwan,* 69 FR 67311, 67312 (November 17, 2004). Accordingly, the rate assigned for Tung Mung Development Co., Ltd. in this review is only for where the company was the producer or exporter of subject merchandise but not both.

SUMMARY: The U.S. Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty order on certain uncoated paper (uncoated paper) from Portugal with respect to one exporter/producer of subject merchandise. The period of review (POR) is March 1, 2021, through February 28, 2022. Commerce preliminarily finds that sales of uncoated paper from Portugal were made at less than normal value during the POR. We invite interested parties to comment on these preliminary results.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Eric Hawkins, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1988.

SUPPLEMENTARY INFORMATION:

Background

On May 13, 2022, Commerce initiated an administrative review of the antidumping duty order on uncoated paper from Portugal,[1] in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[2] This review covers one producer/exporter of subject merchandise, The Navigator Company, S.A. (Navigator).

On November 3, 2022, Commerce extended the deadline for the preliminary results until March 31, 2023.[3] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[4]

Scope of the Order

The merchandise subject to the *Order* is certain uncoated paper from Portugal. For a complete description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. We calculated constructed export price in accordance with section 772 of the Act. We calculated normal value in accordance with section 773 of the Act.

For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of topics included in the Preliminary Decision Memorandum is included as an appendix 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, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Preliminary Results of Review

We preliminarily determine that the following weighted-average dumping margin exists for the period March 1, 2021, through February 28, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
The Navigator Company, S.A	8.18

Assessment Rates

Upon completion of the final results of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), if Navigator's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales. If Navigator's weighted-average dumping margin is zero or *de minimis,* or if an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review and for future deposits of estimated duties, where applicable.[5]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Navigator for which it did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate established in the original less-than-fair value (LTFV) investigation (*i.e.,* 7.80 percent)[6] if there is no rate for the intermediate company(ies) involved in the transaction.[7]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the 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).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the finals results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Navigator in the final results of review will be equal to the weighted-average dumping margin established in the final results of this administrative review except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by a company not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment in which they were reviewed; (3) if the exporter is not a firm covered in this review or the original LTFV investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently-completed segment of this proceeding for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to

[1] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Amended Final Affirmative Antidumping Determinations for Brazil and Indonesia and Antidumping Duty Orders,* 81 FR 11174 (March 3, 2016) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280 (May 13, 2022).

[3] *See* Memorandum, ''Certain Uncoated Paper from Portugal: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review, 2021–2022,'' dated November 3, 2022.

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Certain Uncoated Paper from Portugal; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See* section 751(a)(2)(C) of the Act.

[6] *See Order.*

[7] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

be 7.80 percent,[8] the all-others rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results or, if there is no public announcement, within five days of the date of publication of this notice.[9] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[10] Parties who submit case or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[11] Case and rebuttal briefs should be filed using ACCESS [12] and must be served on interested parties.[13] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must d submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS.[15] Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the case and rebuttal briefs.[16] If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. A hearing request must be filed electronically using ACCESS and received in its entirety by 5:00 p.m. Eastern Time within 30 days after publication of this notice.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice 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 duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

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[8] *See Order.*

[9] *See* 19 CFR 351.224(b).

[10] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] *See generally* 19 CFR 351.303.

[13] *See* 19 CFR 351.303(f).

[14] *See Temporary Rule.*

[15] *See* 19 CFR 351.310(c).

[16] *See* 19 CFR 351.310.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–121]

Difluoromethane From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission, and Preliminary Intent To Rescind, in Part, of Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that the sole mandatory respondent under review made sales of difluoromethane (R–32) from the People's Republic of China (China) below normal value (NV) during the period of review (POR). Additionally, we are rescinding this review with respect to Huantai Dongyue International Trade Co., Ltd. (Huantai Dongyue) and preliminarily rescinding this review with respect to Zhejiang Sanmei Chemical Ind. Co., Ltd. (Zhejiang Sanmei). Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Paul Gill, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5673.

SUPPLEMENTARY INFORMATION:

Background

On May 13, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the antidumping duty order on R–32 from China.[1] The POR is August 27, 2020, through February 28, 2022. On November 2, 2022, we extended the preliminary results of this review to no later than March 31, 2023.[2] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[3]

Scope of the Order

The merchandise covered by the *Order* is difluoromethane (R–32), or its chemical equivalent, regardless of form, type, or purity level.[4] R–32 is classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2903.39.2035. Other merchandise subject to the scope may be classified under 2903.39.2045 and 3824.78.0020. While HTSUS subheadings are provided

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280 (May 13, 2022); *see also Difluoromethane (R–32) from the People's Republic of China: Antidumping Duty Order,* 86 FR 13886 (March 11, 2021) (*Order*).

[2] *See* Memorandum, ''Difluoromethane (R–32) from the People's Republic of China: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review, 2020–2022,'' dated November 2, 2022.

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Difluoromethane (R–32) from the People's Republic of China; 2020–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] For a complete description of the scope of the order, *see* Preliminary Decision Memorandum

for convenience and customs purposes, the written description of the subject merchandise is dispositive.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. On July 20, 2022, Huantai Dongyue timely withdrew its request for an administrative review.[5] Because no other party requested a review of Huantai Dongyue, we are rescinding the administrative review for this company in accordance with 19 CFR 351.213(d)(1).

Preliminary Intent To Rescind, in Part

It is Commerce's practice to rescind an administrative review pursuant to 19 CFR 351.213(d)(3) when there are no reviewable entries of subject merchandise during the POR subject to the antidumping duty order and for which liquidation is suspended.[6] At the end of an administrative review, suspended entries are liquidated at the assessment rate computed for the review period.[7] Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry to be liquidated at the newly calculated assessment rate.

While Zhejiang Sanmei requested an administrative review of itself,[8] the U.S. Customs and Border Protection Data (CBP) data on the record of this review show no evidence that Zhejiang Sanmei had suspended entries of subject merchandise during the POR,[9] and we received confirmation of this from CBP.[10] As the record contains no evidence of reviewable entries for Zhejiang Sanmei, we are preliminarily rescinding the review with respect to Zhejiang Sanmei in accordance with 19 CFR 351.213(d)(3).[11]

Preliminary Affiliation and Single Entity Determination

Based on record evidence in this review, 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): Taizhou Qingsong Refrigerant New Material Co., Ltd. (Taizhou Qingsong), Taixing Meilan New Materials Co., Ltd. (Taixing Meilan), and Jiangsu Meilan Chemical Co., Ltd. Furthermore, pursuant to 19 CFR 351.401(f)(1)–(2), we find that Taizhou Qingsong and Taixing Meilan should be treated as a single entity (collectively, Qingsong). For additional information, *see* the Affiliation and Collapsing Memorandum.[12]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. Export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of the topics discussed in the Preliminary Decision Memorandum is attached as an Appendix to this notice.

Preliminary Results of the Review

We preliminarily determine that the following weighted-average dumping margin exists for the period August 27, 2020, through February 28, 2022:

Producer or exporter	Weighted-average dumping margin (percent)
Taizhou Qingsong Refrigerant New Material Co., Ltd.; Taixing Meilan New Materials Co., Ltd	160.65

Assessment Rates

Upon issuing the final results, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[13]

Pursuant to 19 CFR 351.212(b)(1), Commerce calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[14]

Pursuant to Commerce's assessment practice,[15] for entries that were not reported in the U.S. sales data submitted by Qingsong, we will instruct CBP to liquidate such entries at the China-wide rate. For Zhejiang Sanmei, if Commerce rescinds the review for this company in the final results, then antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the POR, in accordance with 19 CFR 351.212(c)(1)(i).

Finally, for Huantai Dongyue, the respondent for which we are rescinding the review, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the POR, in accordance with 19 CFR 351.212(c)(1)(i).

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

[5] *See* Huantai Dongyue's Letter, ''Withdrawal of Request for Administrative Review'' dated July 20, 2022.

[6] *See, e.g., Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation: Notice of Rescission of* Antidumping Duty Administrative Review, 77 FR 65532 (October 29, 2012); *see also Forged Steel Fittings from Taiwan: Preliminary Intent To Rescind the Antidumping Duty Administrative Review; 2018–2019,* 85 FR 44503 (July 23, 2020), unchanged in *Forged Steel Fittings from Taiwan: Rescission of Antidumping Duty Administrative Review; 2018–2019,* 85 FR 71317 (November 9, 2020).

[7] *See* 19 CFR 351.212(b)(l).

[8] *See* Zhejiang Sanmei's Letter, ''Request for Administrative Review,'' dated March 31, 2022.

[9] *See* Memorandum, ''Release of Customs Entry Data from U.S. Customs and Border Protection (CBP),'' dated May 16, 2022.

[10] *See* Memorandum, ''No Shipment Inquiry with Respect to {Zhejiang Sanmei} During the Period 08/27/2020 Through 02/28/2022,'' dated March 20, 2023.

[11] For additional information regarding this preliminary intent to rescind, *see* the Preliminary Decision Memorandum.

[12] *See* Memorandum, ''Affiliation and Single Entity Status—Taizhou Qingsong Refrigerant New Materials Co., Ltd. and Taixing Meilan New Materials Co., Ltd.,'' dated concurrently with this memorandum (Affiliation and Collapsing Memorandum).

[13] *See* 19 CFR 351.106(c)(2).

[14] *Id.*

[15] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

estimated antidumping duties, where applicable.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the 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).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on, or after, the publication date of the final results of review, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Qingsong will be equal to the weighted-average dumping margin established in the final results of this review (except, if the dumping margin is zero or *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 Chinese exporters of subject merchandise that do not have a separate rate, the cash deposit rate will be the cash deposit rate established for the China-wide entity, 221.06 percent; [16] and (4) for all exporters of subject merchandise that are not located in China and that are not eligible for a separate rate, the cash deposit rate will be the rate applicable to the China exporter(s) that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.[17]

Public Comment

Interested parties may submit case briefs to Commerce no later than seven days after the date of the verification report issued in this administrative review.[18] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the time limit for filing case briefs.[19] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[20] Case and rebuttal briefs should be filed using ACCESS.[21]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice.[22] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing.[23]

Verification

As provided in section 782(i)(3) of the Act, Commerce intends to verify the information relied upon for its final results.

Final Results

Commerce intends to issue the final results of this administrative review, including the results of its analysis raised in any written briefs, not later than 120 days after the publication of these preliminary results in the **Federal Register**, unless otherwise extended.[24]

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 duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213, and 19 CFR 351.221(b)(4).

Dated: March 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Review
IV. Scope of the *Order*
V. Preliminary Intent to Rescind, In Part
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2023–07113 Filed 4–5–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–122]

Certain Corrosion Inhibitors From the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that certain producers and/or exporters made sales of certain corrosion inhibitors (corrosion inhibitors) at less than normal value during the period of review (POR) September 10, 2020, through February 28, 2022. Additionally, Commerce is rescinding this review with respect to Dandee Hong Kong Holdings Ltd., CAC Shanghai Chemical Co., Ltd., Jiangsu Bohan Industry Trade Co., Ltd., Jiangsu Yangnong Chemical Group Co., Ltd., Jiangyin Gold Fuda Chemical Co., Ltd., Nanjing Innochem Co., Ltd., and Xingji Xi Chen Re Neng Co., Ltd. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla and Dusten Hom, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone:

[16] *See Common Alloy Aluminum Sheet from the People's Republic of China: Antidumping Duty Order,* 84 FR 2813 (February 8, 2019).

[17] *See* 19 CFR 351.224(b).

[18] *See* 19 CFR 351.309(c).

[19] Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

[20] *See* 19 CFR 351.309(c)(2) and (d)(2).

[21] *See* 19 CFR 351.303.

[22] *See* 19 CFR 351.310(c).

[23] *See* 19 CFR 351.310(d).

[24] *See* section 751(a)(3)(A) of the Act.

(202) 482–3477, and (202) 482–5075, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 19, 2021, Commerce published in the **Federal Register** the antidumping duty (AD) order on certain corrosion inhibitors from the People's Republic of China (China).[1] On March 3, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On May 13, 2022, based on timely requests for an administrative review, Commerce initiated the administrative review of the *Order*.[3] The administrative review covers 34 companies, including two mandatory respondents, Anhui Trust Chem Co., Ltd., and Nantong Botao Chemical Co., Ltd.[4] Further, we have preliminarily collapsed Anhui Trust Chem Co., Ltd., and its affiliates, Jiangsu Trust Chem Co., Ltd., Nanjing Trust Chem Co., Ltd.[5]

On October 27, 2022, Commerce extended the deadline for these preliminary results to March 31, 2023.[6] For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[7]

Scope of the Order

The products covered by this *Order* are certain corrosion inhibitors from China. A full description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.[8]

Rescission of Review, in Part

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested a review withdraws its request within 90 days of the date of publication of the notice of initiation. The requests for an administrative review of the seven companies listed in Appendix II to this notice were withdrawn within 90 days of the date of publication of the *Initiation Notice*.[9] As a result, Commerce is rescinding this review with respect to these companies, in accordance with 19 CFR 351.213(d)(1).

Separate Rates

Commerce preliminarily determines that three companies, not individually examined, are eligible for separate rates in this administrative review.[10] The Tariff Act of 1930, as amended (the Act) and Commerce's regulations do not address the establishment of a separate rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for separate-rate respondents which Commerce did not examine individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins calculated for individually-examined respondents, excluding dumping margins that are zero, de minimis, or based entirely on facts available. For the preliminary results of this review, Commerce determined the estimated dumping margins for Anhui Trust Chem Co., Ltd., and affiliates, and Nantong Botao Chemical Co., Ltd to be 6.12, and 14.66 percent, respectively. For the reasons explained in the Preliminary Decision Memorandum, we are assigning the 9.95 percent rate to the three non-examined respondents, Gold Chemical Limited (Gold Chemical); Jiangyin Delian Chemical Co., Ltd. (Delian); Kanghua Chemical Co., Ltd. (formerly known as Nantong Kanghua Chemical Co.,Ltd.) (Chuzhou Kanghua),[11] which qualify for a separate rate in this review, consistent with Commerce's practice and section 735(c)(5)(A) of the Act.

China-Wide Entity

Commerce's policy regarding the conditional review of the China-wide entity applies to this administrative review.[12] Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the China-wide entity in this review, the entity is not under review, and the entity's assessment rate (*i.e.,* 241.02 percent) is not subject to change.[13] For the reasons explained in the Preliminary Decision Memorandum, Commerce considers all other companies for which a review was requested (none of which filed a separate rate application) listed in Appendix II to this notice, to be part of the China-wide entity.[14]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. 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.* A list of topics discussed in the Preliminary Decision Memorandum is included as an appendix to this notice. In addition, a complete version of the Preliminary Decision Memorandum can be found at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

[1] *See Certain Corrosion Inhibitors from the People's Republic of China: Antidumping Duty Order,* 86 FR 14869 (March 19, 2021) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 87 FR 12086 (March 3, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 29280, 29282 (May 13, 2022) (*Initiation Notice*).

[4] *See* Memoranda, ''Antidumping Duty Administrative Review of Certain Corrosion Inhibitors from the People's Republic of China: Respondent Selection,'' dated June 21, 2022.

[5] *See* Memorandum, ''Administrative Review of the Antidumping Duty Order on Certain Corrosion Inhibitors from the People's Republic of China: Preliminary Affiliation and Collapsing Memorandum for Anhui Trust Chem Co., Ltd., and Nanjing Trust Chem Co., Ltd., and Jiangsu Chem Co., Ltd.

[6] *See* Memorandum, ''Certain Corrosion Inhibitors from the People's Republic of China: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2020–2022,'' dated October 27, 2022.

[7] *See* Memorandum, ''Decision Memorandum for Preliminary Results of the 2020–2022 Antidumping Duty Administrative Review of Certain Corrosion Inhibitors from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[8] *Id.*

[9] *See* Wincom Inc.'s (Wincom) Letters, ''Partial Withdrawal of Request for Administrative Review'' dated July 6, 2022, and ''Second Partial Withdrawal of Request for Administrative Review,'' dated August 1, 2022.

[10] *See* Appendix II; *see also* Preliminary Decision Memorandum at the ''Separate Rate Determination'' section for more details.

[11] *See Certain Corrosion Inhibitors from the People's Republic of China: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 88 FR 1356 (January 10, 2023).

[12] *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).

[13] *See Order.*

[14] *See Initiation Notice* (''All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below.''); *see also* Appendix II for the list of companies that are subject to this administrative review that are considered to be part of the China-wide entity.

Preliminary Results of the Administrative Review

Commerce preliminarily determines that the following weighted-average dumping margins exist for the administrative review covering the period September 10, 2020, through February 28, 2022:

Exporter	Weighted-average dumping margin (percent)
Anhui Trust Chem Co., Ltd.	6.12
Nantong Botao Chemical Co., Ltd.	14.66
Non-Selected Companies Under Review Receiving a Separate Rate [15]	9.95

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations performed for these preliminary results of review 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

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[16] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs.[17] Commerce modified certain of its requirements for serving documents containing business proprietary information until further notice.[18] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[19]

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 publication of this notice. Requests should contain the party's name, address, telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce will announce the date and time of the hearing.

Unless the deadline is extended, Commerce intends to issue the final results of this review, including the results of its analysis of the issues raised in any written briefs, no later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

Upon issuing the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[20] If the preliminary results are unchanged for the final results, we will instruct CBP to apply an *ad valorem* assessment rate of 241.02 percent to all entries of subject merchandise during the POR which were exported by the companies considered to be a part of the China-wide entity listed in Appendix II of this notice. If Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the China-wide rate.[21]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the 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).

For each individually examined respondent in this review whose weighted-average dumping margin in the final results of review is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce intends to calculate importer/customer-specific assessment rates.[22] Where the respondent reported reliable entered values, Commerce intends to calculate importer/customer-specific *ad valorem* assessment rates by aggregating the amount of dumping calculated for all U.S. sales to the importer/customer and dividing this amount by the total entered value of the merchandise sold to the importer/customer.[23] Where the respondent did not report entered values, Commerce will calculate importer/customer-specific assessment rates by dividing the amount of dumping for reviewed sales to the importer/customer by the total quantity of those sales. Commerce will calculate an estimated *ad valorem* importer/customer-specific assessment rate to determine whether the per-unit assessment rate is *de minimis;* however, Commerce will use the per-unit assessment rate where entered values were not reported.[24] Where 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 the respondent's weighted average dumping margin is zero or *de minimis,* or an importer/customer-specific *ad valorem* assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[25]

For the respondents that were not selected for individual examination in this administrative review, but which qualified for a separate rate, the assessment rate will be based on the weighted-average dumping margin(s) assigned to the respondent(s) selected for individual examination, as appropriate, in the final results of this review.[26]

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 final results of this review and for future deposits of estimated antidumping duties, where applicable.

[15] Gold Chemical; Delian; and Chuzhou Kanghua.

[16] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020) (''To provide adequate time for release of case briefs via ACCESS, E&C intends to schedule the due date for all rebuttal briefs to be 7 days after case briefs are filed (while these modifications remain in effect).'').

[17] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[18] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[19] *See* 19 CFR 351.309(c)(2) and (d)(2); *see also* 19 CFR 351.303 (for general filing requirements).

[20] *See* 19 CFR 351.212(b)(1).

[21] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65695 (October 24, 2011).

[22] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 8101 (February 14, 2012) (*Final Modification*).

[23] *See* 19 CFR 351.212(b)(1).

[24] *Id.*

[25] *See Final Modification,* 77 FR at 8103.

[26] *See Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments: 2014–2015,* 81 FR 29528 (May 12, 2016), and accompanying Issues and Decision Memorandum at 10–11, unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2014–2015,* 81 FR 54042 (August 15, 2016).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for the subject merchandise exported by the company listed above that has a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this administrative review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the China-wide entity; and (4) for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice 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 duties prior to liquidation of the relevant entries during these PORs. 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

Commerce is issuing and publishing the preliminary results of this review in accordance with sections 751(a)(1)(B), 751(a)(3) and 777(i) of the Act, and 19 CFR 351.213(d)(4) and 351.221(b)(4).

Dated: March 31, 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. Single Entity Treatment
VII. Discussions of the Methodology
VIII. Adjustment Under Section 777A(f) of the Act
IX. Currency Conversion
X. Recommendation

Appendix II

Companies Subject to Rescission of Review

1. CAC Shanghai Chemical Co., Ltd.
2. Dandee Holdings Ltd. (Hk).
3. Jiangsu Bohan Industry Trade Co., Ltd.
4. Jiangsu Yangnong Chemical Group Co., Ltd
5. Jiangyin Gold Fuda Chemical Co., Ltd
6. Nanjing Innochem Co., Ltd.
7. Xingji Xi Chen Re Neng Co., Ltd

Companies Considered To Be Part of the China-Wide Entity

1. Alvarez Schaer S.A.
2. Bollore Logistics Le Havre
3. Dalsem Greenhouse Technology B.V.
4. Gooyer International Co., Ltd. (Hk).
5. Haruno Sangyo Kaisha Ltd.
6. Johoku Chemical Co., Ltd
7. K. Uttamlal Exports Private Limited
8. Nanjing Hengrun Hogsu Import & Export Company
9. Nantong Bestime Chemical Co., Ltd.
10. Sagar Speciality Chemicals Pvt., Ltd
11. Sinochem Pharmaceutical Co., Ltd.
12. Solenis Especialidades Quimicas Ltda
13. Techwell Technology Holding Limited
14. Tianjin Jinbin International Trade
15. Vcare Medicines
16. Wuxi Base International Trade Co., Ltd
17. Wuxi Connect Chemicals Co., Ltd
18. Yasho Industries Pvt. Ltd
19. Zaozhuang Kerui Chemicals Co., Ltd
20. Nanjing Singchem Co., Ltd.

[FR Doc. 2023–07245 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

NIST Safety Commission

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) Safety Commission (Commission) will meet on May 22, 2023, from 8:30 a.m. to 5:00 p.m. Eastern Time. The purpose of this meeting is for the Commission to continue its assessment of the state of NIST's safety culture and how effectively the existing safety protocols and policies have been implemented across NIST. The agenda may change to accommodate Commission business. The final agenda will be posted on the NIST website at *https://www.nist.gov/director/nist-safety-commission/may-22-nist-safety-commission-meeting-agenda.*

DATES: The Commission will meet on May 22, 2023, from 8:30 a.m. to 5:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, Maryland, 20899 for the NIST Safety Commission members and NIST Senior Leadership with an option to participate via webinar for NIST staff and public participants. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Corrine Lloyd, Special Programs Office, National Institute of Standards and Technology, at 301–975–8762 or *corrine.lloyd@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the NIST Safety Commission will meet on May 22, 2023, from 8:30 a.m. to 5:00 p.m. Eastern Time. The meeting will be open to the public. Members of the Commission are appointed by the Director of NIST. The Commission is composed of not more than seven members who are qualified to provide advice to the NIST Director on matters relating to safety policies; safety management system, practices, and performance; and safety culture. The primary purpose of this meeting is for the Commission to continue its assessment of the state of NIST's safety culture and how effectively the existing safety protocols and policies have been implemented across NIST. The agenda may change to accommodate Commission business. The final agenda will be posted on the NIST website at *https://www.nist.gov/director/nist-safety-commission/may-22-nist-safety-commission-meeting-agenda.*

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Commission's business are invited to request a place on the agenda. Approximately 15 minutes will be reserved for public comments and speaking times will be assigned on a first-come, first-serve basis. The amount

of time per speaker will be determined by the number of requests received but is likely to be about three minutes each. Questions from the public will not be considered during this period. Requests must be submitted by email to Corrine Lloyd at *corrine.lloyd@nist.gov* and must be received by 4:00 p.m. Eastern Time, May 17, 2023 to be considered. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to participate are invited to submit written statements by email to *corrine.lloyd@nist.gov.*

All NIST staff and public participants will be attending via webinar and must register at: *https://events.nist.gov/profile/form/index.cfm?PKformID=0x20977abcd* by 4:00 p.m. Eastern Time, May 17, 2023 for detailed instructions on how to join the webinar. Any questions regarding registration may be directed to Corrine Lloyd at *corrine.lloyd@nist.gov.*

Authority: 15 U.S.C. 1512 as amended, and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–07260 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; West Coast Groundfish Trawl Economic Data

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before June 5, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–618 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Erin Steiner, Northwest Fisheries Science Center, 2725 Montlake Blvd. E, Seattle, WA 98103, (206) 860–3202 or *erin.steiner@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and renewal of a currently approved information collection. This information collection is needed in order to meet the monitoring requirements of the Magnuson-Stevens Act (MSA). In particular, the Northwest Fisheries Science Center (NWFSC) needs economic data on all harvesters, quota share permit owners, first receivers, shorebased processors, catcher processors, and motherships participating in the West Coast groundfish trawl fishery. The current approval covers collection of data for the 2019–2021 operating years. The renewed approval will cover years 2022–2024. Data will be collected from all catcher vessels registered to a limited entry trawl endorsed permit, quota share permit owners, catcher processors registered to catcher processor permits, motherships registered to mothership permits, first receivers, and shorebased processors that received round or head-and-gutted IFQ groundfish or whiting from a first receiver to provide the necessary information for analyzing the effects of the West Coast Groundfish Trawl Catch Share Program.

As stated in 50 CFR 660.114, the EDC forms due on September 1, 2023, will provide data for the 2022 operating year. Changes are being proposed to three forms: the quota share owner form, the first receiver and shorebased processor form, and the catcher vessel form.

Two changes are proposed for the quota share owner form. First, the question ''Is this permit owned solely by a non-profit?'' will be removed from the survey as it was determined that sufficient information is available from other sources to make this question redundant. The second proposed change is to replace the survey's third question with a series of shorter questions guiding the participant to provide the correct information. This change will clarify which information should be reported for each type of respondent and will reduce the need for lengthy instructions section describing how the participant should answer. The series of questions are:

A. ''Which types of quota transactions were associated with QSXXXX in 2022? Check all that apply'' This question helps the participant determine whether any earnings need to be reported on the survey. If appropriate categories are checked, they will be asked question B.

B. ''How much did this quota share account earn from leasing quota in year 2022?'' Participants will answer this question with a dollar amount. To ensure there is no duplicate reporting, participants will be asked question C:

C. ''Did you record any earnings from 2021 quota leasing on an EDC form?'' If participants answer ''No,'' they will be prompted to affirm that their response to question B was correct and submit the survey. If they answer ''Yes,'' they will be asked to respond to question D.

D. ''How much in quota lease earnings did you record on your EDC form(s)? Participants will answer with a numerical value and proceed to question E.

E. ''Please confirm your total quota lease earnings in 2021 was 'Response to question B + 'Response to question D.' After confirming, participants will then submit the survey.

We anticipate no additional burden with this change because the new structure of the survey will generate fewer incorrect responses and survey administrators will no longer need to contact participants outside of the survey to confirm that they did not provide duplicate responses across survey forms.

First receiver and shorebased processor form changes are more extensive. The purpose of the changes are fourfold: remove requests for information that are not used in development of a Pacific Fishery Management Council Fishery Management Plan, consolidate questions where additional detail is no longer required, clarify handling of intercompany transfers and inventory, and collect more accurate information about hourly wages.

First, we propose a complete removal of Question 18: ''Provide the following information about the landing origin of groundfish received at this facility.'' Throughout the eleven years of the program, these data have not been used in the Council process and we do not

anticipate using this information in the future.

Second, we propose consolidating the fishery-level detail requests from Question 19: ''Fish Received. In the table below provide the weight and cost of fish received.'' For groundfish species, the existing form requests weight not paid for, weight paid for, and cost of fish by species group for three fisheries (LE Trawl, LE Fixed Gear, and Other) as well as Non-vessel sources. In the revised form, the table will be consolidated to only request Vessel sources and Non-vessel sources. This will be a net reduction of 72 data entry cells on the form (12 species groups × removal of 2 fisheries × 3 fields). We will no longer request this information because fishery-detail information can be obtained from other sources.

Third, we propose revising how intercompany transfers and inventory are reported on the form. Similar to the quota share owner survey, there are extensive instructions on handling these two topics, but reporting errors are extremely common. To facilitate accurate reporting of intercompany transfers, we will remove a column dedicated to transfer information from Question 19 and remove instructions about recording transfers in Question 20. Then, all of the transfer-related information will be moved to a separate question/table. This change will make the survey instructions easier to understand, allow companies that do not have intercompany transfers to skip the question entirely, and will make it easier to detect and remedy mistakes. Similarly, there are extensive instructions on how to record inventory in Question 20 on the existing form, but no dedicated field for inventory. Instead, participants are currently instructed to add inventory to the other sales categories. We propose adding a new line for each species group to record the inventory volume and value. Similar to the changes to transfers in Question 19 and 20, the new structure of Question 20 clarifies how to complete the form and facilitates identifying and resolving errors. Finally, this change will provide new important information about inventory volumes across years, providing better information about the status of the processing sector to the Pacific Fishery Management Council.

Lastly, a common performance metric for fisheries programs is hourly wage payments to processing workers. In the current form, we request the total number of workers and total hours worked for the week that includes the 12th of each month and total annual compensation payments. To calculate hourly wages, we must extrapolate to the total hours worked for the year. Through conversations with participants, it has become apparent that within-month employment can have high variability and our extrapolations are not always accurate. We propose requesting the equivalent compensation value for each of the one-week windows to allow for a more accurate calculation of hourly wages. This additional field will also allow us to generate an estimate of within-month employment variability.

The only proposed change to the Catcher Vessel survey form is to remove two questions. In 2018, at the request of participants in the trawl catch share program, two additional questions were added, Question 17: ''Do you track capitalized expenditures and expenses on fishing gear by type (*e.g.,* midwater trawl gear, groundfish bottom trawl gear)?'' and Question 18: ''Provide the 2021 total capitalized expenditures and expenses associated with each type of fishing gear used in West Coast Fisheries (Washington, Oregon, and California).'' Since the implementation of the questions in 2018, there has only been one ''Yes'' out nearly 700 total responses to Question 17 and therefore no further information about gear-specific costs have been collected. Therefore there will be no information loss associated with removal of these two questions and there will be a small reduction in total burden hours.

II. Method of Collection

Vessel, first receiver, and shorebased processor forms may be submitted via mail or electronically. All quota share owner survey forms must be submitted online as part of the quota share permit renewal system.

III. Data

OMB Control Number: 0648–0618.

Form Number(s): None.

Type of Review: Regular submission (Revision and extension of a current information collection).

Affected Public: Business or other for-profit and not-for-profit organization.

Estimated Number of Respondents: 352.

Estimated Time per Response: 8 hours for catcher processors, catcher vessels, and motherships, 1 hour for quota share permit owners, and 20 hours for first receivers and shorebased processors.

Estimated Total Annual Burden Hours: 2,209.

Estimated Total Annual Cost to Public: $3,668.45 in recordkeeping/reporting costs.

Respondent's Obligation: Mandatory.

Legal Authority: 50 CFR 660.114.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–07236 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC893]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine

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

ACTION: Notice; issuance of renewal incidental harassment authorization (IHA).

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given

that NMFS has issued a renewal incidental harassment authorization (IHA) to the U.S. Navy (Navy) to incidentally harass marine mammals incidental to construction activities associated with the multifunctional expansion of Dry Dock 1 project at Portsmouth Naval Shipyard in Kittery, Maine.

DATES: This renewal IHA is valid from April 1, 2023 through March 31, 2024.

FOR FURTHER INFORMATION CONTACT: Reny Tyson Moore, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA);

2. The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take);
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.*

History of Request

On April 1, 2022, NMFS issued an IHA to the Navy to take marine mammals incidental to construction activities associated with the multifunctional expansion of Dry Dock 1 project (also referred to as P–381) at Portsmouth Naval Shipyard in Kittery, Maine (87 FR 19886, April 6, 2022), effective from April 1, 2022 through March 31, 2022. On January 31, 2023, NMFS received an application for the renewal of that initial IHA. NMFS received a revised application for the renewal IHA on February 24, 2023. As described in the application for renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial authorization but will not be completed prior to its expiration. As required, the applicant also provided a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. There are no changes from the proposed authorization in this final authorization.

Description of the Specified Activities and Anticipated Impacts

Multifunctional Expansion of Dry Dock 1 (P–381) is one of three projects that support the overall expansion and modification of Dry Dock 1, located in the western extent of the Portsmouth Naval Shipyard. The two additional projects, construction of a super flood basin (P–310) and extension of portal crane rail and utilities (P–1074), are currently under construction. In-water work associated with these projects was completed under separate IHAs issued by NMFS in 2019 (84 FR 24476, May 28, 2019), and in a renewal of the 2019 IHA (86 FR 14598, March 17, 2021). The projects have been phased to support Navy mission schedules. P–381 will be constructed within the same footprint of the super flood basin over an approximate 7-year period, during

which 5 years of in-water work will occur. The initial IHA authorized takes for marine mammals during the first year of in-water construction for P–381 occurring from April 2022 through March 2023. All work beyond year 1 has been addressed in proposed incidental take regulations (88 FR 3146, January 18, 2023).

The purpose of this project, Multifunctional Expansion of Dry Dock 1 (P–381), is to modify the super flood basin to create two additional dry docking positions (Dry Dock 1 North and Dry Dock 1 West) in front of the existing Dry Dock 1 East. The super flood basin provides the starting point for the P–381 work (see Figure 1–2 of the Navy's application for the initial IHA). This renewal will cover a subset of the activities covered in the initial IHA that will not be completed during the effective IHA period due to project delays (see Detailed Description of the Activity for specific activities to be covered in the renewal IHA). This includes the preparation of the walls and floors of the super flood basin to support the placement of the monoliths and the construction of the two dry dock positions.

Construction activities that could affect marine mammals are limited to in-water pile driving and removal activities, rock hammering, rotary drilling, and down-the-hole (DTH) hammering. Under the initial IHA, Level A harassment and Level B harassment was authorized for harbor porpoises (*Phocoena phocoena*), harbor seals (*Phoca vitulina*), gray seals (*Halichoerus grypus*), harp seals *(Pagophilus groenlandicus*) and hooded seals (*Cystophora cristata*). Neither the Navy nor NMFS expects serious injury or mortality to result from this activity and, therefore, a renewal IHA is appropriate.

The following documents are referenced in this notification and include important supporting information:

- Initial 2022 Final IHA (87 FR 19886, April 6, 2022);
- Initial 2022 Proposed IHA (87 FR 11860, March 3, 2022);
- Initial IHA application and References;
- Letter of Authorization (LOA) Application Addendum Memo (October 31, 2022); and
- 2023 Proposed renewal IHA (88 FR 15982, March 15, 2023).

All of these referenced documents are available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-portsmouth-naval-shipyard-kittery-maine*.

Detailed Description of the Activity

A detailed description of the construction activities for which take is authorized here may be found in the **Federal Register** notices of the proposed (87 FR 11860, March 3, 2022) and final (87 FR 19886, April 6, 2022) IHAs for the initial authorization as well as in the LOA Application Addendum Memo (submitted to NMFS on October 31, 2023), which described project modifications and shifting Fleet submarine schedules. As previously mentioned, this request is for a subset of the activities authorized in the initial IHA that would not be completed prior to its expiration due to project delays. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. Table 1 describes the status of all activities covered under the initial IHA as well as the amount of activities covered under the renewal IHA. This renewal IHA is effective for a period not exceeding 1 year from the date of expiration of the initial IHA.

TABLE 1—STATUS OF PILE DRIVING AND DRILLING ACTIVITIES

Activity	Total amount	Activity component	Method	Daily production rate	Number installed under initial IHA	Number remaining to be installed under renewal IHA	Total production days	Number of production days under renewal IHA
Center Wall—Install Foundation Support Piles.	20 drilled shafts [1] ..	Install 102-inch diameter outer casing.	Rotary Drill	1 shaft/day; 1 hour/day.	14	6	20	6
		Pre-drill 102-inch diameter socket.	Rotary Drill	1 shaft/day; 9 hours/day.	14	6	20	6
		Remove 102-inch outer casing.	Rotary Drill	1 casing/day; 15 minutes/casing.	10	10	20	10
		Drill 78-inch diameter shaft.	Cluster drill DTH ...	6.5 days/shaft; 10 hours/day.	2	18	130	117
Center Wall—Install Diving Board Shafts [2].	18 drilled shafts	Install 102-inch diameter outer casing.	Rotary Drill	1 shaft/day; 1 hour/day.	0	0	18	0
		Pre-drill 102-inch diameter socket.	Rotary Drill	1 shaft/day; 9 hours/day.	0	0	18	0
		Remove 102-inch outer casing.	Rotary Drill	1 casing/day; 15 minutes/casing.	0	0	18	0
		Drill 78-inch diameter shaft.	Cluster drill DTH ...	7.5 days/shaft; 10 hours/day.	0	0	135	0
Center Wall—Access Platform Support [3].	38 drilled shafts	Install 102-inch diameter outer casing.	Rotary Drill	1 shaft/day; 1 hour/day.	0	0	38	0
		Pre-drill 102-inch diameter socket.	Rotary Drill	1 shaft/day; 9 hours/day.	0	0	38	0
		Remove 102-inch outer casing.	Rotary Drill	1 casing/day; 15 minutes/casing.	0	0	38	0
		Drill 78-inch diameter shaft.	Cluster drill DTH ...	3.5 days/shaft; 10 hours/day.	0	0	38	0
Center Wall—Temporary Launching Piles.	6 drilled shafts	42-inch diameter shaft.	Mono-hammer DTH.	1 shaft/day; 10 hours/day.	6	0	6	0
Center Wall Tie Downs [3].	Install 36 rock anchors.	9-inch diameter holes.	Mono-hammer DTH.	2 holes/day; 5 hours/hole.	0	0	18	0
Center Wall—Access Platform Tie Downs [3].	Install 18 rock anchors.	9-inch diameter holes.	Mono-hammer DTH.	2 holes/day; 5 hours/hole.	0	0	9	0

TABLE 1—STATUS OF PILE DRIVING AND DRILLING ACTIVITIES—Continued

Activity	Total amount	Activity component	Method	Daily production rate	Number installed under initial IHA	Number remaining to be installed under renewal IHA	Total production days	Number of production days under renewal IHA
Center Wall—Install Tie-In to Existing West Closure Wall.	16 sheet piles	28-inch wide Z-shaped sheets.	Impact with initial vibratory set.	4 piles/day; 5 minutes and; 300 blows/pile.	0	16	4	4
Berth 11 End Wall—Install Secant Pile Guide Wall.	60 sheet piles	28-inch wide Z-shaped sheets.	Impact with initial vibratory set.	8 piles/day; 5 minutes and; 300 blows/pile.	60	0	8	0
Berth 1—Remove Granite Block Quay Wall [4].	610 cy	Granite block demolition.	Hydraulic rock hammering.	2.5 hours/day	0	0	NA	0
P–310 West Closure Wall—Remove Closure Wall.	238 sheet piles	18-inch wide flat-sheets.	Vibratory extraction.	4 piles/day; 5 minutes/pile.	0	238	60	60
P–310 West Closure Wall—Mechanical Rock Excavation.	985 cy	Excavate bedrock	Hydraulic rock hammering.	9 hours/day	0	985	77	77
P–310 West Closure Wall—Mechanical Rock Excavation.	Drill 500 relief holes.	4–6 inch holes	Mono-hammer DTH.	25 holes/day; 24 minutes/hole.	0	500	20	20
	Drill 46 rock borings (50 cy).	42-inch diameter casing.	Mono-hammer DTH.	2 borings/day; 5 hours/boring.	46	0	[5] 24	0
West Closure wall—Berth 11 Abutment—Install Piles.	Drill 28 shafts	42-inch diameter casing.	Mono-hammer DTH.	1 shaft/day; 10 hours/day.	0	28	28	28
Berth 11—Remove Shutter Panels.	112 panels	Demolish shutter panels.	Hydraulic rock hammering.	5 hours/day	92	20	56	10
Berth 11 Face—Mechanical Rock Removal at Basin Floor.	3,500 cy	Excavate Bedrock	Hydraulic rock hammering.	12 hours/day	700	2800	100	80
	Drill 1,277 relief holes [1].	4–6 inch holes	Mono-hammer DTH.	27 holes/day; 22.2 minutes/hole.	300	977	48	37
Berth 11 Face—Mechanical Rock at Abutment.	Drill 365 rock borings (1,220 cy).	42-inch diameter casing.	Mono-hammer DTH.	2 borings/day; 5 hours/boring.	0	365	183	183
Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors [1].	9-inch holes	Mono-hammer DTH.	2 holes/day; 2 hours/hole.	0	25	25	25
Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles [1].	28-inch wide Z-shaped sheets.	Impact with initial vibratory set.	8 sheets/day; 5 minutes and 300 blows/pile.	0	48	6	6
Berth 1—Remove Sheet Piles.	Remove 12 sheet piles.	25-inch wide; Z-shaped sheets.	Hydraulic rock hammering.	6 hours/day	0	12	3	3
Berth 1 Top of Wall—Demolition For Waler Installation [6].	30 lf	Mechanical concrete demolition.	Hydraulic rock hammering.	10 hours/day	NA	NA	NA	NA
Berth 1 Mechanical Rock Removal at Basin Floor [7].	200 cy	Excavate Bedrock	Hydraulic rock hammering.	13 cy/day; 12 hours/day.	0	200	39	39
Removal of Berth 1 Emergency Repair Sheets [7].	108 sheet piles	25-inch wide Z-shaped sheets.	Vibratory extraction.	6 piles/day; 5 minutes/pile.	0	108	18	18
Removal of Berth 1 Emergency Repair Tremie Concrete [7].	500 cy	Mechanical concrete demolition.	Hydraulic rock hammering.	4 hours/day	0	500	15	15
Totals					1,244	6,862	1,278	744

[1] The amount of this activity was adjusted in a memo describing project modifications and shifting Fleet submarine schedules that was submitted to NMFS on October 31, 2022. The memo can be found at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-portsmouth-naval-shipyard-kittery-maine-0.*

[2] The schedule for this work shifted as described in the aforementioned memo submitted to NMFS on October 31, 2022. This activity is now addressed in the proposed rulemaking/LOA (88 FR 3146, January 18, 2023).

[3] These activities are no longer needed.

[4] This activity is complete; it was performed above the water line. The underwater portion of this activity is addressed in the proposed rulemaking/LOA (88 FR 3146, January 18).

[5] An additional day was added to account for equipment repositioning.

[6] This activity is complete; it was performed above the water line.

[7] This activity was added to the initial IHA in the aforementioned memo submitted to NMFS on October 31, 2022.

Description of Marine Mammals in the Area of Specified Activities

A description of the marine mammals in the area of the activities for which take is authorized here, including information on abundance, status, distribution, and hearing, may be found in the Notice of the proposed IHA for the initial authorization (87 FR 11860, March 3, 2022). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which the authorization of take is authorized here may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (87 FR 11860, March 3, 2022). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** notices of the proposed (87 FR 11860, March 3, 2022) and final (87 FR 19886, April 6, 2022) IHAs for the initial authorization as well as the **Federal Register** notice of the proposed renewal IHA (88 FR 15982, March 15, 2023). Specifically, the marine mammal density and occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken and types of take remain unchanged from the previously issued IHA. Since the initial IHA was issued, NMFS updated its recommendations on source pressure levels (SPLs) to use when evaluating DTH systems and reevaluated the data available on rock hammering activities. Updates to recommended SPLs for these activities, however, did not result in any changes to the estimated take as described in the proposed renewal IHA (88 FR 15982, March 15, 2023).

Tables 2, 3, and 4 provide the authorized take by Level A and Level B harassment for harbor porpoises, harbor seals, and grey seals, respectively. Given that a subset of the initially covered activities would be occurring, the number of days of operation, and thus number of takes, has been reduced for each species. Note that the final take numbers differ slightly from those provided in the Navy's request for renewal of the IHA based on rounding errors found in the request. Further, in the initial IHA that was issued, takes by Level B harassment for harbor seals and grey seals were increased to more accurately reflect the number of seal sightings reported in recent monitoring reports. However, this adjustment has not been requested or made for the renewal IHA based on the reduction in the number of construction days. The take calculation for hooded and harp seals remains the same from the initial IHA (see the **Federal Register** notices of the proposed (87 FR 11860, March 3, 2022) and final (87 FR 19886, April 6, 2022) IHAs for the initial authorization for more information).

TABLE 2—AUTHORIZED TAKE BY LEVEL A AND LEVEL B HARASSMENT OF HARBOR PORPOISE BY PROJECT ACTIVITY FOR THE RENEWAL IHA

Activity	Total amount	Method	Number of production days under renewal IHA	Density	Level A harassment zone (km^2)	Takes by Level A harassment	Level B harassment zone (km^2)	Take by Level B harassment
Center Wall—Install Foundation Support Piles.	20 drilled shafts	Rotary Drill	6	0.4	0.00001	0	0.41742	0
		Rotary Drill	6	0.4	0.00025	0	0.41742	0
		Rotary Drill	10	0.4	0.00000	0	0.41742	0
		Cluster drill DTH	117	0.4	0.41742	2	0.41742	0
Center Wall—Install Tie-In to Existing West Closure Wall.	16 sheet piles	Initial vibratory set	4	0.4	0.00045	0	0.41742	0
		Impact	4	0.4	0.40341	0	0.41742	0
P–310 West Closure Wall—Remove Closure Wall.	238 sheet piles	Vibratory extraction	60	0.4	0.00014	0	0.41742	1
P–310 West Closure Wall—Mechanical Rock Excavation.	985 cy	Hydraulic rock hammering.	77	0.4	0.41742	1	0.277858	0
P–310 West Closure Wall—Mechanical Rock Excavation.	Drill 500 relief holes	Mono-hammer DTH	20	0.4	0.04811	0	0.41742	0
West Closure wall—Berth 11 Abutment—Install Piles.	Drill 28 shafts	Mono-hammer DTH	28	0.4	0.41742	0	0.41742	0
Berth 11—Remove Shutter Panels.	112 panels	Hydraulic rock hammering.	10	0.4	0.41742	0	0.277858	0
Berth 11 Face—Mechanical Rock Removal at Basin Floor.	3,500 cy	Hydraulic rock hammering.	80	0.4	0.41742	1	0.277858	0
	Drill 1,277 relief holes	Mono-hammer DTH	37	0.4	0.04811	0	0.41742	1
Berth 11 Face—Mechanical Rock at Abutment.	Drill 365 rock borings (1,220 cy).	Mono-hammer DTH	183	0.4	0.41742	3	0.41742	0
Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors	Mono-hammer DTH	25	0.4	0.03036	0	0.41742	0
Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles	Initial vibratory set	6	0.4	0.00104	0	0.41742	0
		Impact	6	0.4	0.41742	0	0.41742	0

TABLE 2—AUTHORIZED TAKE BY LEVEL A AND LEVEL B HARASSMENT OF HARBOR PORPOISE BY PROJECT ACTIVITY FOR THE RENEWAL IHA—Continued

Activity	Total amount	Method	Number of production days under renewal IHA	Density	Level A harassment zone (km^2)	Takes by Level A harassment	Level B harassment zone (km^2)	Take by Level B harassment
Berth 1—Remove Sheet Piles.	Remove 12 sheet piles.	Hydraulic rock hammering.	3	0.4	0.41742	0	0.277858	0
Berth 1 Mechanical Rock Removal at Basin Floor.	200 cy	Hydraulic rock hammering.	39	0.4	0.41742	1	0.277858	0
Removal of Berth 1 Emergency Repair Sheets.	108 sheet piles	Vibratory extraction	18	0.4	0.00073	0	0.41742	0
Removal of Berth 1 Emergency Repair Tremie Concrete.	500 cy	Hydraulic rock hammering.	15	0.4	0.41742	0	0.277858	0
Total Estimated Take						10		2

TABLE 3—CALCULATED TAKE BY LEVEL A AND LEVEL B HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY FOR THE PROPOSED RENEWAL IHA

Activity	Total amount	Method	Number of production days under renewal IHA	Density	Level A harassment zone (km^2)	Takes by Level A harassment	Level B harassment zone (km^2)	Take by Level B harassment
Center Wall—Install Foundation Support Piles.	20 drilled shafts	Rotary Drill	6	3	0.00001	0	0.41742	8
		Rotary Drill	6	3	0.00009	0	0.41742	8
		Rotary Drill	10	3	0.00000	0	0.41742	13
		Cluster drill DTH	117	3	0.41742	146	0.41742	0
Center Wall—Install Tie-In to Existing West Closure Wall.	16 sheet piles	Initial vibratory set	4	3	0.00008	0	0.41742	5
		Impact	4	3	0.20116	2	0.41742	3
P–310 West Closure Wall—Remove Closure Wall.	238 sheet piles	Vibratory extraction	60	3	0.00002	0	0.41742	75
P–310 West Closure Wall—Mechanical Rock Excavation.	985 cy	Hydraulic rock hammering.	77	3	0.41742	96	0.277858	0
P–310 West Closure Wall—Mechanical Rock Excavation.	Drill 500 relief holes	Mono-hammer DTH	20	3	0.01455	1	0.41742	24
West Closure Wall—Berth 11 Abutment—Install Piles.	Drill 28 shafts	Mono-hammer DTH	28	3	0.41742	35	0.41742	0
Berth 11—Remove Shutter Panels.	112 panels	Hydraulic rock hammering.	10	3	0.41742	13	0.277858	0
Berth 11 Face—Mechanical Rock Removal at Basin Floor.	3,500 cy	Hydraulic rock hammering.	80	3	0.41742	100	0.277858	0
	Drill 1,277 relief holes	Mono-hammer DTH	37	3	0.01455	2	0.41742	45
Berth 11 Face—Mechanical Rock at Abutment.	Drill 365 rock borings (1,220 cy).	Mono-hammer DTH	183	3	0.41742	229	0.41742	0
Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors	Mono-hammer DTH	25	3	0.00903	1	0.41742	31
Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles	Initial vibratory set	6	3	0.00104	8	0.41742	0
		Impact	6	3	0.36495	7	1.50227	1
Berth 1—Remove Sheet Piles.	Remove 12 sheet piles.	Hydraulic rock hammering.	3	3	0.41742	4	0.277858	0
Berth 1 Mechanical Rock Removal at Basin Floor.	200 cy	Hydraulic rock hammering.	39	3	0.41742	49	0.277858	0
Removal of Berth 1 Emergency Repair Sheets.	108 sheet piles	Vibratory extraction	18	3	0.00014	0	0.41742	23
Removal of Berth 1 Emergency Repair Tremie Concrete.	500 cy	Hydraulic rock hammering.	15	3	0.41742	19	0.277858	0
Total Estimated Take						704		244

TABLE 4—CALCULATED TAKE BY LEVEL A AND LEVEL B HARASSMENT OF GREY SEAL BY PROJECT ACTIVITY FOR THE RENEWAL IHA

Activity	Total amount	Method	Number of production days under renewal IHA	Density	Level A harassment zone (km^2)	Takes by Level A harassment	Level B harassment zone (km^2)	Take by Level B harassment
Center Wall—Install Foundation Support Piles.	20 drilled shafts	Rotary Drill	6	0.02	0.00001	0	0.41742	1
		Rotary Drill	6	0.02	0.00009	0	0.41742	1

TABLE 4—CALCULATED TAKE BY LEVEL A AND LEVEL B HARASSMENT OF GREY SEAL BY PROJECT ACTIVITY FOR THE RENEWAL IHA—Continued

Activity	Total amount	Method	Number of production days under renewal IHA	Density	Level A harassment zone (km^2)	Takes by Level A harassment	Level B harassment zone (km^2)	Take by Level B harassment
		Rotary Drill	10	0.02	0.00000	0	0.41742	1
		Cluster drill DTH	117	0.02	0.41742	10	0.41742	0
Center Wall—Install Tie-In to Existing West Closure Wall.	16 sheet piles	Initial vibratory set	4	0.02	0.00008	0	0.41742	0
		Impact	4	0.02	0.20116	0	0.41742	0
P–310 West Closure Wall—Remove Closure Wall.	238 sheet piles	Vibratory extraction	60	0.02	0.00002	0	0.41742	5
P–310 West Closure Wall—Mechanical Rock Excavation.	985 cy	Hydraulic rock hammering.	77	0.02	0.41742	6	0.277858	0
P–310 West Closure Wall—Mechanical Rock Excavation.	Drill 500 relief holes	Mono-hammer DTH	20	0.02	0.01455	0	0.41742	2
West Closure Wall—Berth 11 Abutment—Install Piles.	Drill 28 shafts	Mono-hammer DTH	28	0.02	0.41742	2	0.41742	0
Berth 11—Remove Shutter Panels.	112 panels	Hydraulic rock hammering.	10	0.02	0.41742	1	0.277858	0
Berth 11 Face—Mechanical Rock.	3,500 cy	Hydraulic rock hammering.	80	0.02	0.41742	7	0.277858	0
Removal at Basin Floor	Drill 1,277 relief holes	Mono-hammer DTH	37	0.02	0.01455	0	0.41742	3
Berth 11 Face—Mechanical Rock at Abutment.	Drill 365 rock borings (1,220 cy).	Mono-hammer DTH	183	0.02	0.41742	15	0.41742	0
Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors	Mono-hammer DTH	25	0.02	0.00903	0	0.41742	2
Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles	Initial vibratory set	6	0.02	0.00104	0	0.41742	1
		Impact	6	0.02	0.36495	0	0.41742	0
Berth 1—Remove Sheet Piles.	Remove 12 sheet piles.	Hydraulic rock hammering.	3	0.02	0.41742	0	0.277858	0
Berth 1 Mechanical Rock Removal at Basin Floor.	200 cy	Hydraulic rock hammering.	39	0.02	0.41742	3	0.277858	0
Removal of Berth 1 Emergency Repair Sheets.	108 sheet piles	Vibratory extraction	18	0.02	0.00014	0	0.41742	2
Removal of Berth 1 Emergency Repair Tremie Concrete.	500 cy	Hydraulic rock hammering.	15	0.02	0.41742	1	0.277858	0
Total Estimated Take						45		18

Table 5 summarizes the authorized take for all species described as a percentage of stock abundance.

TABLE 5—TAKE ESTIMATES AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock (N_{EST})	Level A harassment	Level B harassment	Percent of stock
Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	10	2	<0.1
Harbor seal	Western North Atlantic (61,336)	695	240	<0.1
Gray seal	Western North Atlantic (27,300)	45	18	<0.1
Hooded seal	Western North Atlantic (593,500)	0	5	<0.1
Harp seal	Western North Atlantic (7.6 million)	0	5	<0.1

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures included as requirements in the authorization are identical to those included in the FR Notice announcing the issuance of the initial IHA (87 FR 19886, April 6, 2022), and the discussion of the least practicable adverse impact included in that document remains accurate. The same measures are proposed for this renewal and are summarized here:

- The Navy must delay pile driving activities should poor environmental conditions restrict full visibility of the applicable shutdown zones;
- The Navy must ensure that all construction supervisors and crews, the monitoring team, and relevant Navy staff are trained prior to commencing work;
- The Navy must implement a 10 m shutdown zone around construction activities to avoid direct physical interaction with marine mammals;
- The Navy must establish and implement shutdown and monitoring zones for all pile driving activities based on the activity type and marine mammal hearing group (see Table 13 in the FR Notice announcing the issuance of the initial IHA (87 FR 19886, April 6, 2022)

for the shutdown and monitoring zones);

- The Navy must implement soft start techniques while impact driving whereby hammer energy is gradually ramped up;
- The Navy must install a bubble curtain across any openings at the entrance of super flood basin to attenuate sound for the sound sources that encompass the entire ROI, which include during DTH excavation (DTH mono-hammer and cluster drill), hydraulic rock hammering, and impact pile driving of sheet piles;
- The Navy must employ at least three protected species observers (PSOs) to monitor the shutdown and monitoring zones;
- The Navy must monitor for the presence of marine mammals 30 minutes prior to the initial pile-driving activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. If a marine mammal is observed entering or within the shutdown zones, pile driving will be delayed or halted;
- The Navy will delay or halt pile driving activities 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;
- The Navy will conduct a sound source verification study for rotary drilling, DTH excavation (DTH mono-hammer and cluster drill), and rock hammering activities for any remaining piles required to be monitored following their acoustic monitoring plan as described in the FR Notice announcing the issuance of the initial IHA (87 FR 19886, April 6, 2022);
- The Navy must submit a draft report detailing all monitoring within 90 calendar days of the completion of marine mammal monitoring or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first;
- The Navy must prepare and submit final report within 30 days following resolution of comments on the draft report from NMFS;
- The Navy must submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above); and
- The Navy must report injured or dead marine mammals.

Comments and Responses

A notice of NMFS' proposal to issue a renewal IHA to the Navy was published in the **Federal Register** on March 15, 2023 (88 FR 15982). That notice either described, or referenced descriptions of, the applicant's activity, the marine mammal species that may be affected by the activity, the anticipated effects on marine mammals and their habitat, estimated amount and manner of take, and proposed mitigation, monitoring and reporting measures. NMFS received two comments that were not relevant to the scope of the proposed action. No other comments were received.

Determinations

The renewal request consists of a subset of activities analyzed through the initial authorization described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that the Navy's activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than one-third the abundance of all stocks). Although new SPL information became available for DTH and rock hammering, none of this new information affects NMFS' determinations supporting issuance of the initial IHA. The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) the Navy's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and, (5) appropriate monitoring and reporting requirements are included.

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 renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations 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 determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

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 authorized 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.

Renewal

NMFS has issued a renewal IHA to the Navy for the take of marine mammals incidental to construction activities associated with the multifunctional expansion of Dry Dock 1 project at Portsmouth Naval Shipyard in Kittery, Maine, effective through March 31, 2024.

Dated: March 31, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–07164 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice of Intent To Conduct Scoping in Preparation of the National Coral Reef Resilience Strategy for the Coral Reef Conservation Program

AGENCY: National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce.

ACTION: Notice of intent; announcement of public scoping period; request for written comments.

SUMMARY: NOAA announces its intention to prepare a National Coral Reef Resilience Strategy (National Strategy) in accordance with the Coral Reef Conservation Act of 2000 (CRCA), as reauthorized and amended by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. NOAA administers the Coral Reef Conservation Program (CRCP), which is implemented in the coastal areas and marine waters of Florida, Puerto Rico, U.S. Virgin Islands, Gulf of Mexico, Hawaii, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the U.S. Pacific Remote Island Area, and targeted international regions including the wider Caribbean, the Coral Triangle, the South Pacific, and Micronesia. Publication of this document begins the official scoping period to help identify content for specific elements of the National Strategy. The intended effect of this notice is to provide the public with background on the scoping, seek specific input, and provide a general opportunity for comment the agency can consider while developing the National Strategy.

DATES: NOAA will consider all relevant written comments received by May 8, 2023.

ADDRESSES: Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/NOAA-NOS-2023-0043.* Click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Email:* Dr. Harriet L. Nash, Deputy Director, Coral Reef Conservation Program, *harriet.nash@noaa.gov.* Include ''2023 Strategy Scoping'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Dr. Harriet L. Nash of NOAA's Coral Reef Conservation Program, by email at *harriet.nash@noaa.gov* or phone at 240–410–3535.

SUPPLEMENTARY INFORMATION:

Background

NOAA announces its intention to prepare a National Strategy in accordance with the Coral Reef Conservation Act of 2000, as reauthorized and amended by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117–263, December 23, 2022, 136 Stat 2395; reauthorized CRCA). NOAA is preparing the National Strategy to support coral reef conservation and restoration activities throughout the United States, South Atlantic Ocean, Gulf of Mexico, and Pacific Island Regions, and priority international areas (*i.e.,* wider Caribbean, Coral Triangle, South Pacific, and Micronesia). After final publication, the National Strategy will replace CRCP's current Strategic Plan (2018). The National Strategy will contain several elements, many of which exist in the current Strategic Plan (*https://repository.library.noaa.gov/view/noaa/19419/noaa_19419_DS1.pdf*), that will be developed in consultation with the Secretary of the Interior, the U.S. Coral Reef Task Force, covered States, and covered Native entities, as well as the Secretary of Defense; by engagement with stakeholders; and through public review and comment.

Pursuant to Section 204(b) of the reauthorized CRCA, the required elements of the National Strategy are:

- A discussion addressing:
  - continuing and emerging threats to the resilience of U.S. coral reef ecosystems;
  - remaining gaps in coral reef ecosystem research, monitoring, and assessment;
  - the status of management cooperation and integration among Federal reef managers and covered reef managers;
  - the status of efforts to manage and disseminate critical information, and enhance interjurisdictional data sharing, related to research, reports, data sets, and maps;
  - areas of special focus, which may include:
    - improving natural coral recruitment;
    - preventing avoidable losses of corals and their habitat;
    - enhancing the resilience of coral populations;
    - supporting a resilience-based management approach;
    - developing, coordinating, and implementing watershed management plans;
    - building and sustaining watershed management capacity at the local level;
    - providing data essential for coral reef fisheries management;
    - building capacity for coral reef fisheries management;
    - increasing understanding of coral reef ecosystem services;
    - educating the public on the importance of coral reefs, threats, and solutions; and
    - evaluating intervention efficiency;
  - the status of conservation efforts, including the use of marine protected areas to serve as replenishment zones developed consistent with local practices and traditions and in cooperation with, and with respect for the scientific, technical, and management and expertise and responsibilities of, covered reef managers;
  - science-based adaptive management and restoration efforts; and
  - management of coral reef emergencies and disasters.
- A statement of national goals and objectives designed to guide:
  - future Federal coral reef management and restoration activities authorized under Section 203 of the reauthorized CRCA;
  - conservation and restoration priorities for grants awarded under Section 211 of the reauthorized CRCA; and
  - research priorities for the reef research coordination institutes designated under Section 213(b)(1)(B).
- A designation of priority areas for conservation, and priority areas for restoration, to support the review and approval of grants under Section 211(e) of the reauthorized CRCA.
- Technical assistance in the form of general templates for use by covered reef managers and Federal reef managers to guide the development of coral reef action plans under Section 205 of the reauthorized CRCA, including guidance on the best science-based practices to respond to coral reef emergencies that can be included in coral reef action plans.

Public Comment

NOAA begins this National Strategy development process by soliciting input from the public and interested parties, including underrepresented groups, regarding information to be included in any of the elements stated above and any other pertinent information. Specifically, this scoping process is intended to accomplish the following objectives:

1. Invite affected Federal, State, and local agencies, and interested persons to participate in the scoping process for development of the National Strategy.

2. Initiate consultations with the Secretary of the Interior, the U.S. Coral Reef Task Force, covered states, covered Native entities, and the Secretary of Defense, as appropriate, pursuant to the reauthorized CRCA.

3. Engage stakeholders, including covered states, coral reef stewardship partnerships, reef research coordination institutes, coral reef research centers, and recipients of grants awarded pursuant to Section 211 of the reauthorized CRCA.

4. Identify information that may be helpful in developing the elements listed above and in Section 204 of the reauthorized CRCA.

The official scoping period is from April 6, 2023 to May 8, 2023. Please visit the CRCP web page for additional information regarding the program: *https://coralreef.noaa.gov/.*

The preparation of the National Strategy for the CRCP will be conducted under the authority and in accordance with the requirements of the reauthorized CRCA.

Authority: Public Law 117–263, 136 Stat 2395.

Nicole R. LeBoeuf,

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

[FR Doc. 2023–07195 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Digital Equity RFC Listening Sessions

AGENCY: National Telecommunications and Information Administration, Department of Commerce.

ACTION: Notice of open meetings.

SUMMARY: The National Telecommunications and Information Administration (NTIA) will convene four virtual listening sessions on the Digital Equity Act Request for Comment. The listening sessions are designed to collect stakeholder input to help inform the development and administration of the State Digital Equity Capacity and State Digital Equity Competitive grant programs.

DATES: The listening sessions will be held on April 10, 17, 24, and 29, 2023, from 3:00 p.m. to 4:00 p.m., Eastern Daylight Time.

ADDRESSES: The session will be held virtually, with online slide share and dial-in information to be posted at *https://www.internetforall.gov/calendar.*

FOR FURTHER INFORMATION CONTACT: Please direct questions regarding this Notice to *digitalequity@ntia.gov,* indicating ''DE RFC Listening Session'' in the subject line, or if by mail, addressed to National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: 202–482–3806. Please direct media inquiries to Virginia Bring, (202) 594–6254, or NTIA's Office of Public Affairs, *press@ntia.gov.*

SUPPLEMENTARY INFORMATION:

Background and Authority: Recognizing the internet's fundamental role in today's society and its centrality to our nation's continued health and prosperity, the Biden-Harris Administration will work to ensure that every community in America has access to affordable, reliable, high-speed internet service. On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act of 2021 [1] into law, also known (and referred to subsequently herein) as the Bipartisan Infrastructure Law, which includes a historic investment of $65 billion to help close the digital divide and ensure that everyone in America has access to affordable, reliable, high-speed internet service. The National Telecommunications and Information Administration (NTIA), is responsible for distributing more than $48 billion in Bipartisan Infrastructure Law funding through several different programs, including the $2.75 billion Digital Equity Act of 2021 Program.

The COVID–19 pandemic highlighted what many have known for a very long time: High-speed internet access is not a luxury, but a basic necessity for all Americans. Since the pandemic, telehealth access and use has expanded and the workplace is changing as more workers are choosing to work from home. Passed on a bipartisan basis in both chambers of Congress, the Bipartisan Infrastructure Law allocated $42.45 billion to create the Broadband, Equity, Access and Deployment Program (BEAD), $1 billion to create the Enabling Middle Mile Broadband Infrastructure Program, $2 billion to help tribal communities expand high-speed internet access and adoption on tribal lands, and $2.75 billion (through the Digital Equity Act of 2021 (Digital Equity Act), also passed as part of the Bipartisan Infrastructure Law) to advance federal goals relating to digital equity [2] and digital inclusion.[3] These programs administered by NTIA are designed to work in tandem with other high-speed internet programs, including the Affordable Connectivity Program, which provides up to $30 per month toward internet service for qualifying households and up to $75 per month for households on qualifying Tribal lands. With the passage of the Bipartisan Infrastructure Law, Congress took a significant step forward in achieving the Biden-Harris Administration's goal of ensuring that all Americans not only have access to affordable, reliable, high-speed internet service but also the skills and resources needed for full participation in the society and economy of the United States.

To help inform development and administration of the Digital Equity Act grant programs, NTIA has established multiple avenues for the public to offer input, including through a Request for Comment, published March 2nd, 2023, as well as these four public virtual listening sessions. This Notice is part of NTIA's strategy to engage with partners, stakeholders, and most importantly, individuals with lived experiences who faced challenges of having access to and/or the skills and devices to fully utilize affordable, reliable, high-speed internet, to help meet the President's goal to close the digital divide and transform the lives of all Americans. This is America's opportunity to harness the talents and strengths of all parts of our country and remove systemic barriers and provide equal access to opportunities and benefits, so that everyone has a chance to reach their full potential. But in order to achieve this objective, we need to hear from you. This Notice provides an opportunity to provide direct responses to NTIA's Request for Comment via public listening sessions, and to inform how NTIA designs a program that works to achieve this national and community driven opportunity for change.

[1] Public Law 117–58, 135 Stat. 429 (November 15, 2021).

[2] Section 60302(10) of the IIJA defines ''digital equity'' as ''the condition in which individuals and communities have the information technology capacity that is needed for full participation in the society and economy of the United States.''

[3] Section 60302(11) of the IIJA Law defines ''digital inclusion'' as ''(A) . . . the activities that are necessary to ensure that all individuals in the United States have access to, and the use of, affordable information and communication technologies, such as—(i) reliable fixed and wireless broadband internet service; (ii) internet-enabled devices that meet the needs of the user; and (iii) applications and online content designed to enable and encourage self-sufficiency, participation, and collaboration; and (B) includes—(i) obtaining access to digital literacy training; (ii) the provision of quality technical support; and (iii) obtaining basic awareness of measures to ensure online privacy and cybersecurity.''

Time and Date: The listening sessions will be held on April 10, 17, 24, and 29, 2023, from 3:00 p.m. to 4:00 p.m., Eastern Daylight Time. The exact time of the meeting is subject to change. Please refer to NTIA's website, *https://www.internetforall.gov/calendar.,* for the most current information.

Place: The meeting will be held virtually, with online slide share and dial-in information to be posted at *https://www.internetforall.gov/calendar.* Please refer to NTIA's website, *https://www.internetforall.gov/calendar.,* for the most current information.

Other Information: The meeting is open to the public and the press on a first-come, first-served basis. The virtual meeting is accessible to people with disabilities. Sign language interpretation and virtual real-time captioning will be available. Individuals requiring other ancillary aids should notify the Department at *digitalequity@ntia.gov* at least seven (7) business days prior to the meeting. Access details for the meeting are subject to change. Please refer to NTIA's website, *https://www.internetforall.gov/calendar.,* for the most current information.

Josephine Arnold,

Senior Attorney Advisor, National Telecommunications and Information Administration.

[FR Doc. 2023–07133 Filed 4–5–23; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0060]

Agency Information Collection Activities; Comment Request; School Pulse Panel 2023–24 Data Collection

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before June 5, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0060. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Pulse Panel 2023–24 Data Collection.

OMB Control Number: 1850–0975.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 70,455.

Total Estimated Number of Annual Burden Hours: 9,647.

Abstract: The School Pulse Panel (SPP) is a data collection originally designed to collect voluntary responses from a nationally representative sample of public schools to better understand how schools, students, and educators are responding to the ongoing stressors of the coronavirus pandemic. It is conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the United States Department of Education, in cooperation with the U.S. Census Bureau. Due to the immediate need to collect information from schools during the pandemic to satisfy the requirement of Executive Order 14000, an emergency clearance was issued to develop and field the first several monthly collections of the SPP in 2021, and a full review of the SPP data collection was completed in 2022 (OMB #1850–0969). SPP's innovative design and timely dissemination of findings have been used and cited frequently among Department of Education senior leadership, the White House Domestic Policy Counsel, the USDA's Food and Nutrition Service, the Centers for Disease Control and Prevention, Congressional deliberations, and the media. The ongoing, growing interest by stakeholders has resulted in the request for dedicated funding to create an established NCES quick-turnaround data collection vehicle, with the goal of standing up a post-pandemic panel to begin with the 2023–24 school year.

One notable difference for the next SPP study will be the potential addition of a district-level survey. The purpose of the district component is two-fold: (1) to collect data on topics that schools cannot report about such as facilities, supply chain issues and finances; and (2) to reduce burden on schools by allowing district staff to report on district policies and school level data tracked at the district. The district component will enhance the breadth of data that can be collected in SPP. For the 23–24 school year, the survey may ask school and district staff about a range of topics, including but not limited to instructional mode offered; enrollment counts of subgroups of students for various subject interests; strategies to address learning recovery; safe and healthy school mitigation strategies; mental health services; use of technology; information on staffing, nutrition services, absenteeism, usage of federal funds, facilities, and overall principal and district staff experiences.

Some new content will be rotated in and out monthly.

As in previous waves, for SPP 2023–24 roughly 5,000 (4,000 in an initial sample and 1,000 in a reserve sample) public elementary, middle, high, and combined-grade schools will be randomly selected to participate in a panel. It is expected these schools will come from roughly 3,000 districts with a reserve sample of 300 districts to replace district refusals. The goal is national representation from 1,000 responding schools and districts to report national estimates. School and district staff will be asked to provide requested data as frequently as monthly during the 23–24 school year. This approach provides the ability to collect detailed information on various topics while also assessing changes over time for items that are repeated. Given the high demand for data collection, the content of the survey will change monthly.

This request is to conduct the SPP 2023–24 main study data collection activities, including instruments for the first quarter of monthly collections, for 60-day and 30-day public comment. Some documents will be revised for the 30-day public comment period. Subsequent quarterly content submissions will be submitted for 30-day public comment periods.

Dated: April 3, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–07239 Filed 4–5–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2741–037]

Kings River Conservation District; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 Code of Federal Regulations (CFR) Part 380, Commission staff reviewed Kings River Conservation District's application for an amendment to the license of the Pine Flat Hydroelectric Project No. 2741 and have prepared an Environmental Assessment (EA). The licensee proposes to add a fourth generating unit (Unit 4) to the project that will utilize flows from the bypass system. The new Unit 4 would utilize flows up to 375 cfs but would not increase the existing 8,000 cfs maximum hydraulic capacity and would increase the generating capacity of the project by 3.8%. Unit 4 would be constructed in a previously disturbed area at the toe of the U.S. Army Corps of Engineers' Pine Flat Dam. The project is located on the Kings River in Fresno County, California. The project is located at the U.S. Army Corps of Engineers' Pine Flat Dam.

The EA contains Commission staff's analysis of the potential environmental effects of the proposed amendment to the licensee, and concludes that the proposed amendment, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA may be viewed on the Commission's website at *http://www.ferc.gov* using the ''elibrary'' link. Enter the docket number (P–7590) in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3372, or for TTY, (202) 502–8659.

For further information, contact Jeffrey V. Ojala at 202–502–8206 or *Jeffrey.Ojala@ferc.gov.*

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07201 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14861–002]

FFP Project 101, LLC; Notice of Availability of the Draft Environmental Impact Statement for the Goldendale Energy Storage Project

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for license for the Goldendale Energy Storage Project (FERC No. 14861) and has prepared a draft environmental impact statement (EIS) for the project.[1] The closed-loop pumped storage project would be located approximately 8 miles southeast of the City of Goldendale, Klickitat County, Washington, with transmission facilities extending into Sherman County, Oregon. The project would occupy 18.1 acres of lands owned by the U.S. Army Corps of Engineers (Corps) and administered by the Bonneville Power Administration. The Corps participated as a cooperating agency to prepare the EIS.

The draft EIS contains staff's analysis of the applicant's proposal and the alternatives for licensing the Goldendale Energy Storage Project. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Native-American tribes, the public, the license applicant, and Commission staff.

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. The draft EIS also may be viewed on the Commission's website at *http://www.ferc.gov* under the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

All comments must be filed by June 6, 2023.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *https://ferconline.ferc.gov/eFiling.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or

[1] The Council on Environmental Quality (CEQ) issued a final rule on April 20, 2022, revising the regulations under 40 CFR 1502, 1507, and 1508 that Federal agencies use to implement NEPA (see *National Environmental Policy Act Implementing Regulations Revisions,* 87 FR 23453). The final rule became effective May 20, 2022. Accordingly, Commission staff prepared this EIS in accordance with CEQ's new regulations.

(202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–14861–002.

Anyone may intervene in this proceeding based on this draft EIS (18 CFR 380.10). You must file your request to intervene as specified above.[2] You do not need intervenor status to have your comments considered.

In addition to or in lieu of sending written comments, you are invited to attend a public meeting that will be held to receive comments on the draft EIS. Commission staff will hold two public meetings for the purpose of receiving comments on the draft EIS. At the meetings, resource agency personnel and other interested persons will have the opportunity to provide oral and written comments and recommendations regarding the draft EIS. The meetings will be recorded by a court reporter, and all statements (verbal and written) will become part of the Commission's public record for the project. All interested individuals and entities will be invited to attend one or both of the public meetings. A notice detailing the exact date, time, and location of the public meetings will be forthcoming.

For further information, please contact Michael Tust at (202) 502–6522 or at *michael.tust@ferc.gov.*

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07200 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at North American Electric Reliability Corporation Standard Drafting Team Meeting

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission and/or Commission staff may attend the following meeting:

North American Electric Reliability Corporation Project 2021–07 Extreme Cold Weather Grid Operations, Preparedness, and Coordination Standard Drafting Team Meeting

April 11, 2023 (1:00 p.m.–3:00 p.m. eastern time).

Further information regarding these meetings may be found at: *http://www.nerc.com/Pages/Calendar.aspx.*

The discussions at the meetings, which are open to the public, may address matters at issue in the following Commission proceeding:

Docket No. RD23–1–000: Extreme Cold Weather Reliability Standards EOP–011–3 and EOP–012–1.

For further information, please contact Chanel Chasanov, 202–502–8569, or *chanel.chasanov@ferc.gov.*

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07205 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3133–033]

Brookfield White Pine Hydro, LLC, Errol Hydro Co., LLC; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for a new license to continue to operate and maintain the Errol Hydroelectric Project. The project is located on the Androscoggin River and Umbagog Lake, near the Town of Errol, and Township of Cambridge, in Coos County, New Hampshire, and the Towns of Magalloway Plantation and Upton in Oxford County, Maine. Commission staff has prepared an Environmental Assessment (EA) for the project. The project would occupy 3,285 acres of federal land in the Umbagog National Wildlife Refuge administered by the U.S. Fish and Wildlife Service.

The EA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the EA 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. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–3133–033.

For further information, contact Kelly Wolcott at (202) 502–8576 or by email at *kelly.wolcott@ferc.gov.*

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07198 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

[2] Interventions may also be filed electronically via the internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–468–000]

Trailblazer Pipeline Company, Rockies Express Pipeline, LLC; Notice of Availability of the Environmental Assessment for the Proposed Trailblazer Conversion Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Trailblazer Conversion Project (Project), proposed by Trailblazer Pipeline Company, LLC (TPC) and Rockies Express Pipeline, LLC (REX), collectively, the Applicants, in the above-referenced docket. The Applicants request authorization to abandon in-place, construct, and operate natural gas transmission facilities in Wyoming, Colorado and Nebraska. According to TPC and REX, the Project is designed to provide continuing service to TPC's existing natural gas firm transportation customers using underutilized jurisdictional capacity on REX pipeline facilities while making TPC's pipeline facilities available in anticipation of future non-jurisdictional use to transport carbon dioxide (CO_2) for final sequestration. The Project would not involve an increase in natural gas transportation capacity.

The EA assesses the potential environmental effects of the abandonment, construction, and operation of the Project in accordance with the requirements of the National Environmental Policy Act. The FERC staff concludes that approval of the proposed Project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Trailblazer Conversion Project would consist of the following:

- abandonment in-place of 392 miles of 36-inch-diameter Trailblazer Pipeline and three TPC mainline compressor stations on the Trailblazer Pipeline, including activities involving excavation to expose, cut, and cap the pipeline facilities, at discrete sites;
- construction of a new 18.8-mile-long, 20-inch-diameter lateral pipeline (REX Lateral to TPC Adams);
- construction of a new 22.2-mile-long, 36-inch-diameter lateral pipeline (REX Lateral to TPC East);
- installation of station piping and additional regulation at three existing TPC meter stations to enable deliveries into end users or interstate pipeline systems;
- expansion of one existing meter station between the Rockies Express Pipeline and the Trailblazer Pipeline;
- construction of two new REX meter stations; and
- construction of five new interconnect booster stations (small capacity compressor stations) at existing pipeline facilities (footprint of booster stations ranging from 1.2 to 2.1 acres in size and total horsepower ranging from 50 to 3,533).

The EA addresses the facilities and abandonment activities proposed by the Applicants. If the Commission grants approval for abandonment, future use of the pipeline for purposes other than interstate natural gas transportation, including any subsequent construction related to future use of the abandoned pipeline for CO_2 sequestration, would not be subject to the Commission's jurisdiction.

The Commission mailed a copy of the *Notice of Availability* of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the Project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://www.ferc.gov/ferc-online/elibrary/overview*), select ''General Search'' and enter the docket number in the ''Docket Number'' field, excluding the last three digits (*i.e.* CP22–468). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The number of pages in the EA exceeds the page limits set forth in the Council on Environmental Quality's July 16, 2020 final rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (85 FR 43304). The Director of the Office of Energy Projects, as our senior agency official, has authorized this page limit exceedance for the EA to provide information that is useful to the decision-making process.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this Project, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on May 1, 2023.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address using the U.S. Postal Service. Be sure to reference the Project docket number (CP22–468–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent through carriers other than the U.S. Postal Service must be sent to 12225 Wilkins Avenue, Rockville, Maryland 20852 for processing.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have

your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/ferc-online/ferc-online/how-guides.*

Additional information about the Project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07197 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER22–2174–004.
Applicants: Daybreak Solar, LLC.
Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5002.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1408–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Supplement to Revisions to Sch. 12-Appx A: February 2023 RTEP in ER23–1408 to be effective 6/14/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5116.
Comment Date: 5 p.m. ET 5/1/23.

Docket Numbers: ER23–1520–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 5861; Queue No. AF2–305/AG1–398 to be effective 5/31/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5022.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1521–000.
Applicants: Virginia Electric and Power Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Virginia Electric and Power Company submits tariff filing per 35.13(a)(2)(iii: VEPCO submits one WDSA, SA No. 6858 to be effective 3/22/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5037.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1522–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: SCE 2023 TACBAA Update to be effective 6/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5096.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1523–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–03–31_Available Maximum Emergency Resource Filing to be effective 6/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5099.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1524–000.
Applicants: Consumers Energy Company.
Description: § 205(d) Rate Filing: Revised RS FERC No. 116—Removal of Karn 1 & 2 Reactive Supply Service to be effective 6/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5118.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1525–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of ISA, SA No. 5683, Queue No. AF1–119 to be effective 3/31/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5148.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1526–000.
Applicants: Public Service Company of Colorado.
Description: § 205(d) Rate Filing: 2023–03–31 BkCoU-NonConforming BASA–469–0.1.0 to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5150.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1527–000.
Applicants: New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: NYISO 205 conforming changes re: DAM bidding for certain ICAP Suppliers to be effective 5/31/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5157.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1528–000.
Applicants: ITC Interconnection LLC, PJM Interconnection, L.L.C.
Description: Tariff Amendment: ITC Interconnection LLC submits tariff filing per 35.15: ITCI submits Notice of Cancellation of Interconnection Agreement, SA No. 4426 to be effective 6/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5168.
Comment Date: 5 p.m. ET 4/21/23

Docket Numbers: ER23–1529–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Revisions to OATT, Sec. 31.7 to Enhance Day-Ahead Zonal Factors to be effective 5/31/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5170.
Comment Date: 5 p.m. ET 4/21/23

Docket Numbers: ER23–1530–000.
Applicants: ITC Interconnection LLC, PJM Interconnection, L.L.C.
Description: Tariff Amendment: ITC Interconnection LLC submits tariff filing per 35.15: ITCI submits Notice of Cancellation of Interconnection Agreement, SA No. 4427 to be effective 6/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5208.
Comment Date: 5 p.m. ET 4/21/23

Docket Numbers: ER23–1531–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: Annual Real Power Loss Factor Filing for 2022 to be effective 6/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5231.
Comment Date: 5 p.m. ET 4/21/23

Docket Numbers: ER23–1532–000.
Applicants: Midcontinent Independent System Operator, Inc., Xcel

Energy Services Inc., Northern States Power Company, a Minnesota corporation, Northern States Power Company, a Wisconsin corporation.

Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–03–31_NSP Revisions to Att GG–NSP, MM & O True-Up Procedures to be effective 6/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5250.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1533–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2023–03–31 Energy Storage Enhancements Tariff Amendment to be effective 12/31/9998.

Filed Date: 3/31/23.

Accession Number: 20230331–5260.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1534–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2023–03–31 Resource Sufficiency Evaluation Enhancements—Phase 2 to be effective 12/31/9998.

Filed Date: 3/31/23.

Accession Number: 20230331–5270.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER23–1535–000.

Applicants: Pennsylvania Electric Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Pennsylvania Electric Company submits tariff filing per 35.13(a)(2)(iii: Penelec submits Revised Interconnection Agreement, Service Agreemement No. 6412 to be effective 5/31/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5282.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1536–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1518R25 Arkansas Electric Cooperative Corp NITSA NOA to be effective 3/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5298.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1537–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1628R22 Western Farmers Electric Cooperative NITSA NOAs to be effective 3/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5326.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1538–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6840; Queue No. AD2–067 to be effective 3/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5337.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1539–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of ISA, SA No. 4138; Queue No. AD2–075 to be effective 6/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5382.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1540–000.

Applicants: Rock Falls Wind Farm LLC.

Description: Tariff Amendment: Amendment to 348 to be effective 3/31/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5427.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1541–000.

Applicants: Desert Peak Energy Center, LLC.

Description: Baseline eTariff Filing: Desert Peak Energy Center, LLC Application for Market-Based Rate Authorization to be effective 5/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5443.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1542–000.

Applicants: Desert Peak Energy Storage I, LLC.

Description: Baseline eTariff Filing: Desert Peak Energy Storage I, LLC Application for MBR Authorization to be effective 5/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5447.

Comment Date: 5 pm ET 4/21/23.

Docket Numbers: ER23–1543–000.

Applicants: Desert Peak Energy Storage II, LLC.

Description: Baseline eTariff Filing: Desert Peak Energy Storage II, LLC Application for MBR Authorization to be effective 5/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5450.

Comment Date: 5 pm ET 4/21/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–39–000.

Applicants: PJM Interconnection, L.L.C.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of PJM Interconnection, L.L.C.

Filed Date: 3/29/23.

Accession Number: 20230329–5252.

Comment Date: 5 pm ET 4/19/23.

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 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–07221 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1503–000]

Cavalier Solar A, 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 Cavalier Solar A, 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 April 19, 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 30, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–07101 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas & Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR23–40–000.
Applicants: Regency Intrastate Gas LP.
Description: § 284.123 Rate Filing: Regency Intrastate Gas LP Operating Statement 4–1–2023 to be effective 4/1/2023.
Filed Date: 3/30/23.
Accession Number: 20230330–5177.
Comment Date: 5 p.m. ET 4/20/23.

Docket Numbers: PR23–41–000.
Applicants: Columbia Gas of Ohio, Inc.
Description: § 284.123 Rate Filing: COH Rates effective March 1 2023 to be effective 3/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5255.
Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: RP23–619–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Volume No. 2—XTO Energy Inc. & GDF Suez to be effective 4/1/2023.
Filed Date: 3/30/23.
Accession Number: 20230330–5154.
Comment Date: 5 p.m. ET 4/11/23.

Docket Numbers: RP23–620–000.
Applicants: Elba Express Company, L.L.C.
Description: Compliance filing: Annual Interruptible Revenue Crediting Report 2023 to be effective N/A.
Filed Date: 3/30/23.
Accession Number: 20230330–5173.
Comment Date: 5 p.m. ET 4/11/23.

Docket Numbers: RP23–621–000.
Applicants: Northern Border Pipeline Company.
Description: § 4(d) Rate Filing: Compressor Usage Surcharge 2023 to be effective 5/1/2023.
Filed Date: 3/30/23.
Accession Number: 20230330–5176.
Comment Date: 5 p.m. ET 4/11/23.

Docket Numbers: RP23–622–000.
Applicants: Kern River Gas Transmission Company.
Description: Kern River Gas Transmission Company submits Annual Gas Compressor Fuel Report for 2022.
Filed Date: 3/30/23.
Accession Number: 20230330–5215.
Comment Date: 5 p.m. ET 4/11/23.

Docket Numbers: RP23–624–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: § 4(d) Rate Filing: 2023 ETNG Fuel Filing to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5020.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–625–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: Compliance filing: 2021–2022 ETNG Cashout Report to be effective N/A.
Filed Date: 3/31/23.
Accession Number: 20230331–5021.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–626–000.
Applicants: Eastern Gas Transmission and Storage, Inc.
Description: § 4(d) Rate Filing: EGTS—March 31, 2023 MCS Negotiated Rate Agreements to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5025.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–627–000.
Applicants: Eastern Gas Transmission and Storage, Inc.
Description: § 4(d) Rate Filing: EGTS—Interim Fuel Retention Percentages to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5030.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–628–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Apr 1 2023 Releases to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5031.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–629–000.
Applicants: MountainWest Pipeline, LLC.
Description: § 4(d) Rate Filing: Contact Information Update for 2023 to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5034.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–630–000.
Applicants: MountainWest Overthrust Pipeline, LLC.
Description: § 4(d) Rate Filing: Contact Information Update for 2023 to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5035.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–631–000.
Applicants: White River Hub, LLC.
Description: § 4(d) Rate Filing: Contact Information Update for 2023 to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5036.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–632–000.
Applicants: Pine Needle LNG Company, LLC.
Description: § 4(d) Rate Filing: 2023 Annual Fuel and Electric Power Tracker Filing to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5040.
Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–633–000.
Applicants: Panhandle Eastern Pipe Line Company, LP.

Description: Compliance filing: Flow Through of Penalty Revenues Report filed 3–31–23 to be effective N/A.
Filed Date: 3/31/23.
Accession Number: 20230331–5041.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–634–000.
Applicants: Panhandle Eastern Pipe Line Company, LP.
Description: Compliance filing: Flow Through of Cash-Out Revenues filed on 3–31–23 to be effective N/A.
Filed Date: 3/31/23.
Accession Number: 20230331–5043.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–635–000.
Applicants: Enable Gas Transmission, LLC.
Description: Compliance filing: 2023 Annual IT Revenue Crediting Filing to be effective N/A.
Filed Date: 3/31/23.
Accession Number: 20230331–5046.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–636–000.
Applicants: Enable Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Fuel Tracker Filing—Effective May 1, 2023 to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5047.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–637–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmts (FPL 48381, 41618, 41619 to various eff 4–1–2023) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5048.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–638–000.
Applicants: Enable Mississippi River Transmission, LLC.
Description: Compliance filing: 2023 Annual SCT Revenue Crediting Filing to be effective N/A.
Filed Date: 3/31/23.
Accession Number: 20230331–5049.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–639–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Non-conforming Agreements Filing (NNS–SCO) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5050.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–640–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmts (JERA 46434, 46435 to EDF 56120, 56117) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5051.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–641–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmts (BP 51411 to BP 56164, 56165) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5054.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–642–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (BP 55005 to BP 56137) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5055.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–643–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Fuel Neg Rate Agmt (PowerSouth 54058) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5056.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–644–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmts (WSGP to Tenaska eff 4–1–23) to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5057.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–645–000.
Applicants: MarkWest New Mexico, L.L.C.
Description: § 4(d) Rate Filing: Housekeeping Filing to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5058.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–646–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: TCO Negotiated Rate Agreements Eff. 4.1.23 to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5074.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–647–000.
Applicants: Destin Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Destin Pipeline Negotiated Rate Agreement Filing to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5105.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–648–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Volume No. 2—Mex Gas and Morgan Stanley to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5173.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–649–000.
Applicants: Great Lakes Gas Transmission Limited Partnership.
Description: § 4(d) Rate Filing: GLGT April 1 Negotiated Rate Agreements to be effective 3/31/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5204.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–650–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Cherokee AGL—Replacement Shippers—Apr 2023 to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5213.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–651–000.
Applicants: LA Storage, LLC.
Description: § 4(d) Rate Filing: Filing of Negotiated Rate Conforming IW Agreement 3.31.23 to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5221.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–652–000.
Applicants: Kinder Morgan Louisiana Pipeline LLC.
Description: § 4(d) Rate Filing: Out-of-Cycle Fuel Adjustment Effective May 1, 2023 to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5224.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–653–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2023–03–31 Negotiated Rate Agreement and Amendments to be effective 4/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5239.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–654–000.
Applicants: Ruby Pipeline, L.L.C.
Description: § 4(d) Rate Filing: RP 2023–03–31 Negotiated Rate Agreements to be effective 5/1/2023.
Filed Date: 3/31/23.
Accession Number: 20230331–5245.
Comment Date: 5 p.m. ET 4/12/23.
Docket Numbers: RP23–655–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: § 4(d) Rate Filing: TPC 2023–03–31 Fuel and L&U

Reimbursement and Power Cost Tracker to be effective 5/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5249.

Comment Date: 5 p.m. ET 4/12/23.

Docket Numbers: RP23–656–000.

Applicants: ANR Pipeline Company.

Description: § 4(d) Rate Filing: ANR—Vitol 138868 Negotiated Rate Agreement to be effective 4/1/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5259.

Comment Date: 5 p.m. ET 4/12/23.

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: RP23–584–001.

Applicants: Trailblazer Pipeline Company LLC.

Description: Compliance filing: TPC Annual Incidental Purchases and Sales Report Amendment to be effective N/A.

Filed Date: 3/30/23.

Accession Number: 20230330–5156.

Comment Date: 5 p.m. ET 4/11/23.

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 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–07220 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2628–066]

Alabama Power Company; Notice of Intent To Prepare an Environmental Impact Statement

On November 23, 2021, Alabama Power Company filed an application for a new major license to operate its 137.5-megawatt (MW) [1] R.L. Harris Hydroelectric Project (Harris Project; FERC No. 2628). The project is located on the Tallapoosa River near the City of Lineville in Randolph, Clay, and Cleburne Counties, Alabama. The Harris Project also includes land within the James D. Martin-Skyline Wildlife Management Area located approximately 110 miles north of Harris Lake in Jackson County, Alabama. The project occupies 4.90 acres of federal land administered by the Bureau of Land Management.

On July 31, 2018, Commission staff issued Scoping Document 1, initiating the scoping process for the project in accordance with the National Environmental Policy Act (NEPA) and Commission regulations. On November 16, 2018, Commission staff issued a revised scoping document (Scoping Document 2). In accordance with the Commission's regulations, on January 17, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA Notice). Based on the information in the record, including comments filed during scoping and in response to the REA Notice, staff has determined that relicensing the project may constitute a major federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Impact Statement (EIS) for the Harris Project.

A draft EIS will be issued and circulated for review by all interested parties. All comments filed in response to the REA notice, and on the draft EIS will be analyzed by staff in a final EIS. The staff's conclusions and recommendations will be available for the Commission's consideration in reaching its final licensing decision.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

[1] This capacity includes a proposed 2.5–MW increase in generation that would be provided through a new minimum flow unit.

Milestone	Target date
Issue draft EIS	September 2023.
Draft EIS Public Meeting	October 2023.
Comments on draft EIS due.	November 2023.
Commission issues final EIS.	April 2024.[2]

Any questions regarding this notice may be directed to Sarah Salazar at (202) 502–6863 or *sarah.salazar@ferc.gov.*

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07207 Filed 4–5–23; 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 exempt wholesale generator filings:

Docket Numbers: EG23–112–000.

Applicants: AES ES Westwing, LLC.

Description: AES ES Westwing, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.

Filed Date: 3/31/23.

Accession Number: 20230331–5448.

Comment Date: 5 p.m. ET 4/21/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1776–007.

Applicants: Leaning Juniper Wind Power II LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5198.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–2824–007.

Applicants: Big Horn Wind Project LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5128.

[2] The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(2) require that a Record of Decision be completed within 2 years of the federal action agency's decision to prepare an EIS. This notice establishes the Commission's intent to prepare a draft and final EIS for the Harris Project. Therefore, in accordance with CEQ's regulations, the Commission must reach a licensing decision within 2 years of the issuance date of this notice.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–2825–008.

Applicants: Big Horn II Wind Project LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5138.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–2957–008.

Applicants: Hay Canyon Wind LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5152.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–2995–008.

Applicants: Juniper Canyon Wind Power LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5156.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–2996–007.

Applicants: Klamath Energy LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5169.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–2999–007.

Applicants: Klondike Wind Power LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5178.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–3000–007.

Applicants: Klondike Wind Power II LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5188.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–3009–009.

Applicants: Pebble Springs Wind LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5205.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–3013–008.

Applicants: Star Point Wind Project LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5216.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER10–3029–007.

Applicants: Klondike Wind Power III LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5193.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER16–1250–018.

Applicants: Avangrid Renewables, LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5073.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER19–2360–006.

Applicants: Montague Wind Power Facility, LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5006.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER20–1128–001.

Applicants: Black Hills Power, Inc.

Description: Compliance filing: Order No. 864 Supplemental Compliance Filing to be effective 1/27/2020.

Filed Date: 3/31/23.

Accession Number: 20230331–5439.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER21–2272–005.

Applicants: Golden Hills Wind Farm, LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5003.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER21–2748–004.

Applicants: Lund Hill Solar, LLC, Bracewell LLP.

Description: Compliance filing: Lund Hill Solar, LLC submits tariff filing per 35: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5004.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER21–2847–005.

Applicants: Montague Solar, LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5005.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER22–616–003.

Applicants: Dressor Plains Solar, LLC.

Description: Compliance filing: Compliance Filing ER22–616–000 to be effective 2/1/2022.

Filed Date: 3/31/23.

Accession Number: 20230331–5108.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER22–962–002.

Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: Order No. 2222 30-Day Compliance Filing to be effective 2/2/2026.

Filed Date: 3/31/23.

Accession Number: 20230331–5248.

Comment Date: 5 p.m. ET 4/21/23.

Docket Numbers: ER22–2173–004.

Applicants: Bakeoven Solar, LLC.

Description: Compliance filing: Compliance Filing to Reflect Participation in the CAISO's Western EIM to be effective 3/24/2023.

Filed Date: 3/31/23.

Accession Number: 20230331–5001.

Comment Date: 5 p.m. ET 4/21/23.

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 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–07222 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1984–265]

Wisconsin River Power Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Non-Capacity Amendment of License.

b. Project No.: 1984–265.

c. *Date Filed:* December 3, 2021, as supplemented on December 12, 2022.

d. *Applicant:* Wisconsin River Power Company.

e. *Name of Project:* Petenwell and Castle Rock Hydroelectric Project.

f. *Location:* The project is located on the Wisconsin River in Juneau, Adams, and Wood Counties, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Todd Jastremski, Asset Manager Hydro Operations, 800 Industrial Park Drive, Iron Mountain, MI 49801; (906) 779–4099, *todd.jastremski@we-energies.com.*

i. *FERC Contact:* Christopher Chaney, (202) 502–6778, *christopher.chaney@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance date of this notice by the Commission.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. The first page of any filing should include the docket number P–1984–265. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, it must also serve a copy of the document on that resource agency.

k. *Description of Request:* Wisconsin River Power Company (licensee) proposes to modify the requirements of Article 401 of the project license, and revise the approved Operations Compliance Monitoring Plan (OCMP) consistent with the proposed modifications to Article 401. In the pertinent part, Article 401 requires the licensee to limit any reduction in discharge from the Castle Rock Development to a down-ramping rate not to exceed 1-inch per hour as measured 0.7 miles downstream of Castle Rock dam. Under the licensee's proposal, the down-ramping rate would increase to 3.5-inches per hour as measured 0.7 miles downstream of Castle Rock dam. The proposed down-ramping requirement would only apply to reductions in flow from the Castle Rock powerhouse and only when inflows to the Petenwell impoundment are greater than 3,500 cubic feet per second. The licensee proposes revisions to the OCMP, which would provide further details on the down-ramping, minimum flow, and reservoir elevation requirements of the license.

l. *Locations of the Application:* This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Documents: Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting, or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07206 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14787–004]

Black Canyon Hydro, LLC; Notice of Anticipated Schedule for Seminoe Pumped Storage Project

On January 18, 2023, Black Canyon Hydro, LLC filed an application for authorization to construct and operate the Seminoe Pumped Storage Project. The project would be located at the Bureau of Reclamation's Seminoe Reservoir on the North Platte River in Carbon County, Wyoming, approximately 35 miles northeast of Rawlins, Wyoming. The project would occupy 820.62 acres of land managed by the Bureau of Land Management and

52.89 acres of land managed by the Bureau of Reclamation.

The application will be processed according to the following anticipated schedule.

Notice of Ready for Environmental Analysis: August 2023.

Draft National Environmental Policy Act Document: May 2024.

Final National Environmental Policy Act Document: November 22, 2024.

In addition, in accordance with Title 41 of the Fixing America's Surface Transportation Act, enacted on December 4, 2015, agencies are to publish completion dates for all federal environmental reviews and authorizations. This notice identifies the Commission's anticipated schedule for issuance of the final order for the project, which is based on the anticipated date of issuance of the final National Environmental Policy Act document. Accordingly, we currently anticipate issuing a final order for the project no later than:

Issuance of Final Order: February 20, 2025.

If a schedule change becomes necessary, an additional notice will be provided so that interested parties and government agencies are kept informed of the project's progress.

Dated: March 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–07199 Filed 4–5–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0720; FRL–10861–01–OCSPP]

Pesticide Registration Review; Draft Human Health and/or Ecological Risk Assessments for Peroxy Compounds; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's draft human health and/or ecological risk assessments for the registration review of peroxy compounds (revised DRA for biopesticide uses).

DATES: Comments must be received on or before June 5, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2017–0720, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information contact: The Chemical Review Manager for the pesticide of interest identified in Table 1 in Unit IV.

For general questions on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0701; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in table 1 in unit IV.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed comprehensive draft human health and/or ecological risk assessments for the pesticides listed in table 1 in unit IV. After reviewing comments received during the public comment period, EPA may issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments and may request public input on risk mitigation before completing a proposed registration review decision for the pesticides listed in table 1 in unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the chemicals listed in table 1 in unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and

commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's human health and/or ecological risk assessments for the pesticides shown in Table 1 and opens a 60-day public comment period on the risk assessments.

TABLE 1—DRAFT RISK ASSESSMENTS BEING MADE AVAILABLE FOR PUBLIC COMMENT

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
Peroxy Compounds (revised DRA for biopesticide uses) Case Number 6059.	EPA–HQ–OPP–2009–0546	Joseph Mabon, *mabon.joseph@epa.gov,* (202) 566–1535.

Pursuant to 40 CFR 155.53(c), EPA is providing an opportunity, through this notice of availability, for interested parties to provide comments and input concerning the Agency's draft human health and/or ecological risk assessments for the pesticides listed in table 1 in unit IV. The Agency will consider all comments received during the public comment period and make changes, as appropriate, to a draft human health and/or ecological risk assessment. EPA may then issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments.

Information submission requirements. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English, and a written transcript must accompany any information submitted as an audio graphic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

Authority: 7 U.S.C. 136 *et seq.*

Dated: March 31, 2023.

Mary Elissa Reaves,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2023–07146 Filed 4–5–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0750; FRL–10863–01–OCSPP]

Pesticide Registration Review; Proposed Decisions for Several Pesticides; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed interim and final registration review decisions and opens a 60-day public comment period on the proposed decisions for the following pesticides: 2-(Thiocyanomethylthio)benzothiazole (TCMTB), bromine, citric acid, demiditraz, linalool, sodium fluoroacetate.

DATES: Comments must be received on or before June 5, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2017–0750, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information, contact: The Chemical Review Manager for the pesticide of interest identified in Table 1 in Unit IV.

For general information on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0701; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager for the pesticide of interest identified in Table 1 in Unit IV.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or

CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at: *https://www.epa.gov/dockets/commenting-epa-dockets.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed proposed interim or final decisions for all pesticides listed in Table 1 in Unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the chemicals listed in the Table 1 in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's proposed interim or final registration review decisions for the pesticides shown in Table 1 and opens a 60-day public comment period on the proposed interim and proposed final registration review decisions.

TABLE 1—PROPOSED INTERIM AND PROPOSED FINAL DECISIONS

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
2-(Thiocyanomethylthio)benzothiazole (TCMTB) Case Number 2625.	EPA–HQ–OPP–2014–0405	Erin Dandridge, *dandridge.erin@epa.gov*, (202) 566–0635.
Bromine Case Number 4015	EPA–HQ–OPP–2021–0034	Megan Snyderman, *snyderman.megan@epa.gov*, (202) 566–0639.
Citric Acid Case Number 4024	EPA–HQ–OPP–2020–0558	Areej Jahangir, *jahangir.areej@epa.gov*, (202) 566–1577.
Demiditraz Case Number 7482	EPA–HQ–OPP–2021–0407	Anitha Kisanga, *kisanga.anitha@epa.gov*, (202) 566–2214.
Linalool Case Number 6058	EPA–HQ–OPP–2021–0423	Hannah Dean, *dean.hannah@epa.gov*, (202) 566–2969.
Sodium fluoroacetate Case Number 3073.	EPA–HQ–OPP–2010–0753	Natalie Bray, *bray.natalie@epa.gov*, (202) 566–2222.

The registration review docket for a pesticide includes earlier documents related to the registration review case. For example, the review opened with a Preliminary Work Plan, for public comment. A Final Work Plan was placed in the docket following public comment on the Preliminary Work Plan.

The documents in the dockets describe EPA's rationales for conducting additional risk assessments for the registration review of the pesticides included in Table 1 in Unit IV, as well as the Agency's subsequent risk findings and consideration of possible risk mitigation measures. These proposed interim and proposed final registration review decisions are supported by the rationales included in those documents. Following public comment, the Agency will issue interim or final registration review decisions for the pesticides listed in Table 1 in Unit IV.

The registration review final rule at 40 CFR 155.58(a) provides for a minimum 60-day public comment period on all proposed registration review decisions. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the proposed decision. All comments should be submitted using the methods in **ADDRESSES** and must be received by EPA on or before the closing date. These comments will become part of the docket for the pesticides included in the Tables in Unit IV. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and may provide a ''Response to Comments Memorandum'' in the docket. The interim or final registration review decision will explain the effect that any comments had on the decision and provide the Agency's response to significant comments.

Background on the registration review program is provided at: *https://www.epa.gov/pesticide-reevaluation.*

Authority: 7 U.S.C. 136 *et seq.*

Dated: March 31, 2023.

Mary Elissa Reaves,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2023–07234 Filed 4–5–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10853–01–OMS]

Good Neighbor Environmental Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, the Environmental Protection Agency (EPA) gives notice of a public meeting of the Good Neighbor Environmental Board. The purpose of this meeting is to discuss and further develop the December 2022 advice letter into the board's 20th comprehensive report on water and wastewater infrastructure issues and challenges along the U.S.-Mexico border region.

DATES: April 27, 2023, from 2 p.m. to 6 p.m. (EST). A copy of the agenda will be posted at *www.epa.gov/faca/gneb.*

The meeting will be conducted virtually and is open to the public with limited access available on a first-come, first-served basis. Members of the public wishing to participate in the video/teleconference, should contact Eugene Green at *green.eugene@epa.gov* by April 20, 2023.

Requests to make oral comments or submit written public comments to the board, should also be directed to Eugene Green at least five business days prior to the video/teleconference. Requests for accessibility and/or accommodations for individuals with disabilities should be directed to Eugene Green at the email address or phone number listed above. To ensure adequate time for processing, please make requests for accommodations at least 10 days prior to the video/teleconference.

FOR FURTHER INFORMATION CONTACT: Regarding the board meeting, please contact Eugene Green at (202) 564–2432 or via email at *green.eugene@epa.gov.*

SUPPLEMENTARY INFORMATION: The board is an independent Federal advisory committee. Its mission is to advise the President and Congress of the United States on good neighbor practices along the U.S. border with Mexico. Its recommendations are focused on environmental infrastructure needs within the U.S. states contiguous to Mexico. The board is a Federal advisory committee chartered under the Federal Advisory Committee Act, Public Law 92–463.

Eugene Green,

Program Analyst.

[FR Doc. 2023–07175 Filed 4–5–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0720; FRL–10862–01–OCSPP]

Pesticide Registration Review; Pesticide Dockets Opened for Review and Comment; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of the EPA's preliminary work plans for the following chemicals: 3-decen-2-one, *Bacillus amyloliquefaciens, Chromobacterium subtsugae* strain PRAA4–1T cells and spent fermentation media, homobrassinolide, terpene constituents of the extract of *Chenopodium ambrosioides* near *ambrosioides,* tolclofos-methyl. This notice also announces the availability of the continuing work plan for hexythiazox. With this document, the EPA is opening the public comment period for registration review for these chemicals.

DATES: Comments must be received on or before June 5, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2017–0720, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information, contact: The Chemical Review Manager for the pesticide of interest identified in Table 1 in Unit IV.

For general questions on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: 202–566–0701; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in Table 1 in Unit IV.

B. What should I consider as I prepare my comments for the EPA?

1. *Submitting CBI.* Do not submit this information to the EPA through regulations.gov or email. Clearly mark the part or all the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI, and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Background

Registration review is the EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the

environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the agency may consider during the course of registration reviews. As part of the registration review process, the Agency has completed preliminary work plans and, in some cases, continuing work plans for the pesticides listed in Table 1 in Unit IV. Through this program, the EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

The EPA is conducting its registration review of the chemicals listed in Table 1 in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. Registration Reviews

A. What action is the Agency taking?

A pesticide's registration review begins when the agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. Pursuant to 40 CFR 155.50, this notice announces the availability of the EPA's preliminary or continuing work plans for the pesticides shown in Table 1 and opens a 60-day public comment period on the work plans.

TABLE 1—PRELIMINARY AND CONTINUING WORK PLANS BEING MADE AVAILABLE FOR PUBLIC COMMENT

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
3-decen-2-one, Case Number 6317 ...	EPA–HQ–OPP–2022–0792	Joseph Mabon, *mabon.joseph@epa.gov* (202) 566–1535.
Bacillus amyloliquefaciens, Case Number 6522.	EPA–HQ–OPP–2022–0159	Susanne Cerrelli, *cerrelli.susanne@epa.gov* (202) 566–1516.
Chromobacterium subtsugae strain PRAA4–1T cells and spent fermentation media, Case Number 6530.	EPA–HQ–OPP–2022–0791	Bibiana Oe, *oe.bibiana@epa.gov* (202) 566–1538.
Hexythiazox[1], Case Number 7404	EPA–HQ–OPP–2006–0114	Alex Hazlehurst, *hazlehurst.alexander@epa.gov* (202) 566–2249.
Homobrassinolide, Case Number 6311.	EPA–HQ–OPP–2022–0548	Jennifer Odom-Douglas, *odomdouglas.jennifer@epa.gov* (202) 566–1536.
Terpene constituents of the extract of Chenopodium ambrosioides near ambrosioides, Case Number 6312.	EPA–HQ–OPP–2022–0011	Susanne Cerrelli, *cerrelli.susanne@epa.gov* (202) 566–1516.
Tolclofos-methyl, Case Number 7069	EPA–HQ–OPP–2023–0094	Susan Bartow, *bartow.susan@epa.gov* (202) 566–2280.

[1] Continuing Work Plan.

B. Docket Content

The registration review docket contains information that the agency may consider in the course of the registration review. The agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the agency currently knows about the pesticide case and a preliminary work plan and, in some cases, a continuing work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the agency is asking that interested persons identify any additional information they believe the agency should consider during the registration reviews of these pesticides. The agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

The registration review final rule at 40 CFR 155.50(b) provides for a minimum 60-day public comment period on registration review work plans. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary changes to a pesticide's work plan. All comments should be submitted using the methods in **ADDRESSES** and must be received by the EPA on or before the closing date. These comments will become part of the docket for the pesticides included in Table 1 in Unit IV. Comments received after the close of the comment period will be marked ''late.'' The EPA is not required to consider these late comments.

The agency will carefully consider all comments received by the closing date and may provide a ''Response to Comments Memorandum'' in the docket. The final or updated final registration review work plan will explain the effect that any comments had on the final or updated final work plan and provide the agency's response to significant comments.

Background on the registration review program is provided at: *https://www.epa.gov/pesticide-reevaluation.*

Authority: 7 U.S.C. 136 *et seq.*

Dated: March 31, 2023.

Mary Elissa Reaves,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2023–07172 Filed 4–5–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0357, OMB 3060–1028, OMB 3060–1029; FR ID 134829]

Information Collections Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before June 5, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0357.

Title: Recognized Private Operating Agency (RPOA), 47 CFR 63.701.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 2 respondents; 3 responses.

Estimated Time per Response: 3–6 hours.

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. The Commission has statutory authority for this collection pursuant to Sections 4(i), 4(j), 201–205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(j), 201–25, 214 and 403.

Total Annual Burden: 8 hours.

Annual Cost Burden: $4,810.

Needs and Uses: The Federal Communications Commission (Commission) is requesting that the Office of Management and Budget (OMB) to approve a revision to OMB Control No. 3060–0357—Recognized Private Operating Agency—47 CFR 63.701. The Commission is developing revised and new electronic forms for this collection as part of the Commission's modernization of its online, web-based electronic filing system—the International Bureau filing system (IBFS). This Supporting Statement seeks approval for the new and revised forms for requests to be designated as a Recognized Operating Agency (ROA), and reflects changes in the costs and burdens associated with these applications.

At the request of the U.S. Department of State (State Department), the Commission adopted a voluntary program by which companies that provide enhanced services could seek designation as a recognized private operating agency. The term recognized private operating agency was used in the International Telecommunication Convention, the international agreement that created the International Telecommunication Union (ITU), to refer to private-sector providers of international telecommunication services that had been ''recognized'' either by the government of the country in which they had been incorporated, or the country where they operated. Today, the term recognized private operating agency is interchangeable with the term recognized operating agency (ROA).

Most providers of international telecommunications services to or from the U.S. hold either an authorization under section 214 of the Communications Act or a radio license under section 301 of the Act. The issuance of such authorizations or licenses is public evidence that the U.S. government ''recognizes'' the entities to which they are issued. However, providers of enhanced services are not licensed or authorized. They are permitted to begin operations without any formal applications or notifications. It is not, therefore, immediately apparent to foreign governments that a U.S. enhanced service provider has been ''recognized'' within the meaning of the ITU Convention. As a consequence, such entities have sometimes found foreign governments unwilling to let them operate in those countries.

As a result, providers requested that the Commission and the State Department develop a program whereby enhanced service providers could be formally designated as ROAs. The program that was developed calls for those entities wishing to obtain such a designation to submit an application to the Commission setting forth pertinent information about the provider and the services it proposes to provide and a pledge by the provider that it would abide by all international obligations to which the U.S. is a signatory. The Commission places the application on public notice and allows interested parties to comment on the application.

The Commission then makes a recommendation, based on the application and comments, to the State Department either to grant or deny the request. The State Department then acts on the recommendation and notifies the ITU of any applications that it grants. ROA designation is voluntary. If an enhanced service provider does not find such designation necessary, it is not required to file an application.

In order to implement this program, the Commission adopted 47 CFR 63.701 to set forth the information that must be contained in an application for designation as an ROA. ROA designations do not have expiration dates. They continue indefinitely, unless revoked for cause. ROAs are not required to file any reports or other information with the Commission throughout their indefinite period of designation.

Any party requesting designation as an ROA within the meaning of the International Telecommunication Convention must file a request for such designation with the Commission. This filing includes a statement of the nature of the services to be provided and a statement that the applicant is aware that it is obligated under Article 6 of the ITU to obey the mandatory provisions thereof, and all regulations promulgated there under, and a pledge that it will engage in no conduct or operations that contravene such mandatory provisions

and that it will otherwise obey the Convention and regulations in all respects. The applicant must also include a statement that it is aware that failure to comply will result in an order from the Commission to cease and desist from future violations of an ITU regulation and may result in revocation of its ROA status by the State Department .

IBFS Modernization of ROA Electronic Forms. The Commission seeks OMB approval of revisions to its ROA application forms and the addition of new forms that will be electronically filed through IBFS. The new online forms will ensure the Commission collects the information required by the Commission's rules. The use of such online forms will reduce costs and administrative burdens on applicants, resulting in greater efficiencies, and improve transparency to the public. Once the Commission receives approval for the new forms from OMB, as required by section 1.10006 of the Commission's rules, we will announce the availability of mandated e-forms and their effective dates.

OMB Control No.: 3060–1028.

Title: International Signaling Point Code (ISPC).

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 11 respondents; 20 responses.

Estimated Time per Response: 0.5 hours–3 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 1, 4(i)–(j), 201–205, 211, 214, 219–220, 303(r), 309 and 403 of the Communications Act of 1934, as amended, 47 U.S.C 151, 154(i)–(j), 201–205, 211, 214, 219–220, 303(r), and 403.

Total Annual Burden: 15 hours.

Annual Cost Burden: $13,300.

Needs and Uses: The Federal Communications Commission (Commission) is requesting that the Office of Management and Budget (OMB) to approve a revision to OMB Control No. 3060–1028—International Signaling Point Code. The Commission is developing revised and new electronic forms for this collection as part of the Commission's modernization of its online, web-based electronic filing system—the International Bureau filing system (IBFS). This information collection seeks approval for the new and revised forms to request an International Signaling Point Code (ISPC), and reflects changes in the costs and burdens associated with these applications.

An ISPC is a unique, seven-digit code used to identify the signaling network of each international carrier. The ISPC has a unique format that is used at the international level for signaling message routing and identification of signaling points in Signaling System 7 networks. ISPC applications are filed through IBFS. After receipt of the ISPC application, the Commission assigns the ISPC code to each applicant (international carrier) free of charge on a first-come, first-served basis. The collection of this information is required to assign a unique identification code to each international carrier and to facilitate communication among international carriers by their use of the ISPC code on the shared signaling network. The Commission informs the International Telecommunication Union (ITU) of its assignment of ISPCs to international carriers on an ongoing basis.

In 1987, the Commission assumed the responsibility as the Administrator for the U.S. of issuing ISPCs to international carriers based on an exchange of letters between AT&T, the Commission, and the International Telecommunications Union-Telecommunications Standardization (ITU–T). The ITU allocates a specific amount of ISPCs to member countries for assignment to carriers. ITU–T Recommendation Q.708 includes a list of criteria for assignment of signaling point codes.

The ITU, headquartered in Geneva, Switzerland, is an international organization within the United Nations System where governments and the private sector coordinate global telecom networks and services. The ITU–T, which is one of three sectors of the ITU, has a continuing role in preparing the technical specifications for telecommunications systems, networks and services, including their operation, performance and maintenance. In addition, the ITU–T oversees the tariff principles and accounting methods used to provide international services.

Pursuant to the ITU guidance contained in ITU–T Recommendation Q.708, the Commission must obtain certain information from an applicant requesting a new ISPC assignment. This information is used by the Commission to assess whether the applicant's use of the ISPC will be in compliance with ITU guidelines. The minimum information required is the name of the applicant and the name of the signaling point (typically the city where the ISPC will be located). ITU–T Recommendation Q.708 states that administrators can request additional information from applicants, which may include applicant contact information; location(s) where the ISPC(s) will be implemented; description of the nature of the use of the ISPC(s) in the network; a statement regarding the signaling point manufacturer/type; and identification of at least one planned Message Transfer Part (MTP) signaling relation. Applicants must also make several certifications/acknowledgments regarding their obligations and rights associated with an ISPC assignment. Operators that have been assigned an ISPC must also notify the Commission when any parameters of their code assignment(s) have changed (*i.e.,* modifications), such as a change in the location where the ISPC has been implemented. In the event that an assigned ISPC has undergone a transfer of control as a result of a merger, acquisition, divestiture, or formation of a joint venture, the ISPC operator must notify the Commission of the transfer and the identity of the new holder of the ISPC (along with relevant contact information).

IBFS Modernization of ISPC Electronic Forms. The Commission seeks OMB approval of revisions to its ISPC application form and the addition of new forms that will be electronically filed through IBFS. The new online forms will ensure the Commission collects the information required by the Commission's rules. The use of such online forms will reduce costs and administrative burdens on applicants, resulting in greater efficiencies, and improve transparency to the public. Once the Commission receives approval for the new forms from OMB, as required by section 1.10006 of the Commission's rules, we will announce the availability of mandated e-forms and their effective dates.

OMB Control No.: 3060–1029.

Title: Data Network Identification Code (DNIC).

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1 respondent; 2 responses.

Estimated Time per Response: 0.5–4 hours.

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 1, 4(i)–(j), 201–205, 211, 214, 219–220, 303(r), 309, and 403 of

the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 201–205, 211, 214, 219–220, 303(r), 309 and 403

Total Annual Burden: 6.5 hours.

Annual Cost Burden: $1,850

Needs and Uses: The Federal Communications Commission (''Commission'') is requesting that the Office of Management and Budget (OMB) to approve a revision to OMB Control No. 3060–1029—Data Network Identification Code (DNIC). The Commission is developing revised and new electronic forms for this collection as part of the Commission's modernization of its online, web-based electronic filing system—the International Bureau filing system (IBFS). This Supporting Statement seeks approval for the new and revised forms to request an International Signaling Point Code (ISPC), and reflects changes in the costs and burdens associated with these applications.

A Data Network Identification Code (DNIC) is a unique, four-digit number designed to provide discrete identification of individual public data networks. The DNIC is intended to identify and permit automated switching of data traffic to particular networks. The DNIC is the central device of the international data numbering plan developed by the International Telecommunications Union (ITU) and set forth in Recommendation X.121. Prior to the availability of electronic web-based application forms in 1999, the Commission used an informal process for assigning DNICs. In the informal system, a company desiring a code would notify the Commission that it wishes one assigned and demonstrate that it has the ability to originate and terminate international traffic (e.g,, by showing an interconnection arrangement with a U.S. international carrier) and the Commission would assign a DNIC. In 1986, the Commission established procedures for the assignment of DNICs to interested data network operators. Today, the operators of public data networks file an application for a DNIC in IBFS. The DNIC is obtained on a one-time only basis unless there is a change in ownership or the owner chooses to relinquish the code to the Commission.

IBFS Modernization of DNIC Electronic Forms. The Commission seeks OMB approval of revisions to its DNIC application form and the addition of new forms that will be electronically filed through IBFS. The new online forms will ensure the Commission collects the information required by the Commission's rules. The use of such online forms will reduce costs and administrative burdens on applicants, resulting in greater efficiencies, and improve transparency to the public. Once the Commission receives approval for the new forms from OMB, as required by section 1.10006 of the Commission's rules, we will announce the availability of mandated e-forms and their effective dates.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–07147 Filed 4–5–23; 8:45 am]

BILLING CODE 6712–01–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 May 5, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Grinnell Bancshares, Inc., Grinnell, Iowa;* to acquire The Colorado Bank & Trust Company of La Junta, La Junta, Colorado.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–07162 Filed 4–5–23; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') requests that the Office of Management and Budget (''OMB'') extend for an additional three years the current Paperwork Reduction Act (''PRA'') clearance for information collection requirements associated with its Funeral Industry Practice Rule (''Funeral Rule'' or ''Rule''). That clearance expires on July 31, 2023.

DATES: Comments must be filed by May 8, 2023.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. 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: Melissa Dickey, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave. NW, Washington, DC 20580, *mdickey@ftc.gov,* (202) 326–2662.

SUPPLEMENTARY INFORMATION:

Title of Collection: Funeral Industry Practice Rule, 16 CFR part 453.

OMB Control Number: 3084–0025.

Type of Review: Extension without change of currently approved collection.

Abstract: The Funeral Rule ensures that consumers who are purchasing funeral goods and services have access to accurate itemized price information so they can purchase only the funeral goods and services they want or need. Among other things, the Rule requires a funeral provider to: (1) provide consumers a copy of the funeral provider's General Price List that

itemizes the goods and services it offers; (2) show consumers a Casket Price List and an Outer Burial Container Price List at the outset of any discussion of those items or their prices, and in any event before showing consumers caskets or vaults; (3) provide price information from its price lists over the telephone; and (4) give consumers a Statement of Funeral Goods and Services Selected after determining the funeral arrangements with consumers. The Rule requires that funeral providers disclose this information to consumers and maintain records documenting their compliance with the Rule.

Affected Public: Private Sector: Businesses and other for-profit entities.

Estimated Number of Annual Respondents: 18,874.

Estimated Annual Burden Hours: 173,936.

Estimated Annual Labor Costs: $5,387,875.

Request for Comment:

On December 19, 2022, the FTC sought public comment on the information collection requirements in the Funeral Rule. 87 FR 77610 (Dec. 19, 2022). No relevant comments were received during the public comment period. Pursuant to OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule. For more details about the Rule requirements and the basis for the calculations summarized below, see 87 FR 77610.

Your comment—including your name and your state—will be placed on the public record of this proceeding. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for ensuring that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''[t]rade secret or any commercial or financial information which is . . . privileged or confidential''—as provided in section 6(f) of the FTC Act 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16CFR 4.10(a)(2)—including, in particular, competitively sensitive information, such as costs, sales statistics, inventories, formulas, patterns devices, manufacturing processes, or customer names.

Josephine Liu,

Assistant General Counsel for Legal Counsel.

[FR Doc. 2023–07186 Filed 4–5–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Psychosocial and Pharmacologic Interventions for Disruptive Behavior in Children and Adolescents

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 *Psychosocial and Pharmacologic Interventions for Disruptive Behavior in Children and Adolescents,* 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 May 8, 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 06E53A, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Kelly Carper, Telephone: 301–427–1656 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 *Psychosocial and Pharmacologic Interventions for Disruptive Behavior in Children and Adolescents.* 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 Psychosocial and Pharmacologic Interventions for Disruptive Behavior in Children and Adolescents, including those that describe adverse events. The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/disruptive-behavior/protocol.*

This is to notify the public that the EPC Program would find the following information on Psychosocial and Pharmacologic Interventions for Disruptive Behavior in Children and Adolescents 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: In children under 18 years of age diagnosed with disruptive behaviors, which psychosocial interventions are more effective for improving short-term and long-term psychosocial outcomes compared to no treatment or other psychosocial interventions?

KQ 2: In children under 18 years of age diagnosed with disruptive behaviors, which pharmacologic interventions are more effective for improving short-term and long-term psychosocial outcomes compared to placebo or other pharmacologic interventions?

KQ 3: In children under 18 years of age diagnosed with disruptive behaviors, what is the relative effectiveness of psychosocial interventions alone compared with pharmacologic interventions alone for improving short-term and long-term psychosocial outcomes?

KQ 4: In children under 18 years of age diagnosed with disruptive behaviors, are combined psychosocial and pharmacologic interventions more effective for improving short-term and long-term psychosocial outcomes compared to either psychosocial or pharmacologic interventions alone?

KQ 5: What are the harms associated with treating children under 18 years of age for disruptive behaviors with either psychosocial, pharmacologic or combined interventions?

KQ 6a: Do interventions for disruptive behaviors vary in effectiveness and harms based on patient characteristics, including gender, age (including pubertal changes and use of oral contraceptives), racial/ethnic minority, LGBTQ+ status, English proficiency, health literacy, socioeconomic status, insurance status, rural versus urban, developmental status or delays, family history of disruptive behavior disorders or other mental health disorders, prenatal use of alcohol and drugs (specifically methamphetamine), history of trauma or Adverse Childhood Experiences (ACEs), parental ACEs, access to social supports (neighborhood assets, family social support, worship community, etc.), personal and family beliefs about mental health (*e.g.* stigma around mental health), or other social determinants of health?

KQ 6b: Do interventions for disruptive behaviors vary in effectiveness and harms based on clinical characteristics or manifestations of the disorder, including specific disruptive behavior (*e.g.,* stealing, fighting) or specific disruptive behavior disorder (*e.g.,* oppositional defiant disorder, conduct disorder), co-occurring behavioral disorders (*e.g.,* attention deficit hyperactivity disorder, autism spectrum disorder, internalizing disorders), related personality traits and symptom clusters, presence of non-behavioral comorbidities, age of onset, and duration?

KQ 6c: Do interventions for disruptive behaviors vary in effectiveness and harms based on treatment history of the patient?

KQ 6d: Do interventions for disruptive behaviors vary in effectiveness and harms based on characteristics of treatment, including setting (*e.g.,* group homes, residential treatment, family setting), duration, delivery, timing, and dose?

Contextual Question 1. What are the disparities in the diagnosis of disruptive behavior disorders (based on characteristics such as gender, race/ethnicity, socioeconomic status, other social determinants of health, or other factors) in children and adolescents?

Contextual Question 2. What are the disparities in the treatment of disruptive behaviors or disruptive behavior disorders (based on characteristics such as gender, race/ethnicity, socioeconomic status, other social determinants of health, or other factors) in children and adolescents?

Contextual Question 3. How do disparities in the diagnosis and treatment of disruptive behaviors or disruptive behavior disorders affect behavioral and functional outcomes (*e.g.,* compliance with teachers, contact with the juvenile justice system, substance abuse)?

POPULATION, INTERVENTION, COMPARATOR, OUTCOME, TIMING, SETTING/STUDY DESIGN (PICOTS)

PICOTS	Inclusion	Exclusion
Population	KQs 1–6. Children under 18 years of age who are being treated for disruptive behavior or a disruptive behavior disorder that includes oppositional defiant disorder, conduct disorder, and intermittent explosive disorder; children with a co-occurring diagnosis (e.g., ADHD, ASD) provided the disruptive behavior treated is due to a DBD will be included.	—Asymptomatic children. —At-risk children. —Treatment of disruptive behavior secondary to other conditions (e.g., substance abuse, developmental delay, intellectual disability, pediatric bipolar disorder, ADHD).
Interventions	KQs 1, 3–6. Psychosocial interventions for child, parents/family or both including: —Social skills training. —Functional behavioral interventions. —Parent training. —Psychotherapy (e.g., cognitive behavior therapy, interpersonal psychotherapy, psychodynamic therapy, dialectical behavior therapy, equine-assisted psychotherapy with mental health provider). —Contingency management methods. —Behavior management training. KQs 2–6. Pharmacologic interventions that are FDA approved medications used on or off label, including the following class of drugs: —Alpha-agonists. —Anticonvulsants —Second-generation (i.e., atypical) antipsychotics. —Beta-adrenergic blocking agents (i.e., beta-blockers). —Central nervous system stimulants. —First-generation antipsychotics. —Selective serotonin reuptake inhibitors. —Selective norepinephrine reuptake inhibitors. —Mood stabilizers. —Antihistamines.	—Preventive interventions for at-risk populations. —Preventive interventions for caregiver health. —Interventions that do not target disruptive behaviors. —Specialized diet or dietary supplements. —Speech, occupational, physical therapy. —Complimentary and Integrative Health interventions (e.g., acupuncture, herbal remedies). —Exercise programs as the sole intervention. —Massage, chiropractic care. —Invasive medical interventions (e.g., surgery, deep brain stimulation).

POPULATION, INTERVENTION, COMPARATOR, OUTCOME, TIMING, SETTING/STUDY DESIGN (PICOTS)—Continued

PICOTS	Inclusion	Exclusion
	KQs 4–6. Combined psychosocial and pharmacologic interventions included for KQs 1–3.	
Comparators	—Other included psychosocial and/or pharmacologic interventions —Inactive treatment, including waitlist control, no treatment and placebo.	No comparison group, excluded interventions.
Outcomes	KQs 1–4, 6. Behavioral outcomes: —Aggressive behavior. —Temper outbursts (not considered age-appropriate). —Violent behavior. —Delinquent behavior. —Fighting, property destruction, and rule violations. —Compliance with parents, teachers, and institutional rules. —Affective or mood elements of DBD. —Treatment satisfaction. —Other patient-centered outcomes. KQs 1–4, 6. Functional outcomes: —Family functioning/cohesion. —School performance/attendance. —Interpersonal/social function and competence/need for special accommodations. —Interactions with legal/juvenile justice systems. —Out of home placement. —Health care system utilization. —Substance abuse. —Parenting stress. —Logistical family outcomes (days of work lost, etc.). —Health-related quality of life (e.g., mental health, physical health). —Other patient-centered outcomes. KQ 5. Adverse effects/harms: —Metabolic effects: weight gain, hyperglycemia and diabetes, hyperlipidemia. —Extrapyramidal effects: parkinsonism, acute dystonia, akathisia, tardive dyskinesia. —Cardiac adverse effects: prolonged QT/arrhythmias, hypotension, cardiomyopathy. —Prolactin-related effects. —Neutropenia as a potential adverse effect of atypical antipsychotics. —Allergic reaction. —Sleep disruption, fatigue. —Sudden death. —Suicide. —Over-medication or inappropriate medication. —Negative effects on family dynamics. —Acne. —Stigma. —Harms/barriers to utilization of care related to psychosocial interventions (e.g., time investment, limited access to trained providers, and lower acceptability based on a misperception that family-focused psychosocial interventions carry implicit judgements about the quality of their parenting). —Study withdrawal due to medication adverse effects.	Unvalidated outcomes measures.
Timing	KQs 1–6. Any length of follow-up.	
Setting	KQs 1–6. Clinical setting, including medical or psychosocial care that is delivered to individuals by clinical professionals (including telehealth), as well as individually focused programs to which clinicians refer their patients; may include classroom settings when intervention is directed to treat disruptive behavior(s) in a specific child (not the whole class) as part of that child's treatment plan.	Exclude school wide or system wide settings (e.g., juvenile justice system) wherein interventions are targeted more widely.
Study Design	Randomized controlled trials (no sample size limit), comparative nonrandomized controlled trials that adjust for confounding variables (N≥100), published in English on or after 1994.	Published before 1994.

Abbreviations: ADHD=Attention-deficit/hyperactivity disorder; ASD=Autism Spectrum Disorder; DBD=Disruptive Behavior Disorders; FDA=U.S. Food and Drug Administration; KQ=Key Question.

Dated: March 30, 2023.

Marquita Cullom,

Associate Director.

[FR Doc. 2023–07129 Filed 4–5–23; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–0112]

Considerations for Long-Term Clinical Neurodevelopmental Safety Studies in Neonatal Product Development; Draft Guidance for Industry; Availability; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the notice announcing the availability of a draft guidance for industry that appeared in the **Federal Register** of February 13, 2023. In that notice, FDA requested comments on the draft guidance for industry entitled ''Considerations for Long-Term Clinical Neurodevelopmental Safety Studies in Neonatal Product Development.'' The

Agency is taking this action to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the notice published February 13, 2023 (88 FR 9296). Submit either electronic or written comments by May 15, 2023, to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–D–0112 for ''Considerations for Long-Term Clinical Neurodevelopmental Safety Studies in Neonatal Product Development; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: An Massaro, Office of Pediatric Therapeutics, Office of Clinical Policy and Programs, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Silver Spring, MD 20993–0002, 301–467–8507; Gerri Baer, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Silver Spring, MD 20993–0002, 240–402–2865; Diane Maloney, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7242, Silver Spring, MD 20993–0002, 240–402–8113; and Vasum Peiris, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Silver Spring, MD 20993–0002, 301–796–6089.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of February 13, 2023, FDA published a notice announcing the availability of a draft guidance for industry entitled ''Considerations for Long-Term Clinical Neurodevelopmental Safety Studies in Neonatal Product Development; Draft Guidance for Industry,'' and requested comments on the draft guidance.

Interested persons were originally given until April 14, 2023, to comment on the document. The Agency has elected to extend the comment period so that all interested parties are able to more thoroughly consider the request for input. FDA is extending the comment period for 30 days, until May 15, 2023. The Agency believes that this 30-day extension allows adequate time for interested persons to submit comments.

Dated: April 3, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–07185 Filed 4–5–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–0278]

Action Levels for Lead in Food Intended for Babies and Young Children; Draft Guidance for Industry; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA or we) is reopening the comment period for the draft guidance entitled ''Action Levels for Lead in Food Intended for Babies and Young Children; Draft Guidance for Industry,'' which was announced in the **Federal Register** of January 25, 2023. We are taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: FDA is reopening the comment period on the draft guidance published

January 25, 2023 (88 FR 4797). Submit either electronic or written comments on the draft guidance by May 8, 2023, to ensure that we consider your comment on the draft guidance before we begin work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–D–0278 for ''Action Levels for Lead in Food Intended for Babies and Young Children; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Eileen Abt, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1700; or Philip Chao, Center for Food Safety and Applied Nutrition, Office of Regulations and Policy (HFS–024), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2378.

SUPPLEMENTARY INFORMATION: In the *Federal Register* of January 25, 2023 (88 FR 4797), we published a notice of availability for a draft guidance entitled ''Action Levels for Lead in Food Intended for Babies and Young Children; Draft Guidance for Industry.'' This action opened a docket with a 60-day comment period to receive comments related to action levels for lead in processed food intended for babies and young children.

We have received a request for a 60-day extension of the comment period for the draft guidance to provide additional time to provide analytical data. In the interest of balancing the public health importance of establishing action levels for lead in food labeled for babies and young and granting additional time to submit comments before we finalize the draft guidance, we have concluded that it is reasonable to reopen the comment period for 30 days, until May 8, 2023. We are reopening the comment period because the request for an extension of the comment period arrived too late for us to extend the comment period. We believe that an additional 30 days allows adequate time for interested persons to submit comments.

Dated: April 3, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–07187 Filed 4–5–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–1057]

Notification of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the Federal Food, Drug, and Cosmetic Act; Draft Guidance for Industry; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Notification of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act.'' The draft guidance is intended to assist applicants and manufacturers in providing FDA timely, informative notifications about changes in the production of certain finished drugs and biological products as well as certain active pharmaceutical ingredients (API) that may, in turn, help the Agency in its efforts to prevent or mitigate shortages. The draft guidance also explains how FDA communicates information about products in shortage to the public. This

draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by June 5, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance. Submit electronic or written comments on the proposed collection of information in the draft guidance by June 5, 2023.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–D–1057 for ''Notification of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or to Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, 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 draft guidance may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance: Jin Ahn, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6234, Silver Spring, MD 20993–0002, 301–796–1300; or Diane Maloney, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

With regard to the proposed collection of information: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Notification of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act.'' The draft guidance discusses section 506C of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 356c), as amended by the Coronavirus Aid, Relief, and Economic Security (CARES) Act,[1] and FDA's regulations which generally require certain applicants and manufacturers to notify FDA of: (1) a permanent discontinuance in the manufacture of certain products, (2) an interruption in the manufacture of certain products that is likely to lead to a meaningful disruption in supply of those products in the United States, (3) a permanent discontinuance in the manufacture of API for certain products, or (4) an interruption in the manufacture of API for certain products that is likely to lead to a meaningful disruption in the supply of the API for those products. The draft guidance, when finalized, would recommend that applicants and manufacturers provide additional details and follow additional procedures to ensure FDA has the

[1] The CARES Act (Pub. L. 116–136) was enacted on March 27, 2020. The CARES Act amendments to section 506C of the FD&C Act took effect on September 23, 2020. See section 3112(g) of the CARES Act.

specific information it needs to help prevent or mitigate shortages. The draft guidance also explains how FDA communicates information about products in shortage to the public.

While some supply disruptions and product shortages cannot be predicted or prevented, early communication and detailed notifications from manufacturers to the Agency play a significant role in decreasing the incidence, impact, and duration of supply disruptions and product shortages. Timely notifications that include specific information about the situation allow the Agency to evaluate the situation and determine an appropriate course of action. When FDA does not receive timely, informative notifications, the Agency's ability to respond appropriately is limited. Therefore, FDA is issuing this guidance to assist applicants and manufacturers in providing FDA timely, informative notifications about changes in the production of certain finished drugs and biological products as well as certain API that may, in turn, help the Agency in its efforts to prevent and mitigate shortages. Among other things, the draft guidance, when finalized, would explain: (1) who must notify FDA and what products are subject to the notification requirements, (2) when to notify FDA, and (3) what details to include in notifications that will ensure FDA has information that would be helpful to assess the potential for a supply disruption or shortage.

When finalized, this guidance will replace the March 2020 guidance entitled ''Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act.''

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on notifying FDA of a discontinuance or interruption in manufacturing of finished products or API under section 506C of the FD&C Act. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). Under the PRA, Federal Agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information in §§ 310.306, 314.81, and 600.82 (21 CFR 310.306, 314.81(b)(3)(iii), and 600.82) have been approved under OMB control number 0910–0001. The draft guidance describes the requirements in these regulations for applicants or manufacturers of certain drugs and biological products to notify FDA of a permanent discontinuance in the manufacture of certain finished products or an interruption in manufacture of certain finished products that is likely to lead to a meaningful disruption in the supply of such products in the United States.

In addition, the draft guidance refers to notification requirements added to section 506C of the FD&C Act by the CARES Act and, when finalized, would describe additional recommendations for the submission of information that have not been previously approved by OMB under the PRA.

Section III.B of the draft guidance refers to requirements for when notifications must be submitted to FDA under section 506C of the FD&C Act and FDA regulations, but also requests that manufacturers submit notifications to FDA in specific circumstances when notification is not required. For example, if a manufacturer is considering taking an action that may lead to a meaningful disruption in the supply of a product (*e.g.,* holding production to investigate a quality issue or transfer of ownership), the draft guidance requests that the manufacturer notify FDA immediately. The draft guidance also requests that manufacturers notify FDA when they are unable to meet demand for certain products covered by the notification requirement under section 506C of the FD&C Act, even in the absence of an interruption in manufacturing, for example, when there is a sudden, unexpected spike in demand.

Section III.C of the draft guidance refers to requirements for information that must be included in notifications under section 506C(a) of the FD&C Act concerning permanent discontinuances or interruptions in manufacturing of covered finished products, but also recommends that additional information be included in such notifications. For example, the draft guidance states that under section 506C(a) of the FD&C Act notifications must include:

- If an API is a reason for, or risk factor in, the discontinuation or interruption in manufacturing of a covered finished product, the source of the API and any alternative sources for the API known by the manufacturer and
- Whether any associated device used for preparation or administration included in the product is a reason for, or risk factor in, the discontinuation or interruption in manufacturing of the covered finished product.

In addition, the draft guidance recommends that notifications provide certain additional information beyond what is required under section 506C of the FD&C Act and FDA's regulations. The following are examples of additional information that FDA recommends be included in notifications of a permanent discontinuance or interruption in manufacturing concerning a covered finished product:

- The anticipated time frame for all existing product (on hand and in distribution channels) to be exhausted if the notification is for a permanent discontinuance;
- The estimated market share for the product and whether the entire market share is affected by this issue;
- Amount of current inventory of product at the manufacturing facility or warehouse; and
- Whether a proposal is available for FDA to review to expedite availability of

the product or suggestions for FDA actions that may help prevent or mitigate a supply disruption or shortage.

Section III.D of the draft guidance describes what information to include in notifications about permanent discontinuances or interruptions in manufacturing of API for covered finished products. Similar to section III.C, the draft guidance in section III.D refers to requirements for what information must be included in notifications under section 506C(a) of the FD&C Act concerning permanent discontinuances or interruptions in manufacturing of APIs for covered finished products but also recommends that additional information be included in such notifications.

Based on FDA's extensive experience receiving notifications required under §§ 310.306, 314.81(b)(3)(iii), and 600.82 and working closely with manufacturers to prevent and mitigate shortages, we estimate that 10 percent of the 75 respondents currently covered by OMB control number 0910–0001 [2] (''number of respondents'' in table 1, row 1) will submit 1 additional notification concerning covered finished products annually (''number of responses per respondent'' in table 1, row 1) for certain circumstances that are not required by section 506C of the FD&C Act and FDA regulations, such as an inability to meet demand even with no interruption in manufacturing. This would lead to an additional 7.5 responses annually (''total annual responses'' in table 1, row 1). We estimate that each new response will take approximately 2.75 hours to prepare (2 hours per response as currently approved in OMB control number 0910–0001 and an additional 0.75 hours, as described below) (''hours per response'' in table 1, row 1).

Also based on our experience receiving notifications and working closely with manufacturers to prevent and mitigate shortages, we estimate that the new information that the CARES Act amended section 506C of the FD&C Act to require in notifications, as well as information that FDA recommends in the draft guidance that respondents provide beyond what is required under section 506C would lead to respondents spending an additional 0.75 hours per response (''hours per response'' in table 1, row 2). We anticipate that the additional 0.75 hours will provide sufficient time for respondents to gather and compile the required and voluntary information for submission to FDA. Currently, under OMB control number 0910–0001, it is estimated that FDA receives 352.5 responses annually, and the additional 0.75 hours would apply to each response.

For the new category of notifications required regarding discontinuances and interruptions in manufacturing of API of covered finished products, the respondents remain the same as those currently covered by OMB control number 0910–0001 (subject to the requirements in §§ 310.306, 314.81(b)(3)(iii), and 600.82). However, based on our understanding of the frequency of API manufacturing issues and disruptions in API supply, we anticipate that 50 percent of the 75 respondents currently covered by OMB control number 0910–0001 (''number of respondents'' in table 1, row 3) will submit 1 notification related to API annually. This would lead to 37.5 responses annually (''total annual responses'' in table 1, row 3). In light of anticipated coordination between the applicant or finished product manufacturer and the API supplier, we estimate a burden of 2 hours per response.

FDA estimates the additional burden of this collection of information as follows:

Permanent Discontinuance or Interruption in Manufacturing of Certain Drug or Biological Products OMB Control Number 0910–0001—Revision

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Guidance on notification of a permanent discontinuance or interruption in manufacturing under section 506C of the FD&C Act	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Voluntary Notifications of Circumstances Where Supply May Not Meet Demand for Finished Products (described in section III.B)	75	0.1	7.5	2.75	20.63
Additional Information on the Discontinuance or Interruption in Manufacturing of Finished Products (described in section III.C)	75	4.7	352.5	0.75	264.38
Notifications Regarding Discontinuances and Interruptions in Manufacturing of API	75	0.5	37.5	2	75
Total					360

[1] There are no capital costs or operating and maintenance costs associated with this information collection.

[2] The respondents are applicants of approved new drug applications (NDAs), abbreviated new drug applications (ANDAs), and biologic license applications (BLAs), as well as manufacturers of prescription drugs marketed without an approved ANDA or NDA if the product is life-supporting, life-sustaining, or intended for use in the prevention or treatment of a debilitating disease or condition, including use in emergency medical care or during surgery, and is not a radiopharmaceutical product. BLA applicants of blood or blood components are respondents if they manufacture a significant percentage of the nation's Blood supply. We note that the CARES Act clarified that products that are ''intended for use in the prevention or treatment of a debilitating disease or condition'' includes ''any . . . [product] that is critical to the public health during a public health emergency declared by the Secretary under section 319 of the Public Health Service Act.'' This clarification does not affect the estimated number of respondents because it does not change the products or manufacturers covered by the notification requirement; it merely clarifies that manufacturers of products critical to the public health during a public health emergency declared by the Secretary under section 319 of the Public Health Service Act are covered.

III. Electronic Access

Persons with access to the internet may obtain an electronic version of the draft guidance at *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: April 3, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–07238 Filed 4–5–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–0026]

Patient-Focused Drug Development: Incorporating Clinical Outcome Assessments Into Endpoints for Regulatory Decision-Making; Draft Guidance for Industry, Food and Drug Administration Staff, and Other Stakeholders; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Patient-Focused Drug Development: Incorporating Clinical Outcome Assessments Into Endpoints for Regulatory Decision-Making.'' This draft guidance (Guidance 4) is the fourth in a series of four methodological patient-focused drug development (PFDD) guidance documents that describe how stakeholders (patients, researchers, medical product developers, and others) can collect and submit patient experience data and other relevant information from patients and caregivers to be used for medical product development and regulatory decision-making.

DATES: Submit either electronic or written comments on the draft guidance by July 5, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–0026 for ''Patient-Focused Drug Development: Incorporating Clinical Outcome Assessments Into Endpoints for Regulatory Decision-Making.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Shannon Sparklin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6306, Silver Spring, MD 20993–0002, 301–796–9208, *Shannon.Sparklin@fda.hhs.gov;* or Diane Maloney, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911; or Office of Strategic

Partnerships and Technology Innovation, Center for Devices and Radiological Health, *cdrh-pro@fda.hhs.gov,* 800–638–2041 or 301–796–7100.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Patient-Focused Drug Development: Incorporating Clinical Outcome Assessments Into Endpoints for Regulatory Decision-Making.'' This draft guidance (Guidance 4) is the fourth of a series of four methodological patient-focused drug development guidance documents that describe how stakeholders (patients, researchers, medical product developers, and others) can collect and submit patient experience data and other relevant information from patients and caregivers to be used for medical product development and regulatory decision-making. This series of guidance documents is intended to facilitate the advancement and use of systematic approaches to collect and use robust and meaningful input that can more consistently inform medical product development and regulatory decision-making.

The purpose of Guidance 4 is to: (1) address methods to better incorporate clinical outcome assessment into endpoints that are considered significantly robust for regulatory decision-making; (2) address methodologies, standards, and technologies that may be used for the collection, capture, storage, and analysis of patient perspective data; and (3) identify resources that offer considerations regarding submissions of patient experience data.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Incorporating Clinical Outcome Assessments Into Endpoints for Regulatory Decision-Making.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to collections of information from ''individuals under treatment or clinical examination in connection with research,'' which are not subject to review by the Office of Management and Budget (OMB) under 5 CFR 1320.3(h)(5). This guidance also refers to previously approved FDA collections of information. These collections of information are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in 21 CFR parts 312 and 812 for investigational new drug applications and investigational device exemptions have been approved under OMB control numbers 0910–0014 and 0910–0078, respectively. The collections of information in 21 CFR parts 314 and 601 for new drug applications and biologic license applications have been approved under OMB control numbers 0910–0001 and 0910–0338, respectively, and the collections of information in 21 CFR part 814, subparts A through E, 21 CFR part 860, subpart D, and 21 CFR part 807, subpart E, for premarket approval applications, De Novo classification requests, and premarket notifications have been approved under OMB control numbers 0910–0231, 0910–0844, and 0910–0120, respectively.

III. Additional Information

Section 3002 of Title III, Subtitle A of the 21st Century Cures Act (Pub. L. 114–255) directs FDA to develop patient-focused drug development guidance to address a number of areas, including under section 3002(c)(4): methodologies, standards, and technologies to collect and analyze clinical outcome assessments for purposes of regulatory decision-making.

In addition, FDA committed to meet certain performance goals under the sixth authorization of the Prescription Drug User Fee Act. These goal commitments were developed in consultation with patient and consumer advocates, healthcare professionals, and other public stakeholders, as part of negotiations with regulated industry. Section I.J.1 of the commitment letter ''Enhancing the Incorporation of the Patient's Voice in Drug Development and Decision-Making'' (*https://www.fda.gov/media/99140/download*) outlines work, including the development of a series of guidance documents and associated public workshops to facilitate the advancement and use of systematic approaches to collect and utilize robust and meaningful patient and caregiver input that can more consistently inform drug development, and, as appropriate, regulatory decision-making.

IV. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: April 3, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–07243 Filed 4–5–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–3240]

List of Bulk Drug Substances for Which There Is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is evaluating substances that have been nominated for inclusion on a list of bulk drug substances (active pharmaceutical ingredients (APIs)) for which there is a clinical need (the 503B Bulks List). Drug products that outsourcing facilities compound using bulk drug substances on the 503B Bulks List can qualify for certain exemptions from the Federal Food, Drug, and Cosmetic Act (FD&C Act) provided certain conditions are met. This notice identifies one bulk drug substance that FDA has considered and is including on the list at this time: quinacrine hydrochloride (HCl) to compound drug products for oral use only. This notice also identifies 10 bulk drug substances that FDA has considered and is not including on the list at this time: hydroxyzine HCl, mannitol, methacholine chloride, metoclopramide HCl, nalbuphine HCl, potassium acetate, procainamide HCl, sodium bicarbonate, sodium nitroprusside, and verapamil HCl. Additional bulk drug substances nominated by the public for inclusion on this list are currently under consideration and will be the subject of future notices.

DATES: The announcement of the notice is published in the **Federal Register** on April 6, 2023.

ADDRESSES: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts,

and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Tracy Rupp, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Silver Spring, MD 20993, 301–796–3100.

SUPPLEMENTARY INFORMATION:

I. Background

Section 503B of the FD&C Act (21 U.S.C. 353b) describes the conditions that must be satisfied for drug products compounded in an outsourcing facility to be exempt from section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications (NDAs) or abbreviated new drug applications (ANDAs)), section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use), and section 582 of the FD&C Act (21 U.S.C. 360eee–1) (concerning drug supply chain security requirements).[1]

Compounded drug products that meet the conditions in section 503B are not exempt from current good manufacturing practice (CGMP) requirements in section 501(a)(2)(B) of the FD&C Act (21 U.S.C. 351(a)(2)(B)).[2] Outsourcing facilities are also subject to FDA inspections according to a risk-based schedule, adverse event reporting requirements, and other conditions that help to mitigate the risks of the drug products they compound.[3] Outsourcing facilities may or may not obtain prescriptions for identified individual patients and can, therefore, distribute compounded drugs to healthcare practitioners for ''office stock,'' to hold in their offices in advance of patient need.[4]

One of the conditions that must be met for a drug product compounded by an outsourcing facility to qualify for the exemptions under section 503B of the FD&C Act is that the outsourcing facility may not compound a drug using a bulk drug substance unless: (1) the bulk drug substance appears on a list established by the Secretary of Health and Human Services (the Secretary) identifying bulk drug substances for which there is a clinical need (the 503B Bulks List) or (2) the drug compounded from the bulk drug substance appears on the drug shortage list in effect under section 506E of the FD&C Act (21 U.S.C. 356e) at the time of compounding, distribution, and dispensing.[5]

Section 503B of the FD&C Act directs FDA to establish the 503B Bulks List by: (1) publishing a notice in the **Federal Register** proposing bulk drug substances to be included on the list, including the rationale for such proposal; (2) providing a period of not less than 60 calendar days for comment on the notice; and (3) publishing a notice in the **Federal Register** designating bulk drug substances for inclusion on the list.[6]

FDA has published a series of **Federal Register** notices addressing bulk drug substances nominated for inclusion on the 503B Bulks List.[7] This notice identifies one bulk drug substance that FDA has considered and is including on the 503B Bulks List and 10 bulk drug substances that FDA has considered and is not including on the 503B Bulks List.

For purposes of section 503B of the FD&C Act, *bulk drug substance* means an active pharmaceutical ingredient as defined in 21 CFR 207.1.[8] *Active pharmaceutical ingredient* means any substance that is intended for incorporation into a finished drug product and is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body, but the term does not include intermediates used in the synthesis of the substance.[9] [10]

II. Methodology for Developing the 503B Bulks List

A. Process for Developing the List

FDA requested nominations for specific bulk drug substances for the Agency to consider for inclusion on the 503B Bulks List in the **Federal Register** of December 4, 2013 (78 FR 72838). FDA reopened the nomination process in the **Federal Register** of July 2, 2014 (79 FR 37747), and provided more detailed information on what FDA needs to evaluate nominations for the list. On October 27, 2015 (80 FR 65770), the Agency opened a new docket, FDA–2015–N–3469, to provide an opportunity for interested persons to submit new nominations of bulk drug substances, renominate substances with sufficient information, or submit comments on nominated substances.

As FDA evaluates bulk drug substances, it intends to publish notices for public comment in the **Federal Register** that describe its proposed position on each substance along with the rationale for that position.[11] After considering any comments on FDA's proposals regarding whether to include nominated substances on the 503B Bulks List, FDA intends to consider whether input from the Pharmacy Compounding Advisory Committee (PCAC) on the nominations would be helpful to the Agency in making its determination, and if so, it will seek PCAC input.[12] Depending on its review of the docket comments and other relevant information before the Agency, FDA may finalize its proposed determination without change, or it may finalize a modification to its proposal to reflect new evidence or analysis regarding clinical need. FDA will then publish in the **Federal Register** a final determination identifying the bulk drug substances for which it has determined there is a clinical need and FDA's rationale in making that final determination. FDA will also publish in the **Federal Register** a final determination regarding those substances it considered but found that there is no clinical need to use in compounding and FDA's rationale in making this decision.

[1] Section 503B(a) of the FD&C Act.

[2] Compare section 503A(a) of the FD&C Act (21 U.S.C. 353a(a) (exempting drugs compounded in accordance with that section)) with section 503B(a) of the FD&C Act (not providing the exemption from CGMP requirements).

[3] Section 503B(b)(4) and (5) of the FD&C Act.

[4] Section 503B(d)(4)(C) of the FD&C Act.

[5] Section 503B(a)(2)(A) of the FD&C Act.

[6] Section 503B(a)(2)(A)(i)(I) to (III) of the FD&C Act.

[7] See **Federal Register** of August 28, 2018 (83 FR 43877), March 4, 2019 (84 FR 7383), September 3, 2019 (84 FR 46014), July 31, 2020 (85 FR 46126), March 24, 2021 (86 FR 15673), and November 23, 2022 (87 FR 71642). The comment period for the July 2020 notice was reopened for 30 days on January 8, 2021 (86 FR 1515), to allow interested parties an additional opportunity to comment. FDA has not yet reached a final determination on whether the substances evaluated in the September 2019, July 2020, or March 2021 notices will be added to the 503B Bulks List. In addition, bumetanide, which was considered in the August 2018 notice, remains under consideration by the Agency.

[8] See section 503B(a)(2) of the FD&C Act, which defines bulk drug substances used in compounding under section 503B according to 21 CFR 207.3(a)(4) ''or any successor regulation.'' Section 207.1 is the successor regulation.

[9] Section 503B(a)(2) of the FD&C Act and 21 CFR 207.1.

[10] Inactive ingredients are not subject to section 503B(a)(2) of the FD&C Act and will not be included in the 503B Bulks List because they are not included within the definition of a bulk drug substance. Pursuant to section 503B(a)(3), inactive ingredients used in compounding must comply with the standards of an applicable United States Pharmacopeia (USP) or National Formulary (NF) monograph, if a monograph exists.

[11] This is consistent with procedures set forth in section 503B(a)(2)(A)(i) of the FD&C Act. Although the statute only directs FDA to issue a **Federal Register** notice and seek public comment when it proposes to include bulk drug substances on the 503B Bulks List, we intend to seek comment when the Agency has evaluated a nominated substance and proposes either to include or not to include the substance on the list.

[12] Section 503B of the FD&C Act does not require FDA to consult the PCAC before developing the 503B Bulks List.

FDA intends to maintain a list of all bulk drug substances it has evaluated on its website, and separately identify bulk drug substances it has placed on the 503B Bulks List and those it has decided not to place on the 503B Bulks List. This list is available at *https://www.fda.gov/media/120692/download.* FDA will only place a bulk drug substance on the 503B Bulks List when it has determined there is a clinical need for outsourcing facilities to compound drug products using the bulk drug substance. If a clinical need to compound drug products using the bulk drug substance has not been demonstrated, based on the information submitted by the nominator and any other information considered by the Agency, FDA will not place a bulk drug substance on the 503B Bulks List.

FDA is evaluating bulk drug substances nominated for the 503B Bulks List on a rolling basis. FDA intends to evaluate and publish in the **Federal Register** its proposed and final determinations in groups of bulk drug substances until all nominated substances that were sufficiently supported have been evaluated and either placed on the 503B Bulks List or identified as bulk drug substances that were considered but determined not to be appropriate for inclusion on the 503B Bulks List (Ref. 1).[13]

B. Analysis of Substances Nominated for the List

As noted above, the 503B Bulks List will include bulk drug substances for which there is a clinical need. The Agency is evaluating bulk drug substances that were nominated for inclusion on the 503B Bulks List, proceeding case by case, under the standard provided by the statute (Ref. 2).[14] In applying this standard to make its determinations regarding the substances set forth in this notice, FDA interprets the phrase ''bulk drug substances for which there is a clinical need'' to mean that the 503B Bulks List may include a bulk drug substance if: (1) there is a clinical need for an outsourcing facility to compound the drug product and (2) the drug product must be compounded using the bulk drug substance. FDA does not interpret supply issues, such as backorders, to be within the meaning of ''clinical need'' for compounding with a bulk drug substance. Section 503B of the FD&C Act separately provides for compounding from a bulk drug substance under the exemptions from the FD&C Act discussed above if the drug product compounded from the bulk drug substance is on the FDA drug shortage list at the time of compounding, distribution, and dispensing. Additionally, FDA does not consider convenience in administering a particular compounded drug product (*e.g.,* a ready-to-use form) or the cost of the compounded drug product as compared with an FDA-approved drug product when assessing ''clinical need.''

All of the bulk drug substances addressed in this notice, with the exception of quinacrine HCl, are components of FDA-approved drug products.[15] FDA began its evaluation of the bulk drug substances that are components of FDA-approved drug products by asking one or both, as applicable, of the following questions:

1. Is there a basis to conclude, for each FDA-approved product that includes the nominated bulk drug substance, that (a) an attribute of the FDA-approved drug product makes it medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation, and (b) the drug product proposed to be compounded is intended to address that attribute?

2. Is there a basis to conclude that the drug product proposed to be compounded must be produced from a bulk drug substance rather than from an FDA-approved drug product?

The reason for question 1 is that unless an attribute of the FDA-approved drug is medically unsuitable for certain patients, and a drug product to be compounded using a bulk drug substance that is a component of the FDA-approved drug is intended to address that attribute, there is no clinical need to compound a drug product using that bulk drug substance. Rather, such compounding would unnecessarily expose patients to the risks associated with drug products that do not meet the standards applicable to FDA-approved drug products for safety, effectiveness, quality, and labeling and would undermine the drug approval process. The reason for question 2 is that to place a bulk drug substance on the 503B Bulks List, FDA must determine that there is a clinical need for outsourcing facilities to compound a drug product *using the bulk drug substance* rather than starting with an FDA-approved drug product. When it is feasible to compound a drug product by starting with an FDA-approved drug product, there are certain benefits of doing so over starting with a bulk drug substance, including that FDA-approved drugs have undergone premarket review for safety, effectiveness, and quality, and are manufactured by a facility that is subject to premarket assessment, including site inspection, as well as routine post-approval risk-based inspections. In contrast, FDA does not conduct a premarket review of the quality standards, specifications, and controls for bulk drug substances used in compounding and does not conduct a premarket assessment of the manufacturer of the bulk drug substance.

If the answer to both of the above questions is ''yes,'' there may be a clinical need for outsourcing facilities to compound using the bulk drug substance, and we would evaluate the substance further, applying the factors described below. If the answer to either of these questions is ''no,'' we generally would not include the bulk drug substance on the 503B Bulks List, because there would not be a basis to conclude that there may be a clinical need to compound drug products using the bulk drug substance instead of administering an FDA-approved drug or compounding starting with an FDA-approved drug product. FDA did not answer ''yes'' to both of the threshold questions for the 10 bulk drug substances that are components of FDA-approved drug products that we are addressing in this notice. Accordingly, as explained below, we did not proceed further in our evaluation of these substances and have decided not to include them on the 503B Bulks List.

With respect to the bulk drug substance addressed in this notice that is not a component of an FDA-approved drug, quinacrine HCl, we conducted a balancing test using four factors. Specifically, we considered available data relevant to each factor in the context of the other factors and balanced all four factors to determine whether the

[13] In January 2017, FDA announced the availability of a revised final guidance for industry that provides additional information regarding FDA's policies for bulk drug substances nominated for the 503B Bulks List pending our review of nominated substances under the ''clinical need'' standard entitled ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act'' (the ''Interim Policy''), available at *https://www.fda.gov/media/94402/download.*

[14] In March 2019, FDA announced the availability of a final guidance entitled ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act'' (the ''Clinical Need Guidance''), available at *https://www.fda.gov/media/121315/download.* This guidance describes FDA policies for developing the 503B Bulks List and the Agency's interpretation of the phrase ''bulk drug substances for which there is a clinical need'' as it is used in section 503B. The analysis under the statutory ''clinical need'' standard described in this notice is consistent with the approach described in FDA's guidance.

[15] Specifically, hydroxyzine HCl, mannitol, methacholine chloride, metoclopramide HCl, nalbuphine HCl, potassium acetate, procainamide HCl, sodium bicarbonate, sodium nitroprusside, and verapamil HCl.

statutory ''clinical need'' standard has been met. The balancing test includes the following factors:

- The physical and chemical characterization of the substance;
- any safety issues raised by the use of the substance in compounding;
- the available evidence of effectiveness or lack of effectiveness of a drug product compounded with the substance, if any such evidence exists; and
- current and historical use of the substance in compounded drug products, including information about the medical condition(s) that the substance has been used to treat and any references in peer-reviewed medical literature.

The discussion below reflects FDA's consideration of these four factors and describes how they were applied to develop FDA's decision to include quinacrine HCl for oral use on the 503B Bulks List.

C. Inclusion of a Bulk Drug Substance on the 503B Bulks List

In evaluating a bulk drug substance for the 503B Bulks List, FDA has considered whether the clinical need for the bulk drug substance in the proposed compounded drug product is limited, by, for example, route of administration or dosage form. In the **Federal Register** notice of July 31, 2020 (85 FR 46126), FDA requested comments on the proposal to limit listings in this manner. On January 8, 2021 (86 FR 1515), the comment period for the July 2020 notice was reopened for 30 days to allow interested parties an additional opportunity to comment before FDA began to develop its final determinations. After considering the comments submitted regarding the proposal, in the **Federal Register** notice of January 27, 2022 (87 FR 4240), FDA listed three bulk drug substances to compound drug products for topical use only, consistent with its findings related to clinical need for those bulk drug substances.

FDA has also determined that to be eligible for the statutory exemptions under section 503B, drug products compounded using a bulk drug substance that appears on the 503B Bulks List cannot contain other APIs unless those APIs have been listed in combination on the 503B Bulks List (87 FR 4240). FDA's assessment of the clinical need for compounding with a particular bulk drug substance or combination of bulk drug substances could be affected if a bulk drug substance is commonly used in compounded drug products that contain multiple bulk drug substances (APIs). The use of certain APIs in combination with other APIs in a compounded drug product could also pose a safety risk or affect the compounded drug product's effectiveness. These considerations of the composition of a nominated compounded combination, the history of its use in compounding, and evidence of safety or effectiveness would be included in FDA's clinical need evaluation.

In accordance with these considerations and the clinical need analysis set forth below, FDA is adding one bulk drug substance—quinacrine HCl—to the 503B Bulks List to compound single-ingredient drug products for oral use only.[16]

III. FDA's Determinations Regarding Substances Proposed for the 503B Bulks List

In September 2019, the Agency issued a **Federal Register** notice in which it evaluated nine nominated bulk drug substances under the section 503B statutory standard—dipyridamole, ephedrine sulfate, famotidine, hydralazine HCl, methacholine chloride, sodium bicarbonate, sodium tetradecyl sulfate, trypan blue, and vecuronium bromide—and proposed not to include them on the 503B Bulks List (the September 2019 notice).[17] In this notice, after review of the comments submitted to the docket for the September 2019 notice, FDA is making its final determination not to include methacholine chloride and sodium bicarbonate on the 503B Bulks List. At this time, FDA is not making a final determination regarding ephedrine sulfate, famotidine, hydralazine HCl, sodium tetradecyl sulfate, trypan blue, and vecuronium bromide.[18] These substances remain under consideration by FDA.

In July 2020, the Agency issued a **Federal Register** notice in which it evaluated 23 nominated bulk drug substances under the section 503B statutory standard (the July 2020 notice).[19] FDA proposed to include diphenylcyclopropenone (DPCP), glycolic acid, squaric acid dibutyl ester (SADBE), and trichloroacetic acid (TCA) on the 503B Bulks List. FDA proposed not to include diazepam, dobutamine HCl, dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, hydroxyzine HCl, ketorolac tromethamine, labetalol HCl, mannitol, metoclopramide HCl, moxifloxacin HCl, nalbuphine HCl, polidocanol, potassium acetate, procainamide HCl, sodium nitroprusside, sodium thiosulfate, and verapamil HCl on the 503B Bulks List. In this notice, after review of the comments submitted to the docket for the July 2020 notice, FDA is making its final determination not to include hydroxyzine HCl, mannitol, metoclopramide HCl, nalbuphine HCl, potassium acetate, procainamide HCl, sodium nitroprusside, and verapamil HCl on the 503B Bulks List. FDA has previously made final determinations for DPCP, glycolic acid, SADBE, TCA, diazepam, dobutamine HCl, dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, and sodium thiosulfate (except the topical route of administration) (87 FR 4240). At this time, FDA is not making a final determination regarding ketorolac tromethamine, labetalol HCl, moxifloxacin HCl, and polidocanol. These substances remain under consideration by FDA.

In March 2021, the Agency issued a **Federal Register** notice in which it evaluated five bulk drug substances under the section 503B statutory standard (the March 2021 notice).[20] FDA proposed to include quinacrine HCl on the 503B Bulks List to compound drug products for oral use only. FDA proposed not to include bromfenac sodium, mitomycin-C, nepafenac, and hydroxychloroquine sulfate on the 503B Bulks List. In this notice, after review of the comments submitted to the docket for the March 2021 notice, FDA is making its final determination to include quinacrine HCl on the 503B Bulks List to compound drug products for oral use only. At this time, FDA is not making a final determination regarding bromfenac sodium, mitomycin-C, nepafenac, and hydroxychloroquine sulfate. These substances remain under consideration by FDA. Additional bulk drug substances nominated by the public for inclusion on the 503B Bulks List are currently under consideration and may be the subject of future notices.

A. Substance Evaluated and Included on the 503B Bulks List

FDA is placing quinacrine HCl on the 503B Bulks List. FDA evaluated quinacrine HCl and proposed to include it on the 503B Bulks List in the March 2021 notice. The reasons for FDA's proposal to place quinacrine HCl for oral use on the 503B Bulks List are

[16] In this notice, ''single-ingredient'' refers to a drug product containing one active ingredient. The drug product may also contain excipients.

[17] See 84 FR 46014.

[18] FDA made a final determination not to include dipyridamole on the 503B Bulks List (see 87 FR 4240).

[19] 85 FR 46126.

[20] 86 FR 15673.

included below (Ref. 3).[21] For the reasons set forth in the proposal, FDA is now placing quinacrine HCl on the 503B Bulks List for oral use only.

Quinacrine HCl

FDA considered the bulk drug substance quinacrine HCl for inclusion on the 503B Bulks List to compound drug products in oral dosage forms at strengths of 25–100 milligrams (mg) for the treatment of cutaneous lupus erythematosus (CLE), as described in the Agency's nomination and evaluation.[22]

Quinacrine HCl is not a component of an FDA-approved drug product. The Agency therefore evaluated quinacrine HCl for potential inclusion on the 503B Bulks List under the clinical need standard in section 503B of the FD&C Act using the balancing test described above. FDA considered data and information regarding the physical and chemical characterization of quinacrine HCl, safety issues raised by use of this substance in compounding, available evidence of effectiveness or lack of effectiveness, and historical and current use in compounding (Ref. 3).

Quinacrine HCl is well-characterized physically and chemically. Although there are concerns about its safety profile in certain patient populations, FDA believes these risks are well known within the rheumatology and dermatology specialties that most often treat CLE, and the known risks could be controlled with appropriate dosing and monitoring. Quinacrine HCl has been used for several decades to treat systemic lupus erythematosus and CLE, and there is a significant body of experience, documented in the scientific literature, that quinacrine HCl may be effective in the treatment of patients with cutaneous lupus, and patients who are not fully clinically responsive to, or are intolerant of, treatment with FDA-approved products alone. These patients may respond to the addition of quinacrine HCl to their existing therapy, or to the use of quinacrine HCl alone. On balance, the physical and chemical characterization, safety, effectiveness, and historical and current use of quinacrine HCl weigh in favor of including this substance on the 503B Bulks List. Two commenters supported FDA's proposal to include quinacrine HCl on the 503B Bulks List, although one of them disagreed with FDA's proposal to limit the entry to oral use only. No commenters opposed adding quinacrine HCl to the 503B Bulks List. Several commenters objected generally to FDA's proposals, and these overarching concerns are addressed in section IV of this notice. Accordingly, FDA is adding quinacrine HCl to the 503B Bulks List for oral use only. The entry on the 503B Bulks List is limited in this way because, as discussed above, FDA's evaluation only revealed a clinical need for outsourcing facilities to compound drug products containing the bulk drug substance quinacrine HCl for the oral route of administration.

Due to the safety risks referred to above, FDA is making safety information about the use of quinacrine HCl available to prescribers, pharmacists, outsourcing facilities, and the public through a safety guide on FDA's website, available at *https://www.fda.gov/drugs/human-drug-compounding/consumer-and-health-care-professional-information.*

B. Substances Evaluated and Not Included on the 503B Bulks List

The 10 bulk drug substances that FDA has evaluated, proposed not to include on the 503B Bulks List in a **Federal Register** notice, and has now decided not to place on the 503B Bulks List are: hydroxyzine HCl, mannitol, methacholine chloride, metoclopramide HCl, nalbuphine HCl, potassium acetate, procainamide HCl, sodium bicarbonate, sodium nitroprusside, and verapamil HCl.

Because the substances discussed in this section are components of FDA-approved drug products, FDA considered one or both of the following questions: (1) is there a basis to conclude that an attribute of each FDA-approved drug product containing the bulk drug substance makes each one medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation, and the drug product(s) proposed to be compounded is intended to address that attribute in each FDA-approved drug product, and (2) is there a basis to conclude that the drug product(s) proposed to be compounded must be compounded using a bulk drug substance. FDA considered comments to the docket submitted within the public comment period, but as explained below, none of the comments received on these bulk drug substances provided information that led FDA to change its determination.

1. Hydroxyzine HCl

Hydroxyzine HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat alcohol withdrawal syndrome, analgesia in labor, pre- and postpartum reduction of narcotic use, and relief of anxiety, among other conditions.[23] The proposed route of administration is intramuscular, the proposed dosage form is a solution, and the proposed concentration is 50 milligrams/milliliters (mg/mL). The nominators proposed to compound a preserved solution. However, they failed to acknowledge that there is a preserved formulation of hydroxyzine HCl that is FDA-approved or identify an attribute of that formulation that makes it medically unsuitable for certain patients. The nominations state that hydroxyzine HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 087408). FDA-approved hydroxyzine HCl is marketed as a preserved 50 mg/mL solution for intramuscular administration.[24] [25] [26]

a. Suitability of FDA-Approved Drug Product(s)

The nominations do not identify an attribute of the FDA-approved preserved 50 mg/mL hydroxyzine HCl solution for intramuscular administration that makes it medically unsuitable for certain patients or identify an attribute of the FDA-approved drug products that the proposed compounded drug product is intended to address. Two commenters supported FDA's proposal not to include hydroxyzine HCl on the 503B Bulks List. No new information supporting the clinical need for compounding from the bulk drug substance hydroxyzine HCl was provided by the commenters.

Accordingly, FDA finds no basis to conclude that there is an attribute of the

[21] In addition to FDA's evaluation of the quinacrine HCl nomination for the 503B Bulks List, the Agency considered data and information from its earlier evaluation regarding the use of this bulk drug substance for the list of bulk drug substances that can be used in compounding under section 503A of the FD&C Act (the 503A Evaluation) (see appendices A–D in ''FDA Memo to File, Clinical Need for Quinacrine Hydrochloride in Compounding Under Section 503B of the FD&C Act'' (Ref. 3)). FDA also considered a report provided by the University of Maryland Center of Excellence in Regulatory Science and Innovation and conducted a search for relevant scientific literature and safety information, focusing on materials published or submitted to FDA since the 503A Evaluations (see appendix H in Ref. 3).

[22] See appendix G in Ref. 3.

[23] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[24] See, *e.g.,* ANDA 087408 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/e711ee73-c054-4f3f-a189-bb3c01c7aecc/e711ee73-c054-4f3f-a189-bb3c01c7aecc.xml.*

[25] Per the label for ANDA 087408, each mL contains hydroxyzine HCl 25 mg or 50 mg, benzyl alcohol 0.9 percent, and water for injection q.s. pH is adjusted with sodium hydroxide and/or hydrochloric acid.

[26] Hydroxyzine HCl is also FDA-approved as an oral tablet and as an oral syrup.

FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using hydroxyzine HCl and the FDA-approved drug product containing hydroxyzine HCl, there is nothing for FDA to evaluate under question 2. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that the drug product proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

2. Mannitol

Mannitol has been nominated for inclusion on the 503B Bulks List to compound drug products for treatment of acute renal failure, inhalation bronchial challenge testing, and irrigation of the urinary bladder, among other conditions.[27] The proposed route of administration is intravenous, the proposed dosage form is a solution, and the proposed concentration is 25 percent. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of mannitol that is FDA-approved or identify an attribute of that formulation that makes it medically unsuitable for certain patients. The nominations state that mannitol might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* NDA 016269). FDA-approved mannitol is marketed as a preservative-free solution in water for injection in various concentrations, including a 25 percent concentration in a flip-top vial for administration by intravenous infusion only.[28] [29] [30]

a. Suitability of FDA-Approved Drug Product(s)

The nominations do not identify an attribute of each of the FDA-approved 25 percent preservative-free solution products that makes them medically unsuitable for certain patients or identify an attribute of the FDA-approved drug products that the proposed compounded drug product is intended to address. Two commenters supported FDA's proposal not to include mannitol on the 503B Bulks List. The commenters provided no new information supporting the clinical need for compounding from the bulk drug substance mannitol.

Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using mannitol and FDA-approved drug products containing mannitol, there is nothing for FDA to evaluate under question 2. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that drug products must be compounded using a bulk drug substance rather than an FDA-approved drug product.

3. Methacholine Chloride

Methacholine chloride has been nominated for inclusion on the 503B Bulks List to compound drug products that aid in the diagnosis of bronchial airway hyperactivity.[31] The proposed route of administration is inhalation tapering dose kits, the proposed dosage form is an inhalant, and the proposed strengths are as follows: 8 dilutions (0.125 mg/mL, 0.25 mg/mL, 0.5 mg/mL, 1 mg/mL, 2 mg/mL, 4 mg/mL, 8 mg/mL, 16 mg/mL) and 10 dilutions (0.031 mg/mL, 0.0625 mg/mL, 0.125 mg/mL, 0.25 mg/mL, 0.5 mg/mL, 1 mg/mL, 2 mg/mL, 4 mg/mL, 8 mg/mL, 16 mg/mL). The nominated bulk drug substance is a component of an FDA-approved drug product (NDA 019193). FDA-approved methacholine chloride is marketed as a 100 mg/vial powder for solution to be administered only by inhalation.[32] Per its labeling, methacholine chloride is reconstituted and diluted to the following concentrations with 0.9 percent sodium chloride injection or 0.9 percent sodium chloride injection containing 0.4 percent phenol (pH 7.0): 0.025 mg/mL, 0.25 mg/mL, 2.5 mg/mL, 10 mg/mL, and 25 mg/mL.

a. Suitability of FDA-Approved Drug Product

The nomination does not identify an attribute of the FDA-approved drug product that makes it medically unsuitable to treat certain patients and that the proposed compounded drug products are intended to address. Specifically, the nomination does not identify an attribute of the FDA-approved 100 mg/vial powder for solution (for reconstitution) that makes it medically unsuitable for certain patients. The commenters propose to compound a ready-to-use product from a bulk drug substance to seek improved efficiency for prescribers or healthcare providers, or to address the possibility that the FDA-approved drug might be mishandled by a medical professional, neither of which falls within the meaning of clinical need to compound a drug product using a bulk drug substance.[33] Several commenters supported FDA's proposal not to include methacholine chloride on the 503B Bulks List. The commenters provided no additional information supporting the clinical need for compounding from the bulk drug substance methacholine chloride.

Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved product that makes it medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

The nomination does not provide support for the position that drug products containing methacholine chloride must be compounded from a bulk drug substance rather than by diluting the FDA-approved drug

[27] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[28] See, *e.g.,* NDA 016269 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/drugsatfda_docs/label/2020/016269s056lbl.pdf*.

[29] Per the label for NDA 016269, the solutions contain no bacteriostat, antimicrobial agent, or added buffer (except for pH adjustment) and each is intended only as a single-dose injection.

[30] Mannitol is also FDA-approved as a single ingredient as a solution for irrigation and as a powder for inhalation.

[31] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–2292.

[32] See, *e.g.,* NDA 208943 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/7f538d73-80e2-4c00-911a-df2637e5a4d1/7f538d73-80e2-4c00-911a-df2637e5a4d1.xml*.

[33] See, *e.g.,* ''List of Bulk Drug Substances for Which There Is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act,'' 87 FR 4240 at 4248.

product. None of the commenters provided support for such a position during the comment period. Some commenters stated that there could be a benefit from using a bulk drug substance to compound drug products to avoid the manipulations that the FDA-approved drug products that contain methacholine chloride require before they can be administered (*e.g.,* dilution). Commenters also contended that outsourcing facilities, as opposed to hospitals, are better able to prepare methacholine in the sterile environment that is necessary for the sterility of an injectable drug product. This is essentially an argument that the approved drug might be mishandled by a medical professional, which, as discussed above, does not fall within the meaning of clinical need to compound a drug product using a bulk drug substance. The commenters also did not establish that drug products in the relevant concentrations, including ready-to-use products, cannot be prepared from the FDA-approved drug products, which are labeled for dilution.

Having considered these arguments, and because no further information was supplied regarding the clinical need for compounding from the bulk drug substance, FDA finds no basis to conclude that the methacholine chloride drug products proposed to be compounded must be prepared using a bulk drug substance rather than the FDA-approved drug product.

4. Metoclopramide HCl

Metoclopramide HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat chemotherapy-induced nausea and vomiting, diabetic gastroparesis, gastroesophageal reflux disease, and postoperative nausea and vomiting, among other conditions.[34] The proposed routes of administration are intravenous and intramuscular, the proposed dosage form is a suspension, and the proposed concentration is 5 mg/mL. The nominators proposed to compound both preservative-free and preserved suspensions. However, they failed to acknowledge that there is a preservative-free formulation of metoclopramide HCl that is FDA-approved or identify an attribute of that formulation that would be medically unsuitable for certain patients. The nominations state that metoclopramide HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 073118). FDA-approved metoclopramide HCl is marketed as a preservative-free 10 mg/2 mL (5 mg/mL) solution for intravenous or intramuscular administration.[35] [36] [37]

a. Suitability of FDA-Approved Drug Product(s)

The nominations do not identify an attribute of each of the FDA-approved preservative-free 10 mg/2 mL (5 mg/mL) solution products for intravenous or intramuscular administration that makes them medically unsuitable for certain patients or identify an attribute of the FDA-approved drug products that the proposed compounded drug product is intended to address. In particular, the nominations do not identify any data or information indicating that there are some patients who need a preserved product rather than the FDA-approved preservative-free products. In addition, the nominations do not identify any data or information indicating that there are some patients who need a suspension rather than a solution for intravenous and intramuscular administration. Two commenters supported FDA's proposal not to include metoclopramide HCl on the 503B Bulks List. Commenters provided no new information supporting the clinical need for compounding from the bulk substance metoclopramide HCl.

Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations have not identified an attribute of the FDA-approved drug product that makes it medically unsuitable for certain patients, FDA has not evaluated whether the proposed drug products containing metoclopramide HCl must be compounded from bulk drug substances rather than using the FDA-approved drug product. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that the drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

5. Nalbuphine HCl

Nalbuphine HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that are used for general anesthesia and to treat moderate to severe pain as a preoperative, postoperative, and obstetrical analgesia.[38] The proposed routes of administration are intravenous, intramuscular, and subcutaneous, the proposed dosage form is a solution, and the proposed concentrations are 10 mg/mL and 20 mg/mL. The nominators proposed to compound a preservative-free solution and a preserved solution. However, they failed to acknowledge that there are both a preservative-free solution formulation and a preserved solution formulation of nalbuphine HCl that are FDA-approved or identify an attribute of those formulations that makes them medically unsuitable for certain patients. The nominations state that nalbuphine HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDAs 070914 and 070918). FDA-approved nalbuphine HCl is marketed as both preservative-free and as preserved 10 mg/mL and 20 mg/mL solutions for intravenous, intramuscular, and subcutaneous administration.[39] [40]

a. Suitability of FDA-Approved Drug Product(s)

The nominations do not identify an attribute of each of the FDA-approved 10 mg/mL and 20 mg/mL nalbuphine HCl solutions for intravenous, intramuscular, and subcutaneous administration that makes them medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are

[34] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[35] See, *e.g.,* ANDA 073118 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/d693380f-94fa-46df-ad37-4ecf3c59b8b8/d693380f-94fa-46df-ad37-4ecf3c59b8b8.xml.*

[36] Per the label for ANDA 073118, the solution is preservative-free and is intended for intravenous or intramuscular administration.

[37] Metoclopramide is also FDA-approved as an oral solution, metered nasal spray, and tablet.

[38] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2298 and FDA–2013–N–1524–2292.

[39] See, *e.g.,* ANDA 070914 and 070918 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/f118d0a9-270f-4ced-ba4c-c62e32e0d635/f118d0a9-270f-4ced-ba4c-c62e32e0d635.xml* and *https://www.accessdata.fda.gov/spl/data/0e1346b6-7c47-4957-b0be-849a84b18a89/0e1346b6-7c47-4957-b0be-849a84b18a89.xml,* respectively.

[40] Per the labels for ANDA 070914 and 070918, single-dose products contain no bacteriostat or antimicrobial agent and unused portions must be discarded.

intended to address. Two commenters supported FDA's proposal not to include nalbuphine HCl on the 503B Bulks List. The commenters provided no new information supporting the clinical need for compounding from the bulk substance nalbuphine HCl.

Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using nalbuphine HCl and approved drug products containing nalbuphine HCl, there is nothing for FDA to evaluate under question 2. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that the drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

6. Potassium Acetate

Potassium acetate has been nominated for inclusion on the 503B Bulks List to compound drug products that facilitate electrolyte management.[41] The proposed route of administration is intravenous, the proposed dosage form is a solution, and the proposed concentration is 2 milliequivalents per milliliter (mEq/mL). The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of potassium acetate that is FDA-approved or identify an attribute of that formulation that makes it medically unsuitable for certain patients. The nominations state that potassium acetate might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* NDA 018896). FDA-approved potassium acetate is marketed as a 40 mEq/20 mL (2 mEq/mL) preservative-free solution for intravenous administration.[42] [43]

a. Suitability of FDA-Approved Drug Product(s)

The nominations do not identify an attribute of each of the FDA-approved 2 mEq/mL preservative-free solution products that makes them medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. Two commenters supported FDA's proposal not to include potassium acetate on the 503B Bulks List. The commenters provided no new information supporting the clinical need for compounding from the bulk substance potassium acetate. Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using potassium acetate and approved drug products containing potassium acetate, there is nothing for FDA to evaluate under question 2. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that the drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

7. Procainamide HCl

Procainamide HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat ventricular arrhythmia.[44] The proposed routes of administration are intramuscular and intravenous, the proposed dosage form is a solution, and the proposed concentrations are 100 mg/mL and 500 mg/mL. The nominators proposed to compound a preserved solution. However, they failed to acknowledge that there is a preserved formulation of procainamide HCl that is FDA-approved or identify an attribute of that formulation that makes it medically unsuitable for certain patients. The nominations state that procainamide HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 089069). FDA-approved procainamide HCl is marketed as 100 mg/mL and 500 mg/mL preserved solutions for intramuscular and intravenous administration.[45] [46]

a. Suitability of FDA-Approved Drug Product(s).

The nominations do not identify an attribute of each of the FDA-approved 100 mg/mL and 500 mg/mL preserved solutions that makes them medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. Two commenters supported FDA's proposal not to include procainamide HCl on the 503B Bulks List. Commenters provided no new information supporting the clinical need for compounding from the bulk drug substance procainamide HCl. Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using procainamide HCl and approved drug products containing procainamide HCl, there is nothing for FDA to evaluate under question 2. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that the drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

[41] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[42] See, *e.g.,* NDA 018896 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/28f98aef-8865-4faf-b491-a77b56513d5d/28f98aef-8865-4faf-b491-a77b56513d5d.xml.*

[43] Per the label for NDA 018896, the potassium acetate solution contains no bacteriostat, antimicrobial agent, or added buffer but may contain acetic acid for pH adjustment.

[44] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[45] See, *e.g.,* ANDA 089069 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/6918f728-6c39-4be9-b0f6-6eb5f12bbcaf/6918f728-6c39-4be9-b0f6-6eb5f12bbcaf.xml.*

[46] Per the label for ANDA 089069, each milliliter of the 2 mL vial contains procainamide hydrochloride 500 mg, methylparaben 1 mg, and sodium metabisulfite 1.8 mg added in water for injection, and may contain hydrochloric acid and/or sodium hydroxide for pH adjustment.

8. Sodium Bicarbonate

Sodium bicarbonate has been nominated for inclusion on the 503B Bulks List to compound drug products that treat various conditions, including metabolic acidosis, certain drug intoxications, severe diarrhea, and indigestion.[47] The proposed route of administration is intravenous, the proposed dosage forms are an injectable solution and injection solutions, and the proposed strengths range from 4.2 percent to 8.4 percent. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is an FDA-approved preservative-free formulation of sodium bicarbonate or identify an attribute of that formulation that makes it medically unsuitable for certain patients. The nominations state that sodium bicarbonate might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDAs 203449 and 202494). FDA-approved sodium bicarbonate is a single-dose, preservative-free 1 mEq/mL (8.4 percent) solution for intravenous administration. [48] [49] [50]

a. Suitability of FDA-Approved Drug Product

The nominations do not identify an attribute of the FDA-approved drug products, including the single-dose, preservative-free 1 mEq/mL (8.4 percent) solution, that makes them medically unsuitable to treat certain patients and that the proposed compounded drug products are intended to address. Two commenters supported FDA's proposal not to include sodium bicarbonate on the 503B Bulks List. Commenters provided no new information supporting the clinical need for compounding from the bulk drug substance sodium bicarbonate. Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved product that makes it medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that the proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

The nominations do not provide support for the position that the proposed sodium bicarbonate products with concentrations at or below 8.4 percent (1 mEq/mL) must be compounded from bulk drug substances rather than by diluting the FDA-approved drug product. Because no data or information was submitted supporting the need for a higher concentration, we have not considered whether a bulk drug substance must be used to compound a sodium bicarbonate drug product at concentrations higher than 8.4 percent. No comments provided support for the position that the proposed sodium bicarbonate products with concentrations at or below 8.4 percent (1 mEq/mL) must be compounded from bulk drug substances rather than by diluting the FDA-approved drug product. Several commenters stated that the ability to compound sodium bicarbonate using a bulk drug substance was crucial to address persistent drug shortages. However, as explained above, section 503B of the FD&C Act already provides for compounding from a bulk drug substance if the drug product compounded from such bulk drug substance is on the FDA drug shortage list at the time of compounding, distribution, and dispensing. The Agency does not interpret supply issues, such as shortages and backorders, to be within the meaning of ''clinical need'' for compounding with a bulk drug substance.[51] Other commenters asserted that there could be a benefit from using the bulk drug substance sodium bicarbonate to compound drug products to avoid the manipulations that the FDA-approved drug products that contain sodium bicarbonate require before they can be administered (*e.g.,* dilution or drawing the drug into a syringe before administration). One commenter proposes to compound ready-to-use products from bulk drug substances to seek improved efficiency for prescribers or healthcare providers and to address the possibility that the approved drug might be mishandled by a medical professional, neither of which falls within the meaning of clinical need to compound a drug product using a bulk drug substance.

Having considered these arguments, and because no further information was supplied regarding the clinical need for compounding from the bulk drug substance, FDA finds no basis to conclude that the drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

9. Sodium Nitroprusside

Sodium nitroprusside has been nominated for inclusion on the 503B Bulks List to compound drug products to treat acute decompensated heart failure and acute hypertension.[52] The proposed route of administration is an injection, the proposed dosage form is a solution, and the proposed concentration is 12.5 mg/mL. The nomination states that sodium nitroprusside might also be used to compound other drug products but does not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 209493). FDA-approved sodium nitroprusside is marketed as a 50 mg/2 mL (25 mg/mL) solution that must be diluted prior to injection. [53] [54]

a. Suitability of FDA-Approved Drug Products

Although the nominator proposes to make a drug product that has a lower concentration than the approved drug product with the same API, the nomination does not identify an attribute of each of the FDA-approved 50 mg/2 mL solution for dilution products that makes them medically unsuitable for certain patients or identify an attribute of the FDA-approved drug products that the proposed compounded drug product is intended to address. Two commenters supported FDA's proposal not to include sodium nitroprusside on the 503B Bulks List. Commenters provided no new information supporting the clinical need for compounding from the bulk drug substance sodium nitroprusside. Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products

[47] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298; see also Docket No. FDA–2015–N–3469, document no. FDA–2015–N–3469–0095.

[48] See, *e.g.,* ANDA 203449 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/0e955d36-928c-4f09-9b34-0cc954e5b1f4/0e955d36-928c-4f09-9b34-0cc954e5b1f4.xml.*

[49] Per the label for ANDA 203449, the solutions contain no bacteriostat, antimicrobial agent, or added buffer and are intended only for use as a single-dose injection.

[50] Sodium bicarbonate is also FDA-approved in combination with other ingredients as an injectable, solution for irrigation, and various oral formulations.

[51] See, *e.g.,* ''List of Bulk Drug Substances for Which There Is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act,'' 87 FR 4240 at 4248.

[52] See Docket No. FDA–2015–N–3469, document no. FDA–2015–N–3469–0238.

[53] See, *e.g.,* ANDA 209493 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/37060217-1ad1-462b-a1d0-7271c68ed881/37060217-1ad1-462b-a1d0-7271c68ed881.xml.*

[54] Sodium nitroprusside is also FDA-approved as a solution for intravenous administration.

that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

The nomination does not provide support for the position that drug products containing sodium nitroprusside must be compounded from bulk drug substances rather than using the FDA-approved drug products. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that the drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

10. Verapamil HCl

Verapamil HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat atrial fibrillation and flutter, hypertension, and paroxysmal supraventricular tachycardia, among other conditions.[55] The proposed route of administration is intravenous, the proposed dosage form is a solution, and the proposed concentration is 2.5 mg/mL. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of verapamil HCl that is FDA-approved or identify an attribute of that formulation that makes it medically unsuitable for certain patients. The nominations state that verapamil HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 070737). FDA-approved verapamil HCl is marketed as a preservative-free 5 mg/2 mL (2.5 mg/mL) solution for intravenous administration. [56] [57] [58]

a. Suitability of FDA-Approved Drug Products

The nominations do not identify an attribute of each of the FDA-approved preservative-free 5 mg/2 mL (2.5 mg/mL) solution products for intravenous administration that makes them medically unsuitable for certain patients or identify an attribute of the FDA-approved drug products that the proposed compounded drug products are intended to address. Two commenters supported FDA's proposal not to include verapamil HCl on the 503B Bulks List. Commenters provided no new information supporting the clinical need for compounding from the bulk drug substance verapamil HCl. Accordingly, FDA finds no basis to conclude that there is an attribute of the FDA-approved products that makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

b. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using verapamil HCl and FDA-approved drug products containing verapamil HCl, there is nothing for FDA to evaluate under question 2. No further information was supplied on this point during the comment period. Therefore, FDA finds no basis to conclude that drug products proposed to be compounded must be prepared using a bulk drug substance rather than an FDA-approved drug product.

IV. Other Issues Raised in Nominations and Comments

Two commenters expressed concern that nominations submitted before FDA issued the Clinical Need Guidance in March 2019 are disadvantaged in demonstrating clinical need because the nominators might not have fully understood FDA's thinking on clinical need when they submitted their nominations.[59] In addition, one commenter expressed concern that FDA is evaluating bulk drug substances for clinical need pursuant to a non-binding guidance document.

FDA disagrees with these comments. First, as explained in section II.B of this notice, FDA is evaluating bulk drug substances nominated for inclusion on the 503B Bulks List under the ''clinical need'' standard provided by the FD&C Act, as amended by the Drug Quality and Security Act in 2013.[60] The analysis under the statutory ''clinical need'' standard described in this notice is consistent with the approach described in FDA's Clinical Need Guidance. Second, the commenters fail to note the many opportunities that nominators and interested members of the public had to provide information supporting a clinical need to compound drug products containing the bulk drug substances that are the subject of this notice. As explained in section II.A, a public docket, FDA–2015–N–3469, is available for interested persons to submit nominations, including updated or revised nominations, or comments on nominated substances. Furthermore, during the comment periods for the September 2019 and July 2020 **Federal Register** notices, commenters had an additional opportunity to submit comments to the docket associated with those notices to provide additional supporting information for the bulk drug substances that are the subject of this notice, and many did so. Moreover, in response to a request from a commenter, FDA reopened the comment period on the July 2020 **Federal Register** notice for an additional 30 days to allow interested persons yet another opportunity to submit additional comments.

Three commenters on the bulk drug substances addressed in this notice asserted that FDA is regulating and interfering with the practice of medicine by not placing bulk drug substances on the 503B Bulks List despite some physicians wanting to prescribe drug products compounded from those bulk drug substances. FDA disagrees with these comments. The Agency's evaluation under the clinical need standard only regulates the ability of certain compounded drug products to reach the market and is well within the Agency's authorities.[61] The Agency is fulfilling its statutory mandate of regulating outsourcing facilities'

[55] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2298 and FDA–2013–N–1524–2292.

[56] See, *e.g.,* ANDA 070737 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/072b89b5-6d71-4f63-9686-d715d9256241/072b89b5-6d71-4f63-9686-d715d9256241.xml.*

[57] Per the label for ANDA 070737, the solution contains no bacteriostat or antimicrobial agent, is intended for single-dose intravenous administration, and may contain hydrochloric acid for pH adjustment.

[58] Verapamil HCl is also FDA-approved in various oral capsule and tablet formulations.

[59] See 84 FR 7383, which is available at *https://www.federalregister.gov/documents/2019/03/04/2019-03807/evaluation-of-bulk-drug-substances-nominated-for-use-in-compounding-under-section-503b-of-the.*

[60] See Public Law 113–54, section 102(a) (2013), which is available at *https://www.govinfo.gov/content/pkg/PLAW-113publ54/pdf/PLAW-113publ54.pdf.*

[61] See *United States* v. *Evers,* 643 F.2d 1043, 1048 (5th Cir. 1981) (''[W]hile the [FDCA] was not intended to regulate the practice of medicine, it was obviously intended to control the availability of drugs for prescribing by physicians.''); *United States* v. *Regenerative Scis., LLC,* 741 F.3d 1314, 1319–20 (D.C. Cir. 2014); (citing Evers and noting that the FDCA ''regulate[s] the distribution of drugs by licensed physicians''); *Gonzales* v. *Raich,* 545 U.S. 1, 28 (2005) (''the dispensing of new drugs, even when doctors approve their use must await federal approval.'').

production and distribution of compounded drug products, not interfering with physicians' clinical decisions regarding which drug products to prescribe. Indeed, a Federal court considered the very claim raised in these comments and determined that FDA's evaluation under the clinical need standard ''regulates the type of drug that reaches the marketplace,'' a decision that ''rests well within FDA's regulatory authority under the FDCA . . . and . . . does not intrude on the practice of medicine.'' [62]

Several commenters expressed concern that FDA is promoting the off-label use of FDA-approved drug products. FDA disagrees with this comment. In performing the clinical need evaluation, FDA asks a limited, threshold question to determine whether there might be a clinical need for a compounded drug product, by asking what attributes of the approved drug product the proposed compounded drug product would change and why. Asking this question helps ensure that if a bulk drug substance is included on the 503B Bulks List, it is to compound drug products that include a needed change to an approved drug product rather than to compound drug products without such a change. We do not suggest that the approved drug product or products prepared from it are approved for the use proposed by the nomination being evaluated.

One commenter expressed concern with FDA's decision to evaluate clinical need in the context of the specific drug products proposed to be compounded in the nomination. This commenter stated that requiring nominators to provide information on specific drug products is unnecessary to determine whether there is a clinical need for the bulk drug substance. This commenter also asserted that FDA should not evaluate bulk drug substances in the context of finished dosage forms for drug products. FDA disagrees with these comments. As explained in section I of this notice, section 503B of the FD&C Act limits the bulk drug substances that outsourcing facilities can use in compounding to those that are used to compound drugs in shortage or that appear on a list developed by FDA of bulk drug substances for which there is a clinical need.[63] Section 503B of the FD&C Act includes this limitation, among others, to help ensure that outsourcing facilities do not grow into conventional manufacturing operations making unapproved new drug products without complying with critical requirements, such as new drug approval. Outsourcing facilities, as opposed to other compounders, may compound and distribute drug products for ''office stock'' without first receiving a prescription for an individually identified patient [64] and without conditions on interstate distribution that are applicable to other compounded drugs (Ref. 4).[65] Because of these differences and others, section 503B of the FD&C Act places different conditions on drugs compounded by outsourcing facilities, including limitation on the outsourcing facilities' use of bulk drug substances, which are more stringent than those placed on other compounders' use of bulk drug substances.[66] The clinical need standard in section 503B of the FD&C Act requires FDA to perform a sorting function—to distinguish bulk drug substances for which there is a clinical need from those for which there is not—and this requires FDA to apply its expertise to consider whether there is a need for the finished drug product that would be compounded from the bulk drug substance. Indeed, a Federal court considered the very claim raised in these comments and determined that ''[o]nly when 'clinical need' is assessed against the availability and suitability of an approved drug does the term perform the classifying function that Congress intended.'' In reaching this view, the court found that only when the clinical need evaluation ''considers the actual way in which the active pharmaceutical ingredient supplies a therapeutic benefit—by its administration as a finished drug product—does the inquiry produce the categorization that Congress surely envisioned'' in enacting section 503B of the FD&C Act.[67] FDA's clinical need assessments help limit patient exposure to compounded drug products that have not been demonstrated to be safe and effective to those situations in which the compounded drug product is necessary for patient treatment. In addition, FDA's assessments preserve the incentives for applicants to invest in the research and testing required to obtain FDA approval and continue to manufacture FDA-approved drug products, thereby helping to maintain a supply of high-quality, safe, and effective drugs.

Some of the bulk drug substance nominations and comments discussed above asserted that there could be a benefit from using a bulk drug substance to compound drug products to avoid the manipulations that the FDA-approved drug products that contain these bulk drug substances require before they can be administered (*e.g.,* dilution or drawing the drug into a syringe before administration). As explained above, when a bulk drug substance is a component of an FDA-approved drug, we ask whether there is a basis to conclude that an attribute of each FDA-approved drug product makes each one medically unsuitable to treat certain patients for their condition, an interpretation that protects patients and the integrity of the drug approval process. The nominations proposing to compound drug products in ready-to-use form containing bulk drug substances in one or more FDA-approved drug products do not show

[62] *Athenex Inc.* v. *Azar,* 397 F. Supp. 3d 56, 72 (D.D.C. 2019).

[63] Section 503B(a)(2(A)(i) and (ii) of the FD&C Act.

[64] By contrast, to qualify for the exemptions in section 503A of the FD&C Act, drug products compounded by licensed pharmacists in State-licensed pharmacies or Federal facilities, or by licensed physicians, must be compounded based on the receipt of a valid prescription for an individually identified patient. This means that for drug products compounded under section 503A to meet the conditions of that section and qualify for the exemptions in the statute, the pharmacist or physician compounding under section 503A of the FD&C Act must compound either: (1) after receiving a valid prescription for an identified, individual patient or (2) before receiving a patient-specific prescription, in limited quantities, based on a history of receiving valid orders generated solely within the context of an established relationship with the patient or prescriber. See FDA's final guidance for industry ''Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act'' (December 2016).

[65] For drug products compounded under section 503A of the FD&C Act to meet the conditions of that section and qualify for the exemptions in the statute, drug products must be compounded in a State: (i) that has entered into a memorandum of understanding with the Secretary which addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a State agency of complaints relating to compounded drug products distributed outside such State; or (ii) that has not entered into the memorandum of understanding described in clause (i) and the licensed pharmacist, licensed pharmacy, or licensed physician distributes (or causes to be distributed) compounded drug products out of the State in which they are compounded in quantities that do not exceed 5 percent of the total prescription orders dispensed or distributed by such pharmacy or physician (see section 503A(b)(3)(a)(B)(i) and (ii) of the FD&C Act).

[66] Licensed pharmacies and physicians who compound drugs under the conditions of section 503A of the FD&C Act, including the requirement to compound drugs only pursuant to a prescription for an identified individual patient, may use many bulk drug substances by operation of the statute, without action by FDA. See section 503A(b)(1)(A)(i)(I) and (II) of the FD&C Act (providing that a drug product may be compounded consistent with the exemptions in section 503A of the FD&C Act if the licensed pharmacist or licensed physician compounds the drug product using bulk drug substances that comply with the standards of an applicable USP or NF monograph, if a monograph exists, and the USP chapters on pharmacy compounding; or if such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary).

[67] *Athenex Inc.* at 65.

that the FDA-approved drug product, when not manufactured in the ready-to-use form, is medically unsuitable for certain patients. Nor do the nominations and comments establish that drug products in the relevant concentrations, including ready-to-use products, cannot be prepared from the FDA-approved drug products. Rather, they propose to compound a ready-to-use product from bulk drug substances to seek improved efficiency for prescribers or healthcare providers, or to address the possibility that the FDA-approved drug might be mishandled by a medical professional, neither of which falls within the meaning of clinical need to compound a drug product using a bulk drug substance.

Two commenters requested changes to the Interim Policy. These comments are outside the scope of FDA's bulk drug substance evaluations and decisions that are the subject of this notice. FDA welcomes public comments on its guidance documents that address human drug compounding. Comments on the Interim Policy may be submitted to the docket for the guidance, Docket No. FDA–2015–D–3539, at any time at *https://www.regulations.gov.*

V. Conclusion

For the reasons stated above, we find that there is a clinical need for outsourcing facilities to compound drug products using the bulk drug substance quinacrine HCl for oral use only, and therefore we are now including it on the 503B Bulks List. In addition, we find that there is no clinical need for outsourcing facilities to compound using the bulk drug substances hydroxyzine HCl, mannitol, methacholine chloride, metoclopramide HCl, nalbuphine HCl, potassium acetate, procainamide HCl, sodium bicarbonate, sodium nitroprusside, and verapamil HCl, and therefore we are not including these bulk drug substances on the 503B Bulks List.

VI. References

The following references are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA, Guidance for Industry, ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act,'' January 2017 (available at *https://www.fda.gov/media/94402/download*).
2. FDA, Guidance for Industry, ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act,'' March 2019 (available at *https://www.fda.gov/media/121315/download*).
3. FDA Memorandum to File, ''Clinical Need for Quinacrine Hydrochloride in Compounding Under Section 503B of the FD&C Act,'' March 2021.
4. FDA Guidance for Industry, ''Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act,'' December 2016 (available at *https://www.fda.gov/media/97347/download*).

Dated: April 3, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–07237 Filed 4–5–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; Practice-Based Research in Dental Schools.

Date: May 11, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yun Mei, MD, Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892, (301) 827–4639, *yun.mei@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: April 3, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–07217 Filed 4–5–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; FFRDC Review Meeting.

Date: May 4–5, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, Ph.D., Associate Director, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850, 240–276–6442, *ss537t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI SPORE (P50) Review SEP–I.

Date: May 18, 2023.

Time: 9:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: John Paul Cairns, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850, 240–276–5415, *paul.cairns@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Epidemiology Cohort Studies.
Date: May 18, 2023.
Time: 10:00 a.m. to 3:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W236, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Shuli Xia, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W236, Rockville, Maryland 20850, 240–276–5256, *shuli.xia@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–4: NCI Clinical and Translational Cancer Research.
Date: May 23–24, 2023.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850 (Virtual Meeting).
Contact Person: Ombretta Salvucci, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850, 240–276–7286, *salvucco@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Prevent TEP–3.
Date: May 23, 2023.
Time: 11:00 a.m. to 4:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI SPORE (P50) Review SEP–II.
Date: May 24, 2023.
Time: 9:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W634, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Michael E. Lindquist, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W634, Rockville, Maryland 20850, *mike.lindquist@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Prevent TEP–1.
Date: May 24, 2023.
Time: 11:00 a.m. to 2:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850, 240–276–5856, *nadeem.khan@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project (P01) SEP–A.
Date: May 25–26, 2023.
Time: 9:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Anita T. Tandle, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–276–5085, *tandlea@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Transition Career Development Award and Institutional Research Training Grants.
Date: May 25, 2023.
Time: 10:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Adriana Stoica, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W234, Rockville, Maryland 20850, 240–276–6368, *Stoicaa2@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Cannabis Use During Treatment.
Date: May 25, 2023.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850, 240–276–7975, *chufanee@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Prevent TEP 2.
Date: May 26, 2023.
Time: 11:00 a.m. to 3:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850, 240–276–5856, *nadeem.khan@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–1: NCI Clinical and Translational Cancer Research.
Date: June 1, 2023.
Time: 10:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Virtual Meeting).
Contact Person: Clifford W Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project (P01) SEP–C.
Date: June 8–9, 2023.
Time: 10:00 a.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove 9609 Medical Center Drive, Room 7W618 Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: E. Tian, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850, 240–276–6611, *tiane@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project (P01) SEP–B.
Date: June 12–13, 2023.
Time: 9:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive Room 7W120, Rockville, Maryland 20850, 240–276–6457, *mh101v@nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; Career Development Study Section (J) (NCI).
Date: June 28–29, 2023.
Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850, 240–276–6132, *tushar.deb@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: April 3, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–07213 Filed 4–5–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Cancellation of Meeting

Notice is hereby given of the cancellation of the National Library of Medicine Board of Scientific Counselors, April 27, 2023, 11 a.m. to 5 p.m., Virtual Meeting, which was published in the **Federal Register** on October 6, 2022, 87 FR 193, Page Number 60696.

This notice is being amended to announce that the meeting is cancelled and will not be rescheduled.

Dated: March 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–07160 Filed 4–5–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Council on Aging, May 16, 2023, 02:00 p.m. to May 17, 2023, 02:30 p.m., National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 which was published in the **Federal Register** on December 28, 2022, 321142.

The meeting notice is amended to change the start time of the meeting from 10:00 a.m., to 9:00 a.m. on the second day May 17, 2023. The end time will also change from 2:30 p.m. to 1:30 p.m. on May 17, 2023. The meeting is Partially Closed to the public.

Dated: March 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–07161 Filed 4–5–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Manufacture, Distribution, Sale and Use of T-Cell-Based Immunotherapies for Solid Tumors

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development and the National Cancer Institute, both institutes of the National Institutes of Health, Department of Health and Human Services, are contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this Notice to EnZeta Inc. of the State of Delaware.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before April 21, 2023 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Richard T. Girards, Jr., Esq., MBA, Senior Technology Transfer Manager, National Institutes of Health, NCI Technology Transfer Center by email (*richard.girards@nih.gov)* or phone (240–276–6825).

SUPPLEMENTARY INFORMATION:

Intellectual Property

E–010–2021: Enhanced Antigen Reactivity of Immune Cells Expressing a Mutant Non–Signaling CD3 Zeta Chain

1. United States Provisional Patent Application No. 63/113,428, filed 13 November 2020 (HHS Reference No. E–010–2021–0–US–01);

2. International Patent Application No. PCT/US2021/059109, filed 12 November 2021 (HHS Reference No. E–010–2021–0–PCT–02); and

3. any and all other U.S. and ex-U.S. patents and patent applications claiming priority to any one of the foregoing, now or in the future.

The patent and patent application rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide and the fields of use may be limited to the following: manufacture, distribution, sale and use of T-cell-based immunotherapies for solid tumors.

These technologies disclose, *e.g.,* cells expressing a modified CD3 subunit chain comprising at least one ITAM deletion. The inventive cells and populations thereof can be formulated into a composition, such as a pharmaceutical composition. Such cells and compositions thereof can be utilized to treat a wide variety of conditions, including but not limited to the indications within the scope of the contemplated exclusive license.

This Notice is made in accordance with 35 U.S.C. 209 and 37 CFR 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published Notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information from these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: March 30, 2023.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2023–07117 Filed 4–5–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2023 Notice of Supplemental Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, Department of Health and Human Services (HHS).

ACTION: Notice of intent to award supplemental funding.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) is supporting administrative supplements in scope of the parent award for the 11 eligible grant recipients funded in FY 2017, under the Addiction Technology Transfer Centers (ATTC) Cooperative Agreements, Notice of Funding Opportunity (NOFO) TI–17–005. Recipients may receive up to $743,757 each, for a total of $8,181,327. These recipients have a current project end date of September 29, 2023. The supplemental funding will extend the project period by one-year and will continue training and technical assistance for providers who are serving patients with substance use disorder by improving their capacity and understanding of evidence-based practices, especially practices that are effective in combating substance misuse, including the opioid crisis.

FOR FURTHER INFORMATION CONTACT: Twyla Adams, Senior Public Health Advisor, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857, telephone: 240–2761576; email: *Twyla.Adams@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: FY 2017 Addiction Technology Transfer Centers Cooperative Agreements NOFO TI–17–005.

Assistance Listing Number: 93.243.

Authority: Section 509 of the Public Health Service Act, as amended.

Justification: Eligibility for this supplemental funding is limited to the 10 ATTC Regional Centers and ATTC National Coordinating Office funded in FY 2017, under the ATTC Cooperative Agreements funding announcement TI–17–005, as they are currently providing nationally- and regionally-focused treatment and recovery training activities, which will continue to be funded through this supplement.

This is not a formal request for application. Assistance will only be provided to the 10 ATTC Regional Centers and ATTC National Coordinating Office recipients based on the receipt of a satisfactory application and associated budget that is approved by a review group.

Dated: March 31, 2023.

Carlos Castillo,

ECSB Acting Branch Chief, SAMHSA.

[FR Doc. 2023–07131 Filed 4–5–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2023 Notice of Supplemental Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, Department of Health and Human Services (HHS).

ACTION: Notice of intent to award supplemental funding.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) is supporting administrative supplements in scope of the parent award for the 11 eligible grant recipients funded in FY 2019 under the Prevention Technology Transfer Centers (PTTCs) Cooperative Agreements, Notice of Funding Opportunity (NOFO) SP–19–001. The PTTC National Coordinating Center may receive up to $493,966 and the 10 PTTC Regional Centers may receive up to $600,000 each for a total of $6,492,160. These recipients have a project end date of September 29, 2023. The supplemental funding will extend the project period by one-year and will continue providing training and technical assistance services and quality improvement activities to the substance abuse prevention workforce including professionals and pre-professionals, organizations, and others in the prevention community.

FOR FURTHER INFORMATION CONTACT: Thia Walker, DrPH., Public Health Advisor, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857, telephone 240–276–1835; email: *Thia.Walker@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: FY 2019 Prevention Technology Transfer Centers Cooperative Agreements SP–19–001.

Assistance Listing Number: 93.243.

Authority: Section 509 of the Public Health Service Act, as amended.

Justification: Eligibility for this supplemental funding is limited to the ten PTTC Regional Centers and PTTC National Coordinating Office funded under the PTTC Cooperative Agreements funding announcement SP–19–001, as they are currently providing nationally- and regionally-focused training and technical assistance services and quality improvement activities to the substance abuse prevention workforce including professionals and pre-professionals, organizations, and others in the prevention community, which will continue to be funded through this supplement.

This is not a formal request for application. Assistance will only be provided to the 10 PTTC Regional Centers and PTTC National Coordinating Center recipients based on the receipt of a satisfactory application and associated budget that is approved by a review group.

Dated: March 31, 2023.

Carlos Castillo,

ECSB Acting Branch Chief, SAMHSA.

[FR Doc. 2023–07130 Filed 4–5–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2023 Notice of Supplemental Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, Department of Health and Human Services (HHS).

ACTION: Notice of intent to award supplemental funding.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) is supporting administrative supplements in scope of the parent award for the 11 eligible grant recipients funded in FY 2018 under the Mental Health Technology Transfer Centers (MHTTCs) Cooperative Agreements, Notice of Funding Opportunity (NOFO) SM–18–005. The MHTTC National Coordinating Center may receive up to $900,000 and the 10 MHTTC Regional Centers may receive up to $1,045,454 each. These recipients have a project

end date of September 29, 2023. The supplemental funding will extend the project period by one-year and will continue to support resource development and dissemination, training and technical assistance, and workforce development to the field and provide direct technical assistance and training on the delivery of mental health services in schools and school systems to CMHS Project AWARE grantees.

FOR FURTHER INFORMATION CONTACT: Kimberly E. Reynolds, MPA, MEd, Public Health Advisor and Project Officer, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857, telephone (240) 276–2825; email: *Kimberly.Reynolds@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: FY 2018 Mental Health Technology Transfer Centers Cooperative Agreements SM–18–015.

Assistance Listing Number: 92.243.

Authority: Section 520A of the Public Health Service Act, as amended.

Justification: Eligibility for this supplemental funding is limited to the 10 MHTTC Regional Centers and MHTTC National Coordinating Office funded under the MTTC Cooperative Agreements funding announcement SM–18–005, as they are currently providing nationally- and regionally-focused training and technical assistance services, resource development and dissemination, and workforce development to the field and CMHS grant recipients, which will continue to be funded through this supplement.

This is not a formal request for application. Assistance will only be provided to the 10 MHTTC Regional Centers and MHTTC National Coordinating Center recipients based on the receipt of a satisfactory application and associated budget that is approved by a review group.

Dated: March 31, 2023.

Carlos Castillo,

ECSB Acting Branch Chief, SAMHSA.

[FR Doc. 2023–07132 Filed 4–5–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket Number USCG–2023–0100]

Consolidation of Redundant Coast Guard Boat Stations

AGENCY: Coast Guard, DHS.

ACTION: Request for comments.

SUMMARY: The Coast Guard requests public comments on the planned consolidation of three redundant, seasonally operated Coast Guard boat stations and the seasonalization of one Coast Guard boat station. As modern boat operating speeds rise and navigation technology improves, the Coast Guard can respond to incidents with multiple units significantly faster than when these boat stations were first established. The combination of significantly improved response times, along with an overall reduction in rescue calls due to boating safety improvements throughout the Nation, has resulted in a number of boat stations becoming redundant. This consolidation will result in a more robust response system by increasing staffing levels and capacity at select nearby boat stations. The seasonalization of a unit shifts the Coast Guard's response to Search and Rescue cases from a more robustly staffed nearby boat station during the winter months.

DATES: Written comments and related material may be submitted to the Coast Guard personnel specified below. Your comments and related material must reach the Coast Guard on or before June 4, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0100 using the Federal rulemaking portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document, please call or email Todd Aikins, Coast Guard Office of Boat Forces, 202–372–2463, *todd.r.aikins@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
GAO Government Accountability Office

II. Background and Purpose

In October of 2017, the GAO issued report GAO–18–9, titled ''Actions Needed to Close Stations Identified as Overlapping and Unnecessarily Duplicative.'' This GAO report, a copy of which is in the docket for this notice, recommends the consolidation of 18 boat stations. Due to environmental and operational factors, the Coast Guard is not considering all 18 boat stations identified in the GAO report for consolidation this year. Instead, we anticipate consolidating three stations, with implementation notionally scheduled for fiscal year 2023. These stations have been identified because there are other units nearby capable of responding to cases in these areas, and because these three stations respond to a low number of cases. We do not anticipate any adverse effect on Coast Guard response capability. We expect enhanced proficiency of boat operators as well as a less complicated response system.

III. Discussion

The following seasonal stations have been identified for consolidation with neighboring stations: Stations-Small Block Island, RI; Ocracoke, NC; and Sackets Harbor, NY. These seasonal stations are detached subunits of larger parent stations. In addition, Station-Small East Moriches, NY, has been identified for seasonalization, which means operating from this location during the peak boating season. This station was historically operated seasonally but has been operating year-round without appropriate resources. It will return to its seasonal status.

These actions would create synergy and more opportunities for boat operators to properly train instead of missing training opportunities while standing ready to respond to calls that do not come. Consolidation would allow the Coast Guard to operate more efficiently by not pre-positioning boats and crews in areas that don't have a SAR caseload in the winter months.

IV. Public Participation and Request for Comments

We encourage you to submit comments through the Federal portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. In your submission, please include the docket number for this notice and provide a reason for each suggestion or recommendation. We will review all comments received, but we may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Documents mentioned in this notice as being available in the docket, and public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions.

Dated: March 31, 2023.

Jason C. Aleksak,

Captain, U.S. Coast Guard, Chief, Office of Boat Forces.

[FR Doc. 2023–07148 Filed 4–5–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2022–0047]

Port Access Route Study: Approaches to Maine, New Hampshire, and Massachusetts

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability; final report.

SUMMARY: The First Coast Guard District announces the completion of the Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study (MNMPARS). This study was conducted to evaluate the adequacy of existing vessel routing measures and determine whether additional vessel routing measures are necessary for port approaches to Maine, New Hampshire, and Massachusetts and international and domestic transit areas in the First Coast Guard District area of responsibility. The MNMPARS considered whether routing measure revisions were necessary to improve navigation safety due to several factors such as planned or potential offshore development, current port capabilities and planned improvements, increased vessel traffic, changing vessel traffic patterns, weather, or navigational difficulty. The MNMPARS final report is available for viewing and download from the **Federal Register** docket at *http://www.regulations.gov* or at the Coast Guard Navigation Center (NAVCEN) website at *https://www.navcen.uscg.gov/port-access-route-study-reports.* The recommendations of this study may lead to future rulemakings or appropriate international agreements.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, call or email LTJG Thomas Davis, First Coast Guard District (dpw), U.S. Coast Guard: telephone (617) 223–8632, email *SMB-D1Boston-MNMPARS@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

BOEM Bureau of Ocean Energy Management
DHS Department of Homeland Security
MNMPARS Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study
NAVCEN United States Coast Guard Navigation Center
NEPA National Environmental Policy Act
OREI Offshore Renewable Energy Infrastructure
PARS Port Access Route Study
TSS Traffic Separation Scheme
USCG United States Coast Guard

II. Background and Purpose

Under section 70003 of title 46 of the United States Code (46 U.S.C. 70003(c)), the Commandant of the U.S. Coast Guard (USCG) may designate necessary fairways and traffic separation schemes (TSSs) to provide safe access routes for vessels proceeding to and from U.S. ports. The designation of fairways and TSSs recognizes the paramount right of navigation over all other uses in the designated areas.

Before establishing or adjusting fairways or TSSs, the USCG must conduct a Port Access Route Study (PARS), *i.e.,* a study of potential traffic density and the need for safe access routes for vessels. Through the study process, the USCG must coordinate with federal, state, tribal, and foreign state agencies (where appropriate) and consider the views of maritime community representatives, environmental groups, and other stakeholders. The primary purpose of this coordination is, to the extent practicable, to reconcile the need for safe access routes with other reasonable waterway uses such as anchorages, construction, operation of renewable energy facilities, marine sanctuary operations, commercial and recreational activities, and other uses.

A. When was the MNMPARS conducted? On March 31, 2022, the Coast Guard commenced the Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study (MNMPARS) by publishing a 45-day Notice of Study; request for comments in the **Federal Register** (87 FR 18800). The purpose of the MNMPARS was to evaluate the adequacy of existing vessel routing measures and determine whether additional vessel routing measures are necessary for port approaches to Maine, New Hampshire, and Massachusetts and international and domestic transit areas in the First Coast Guard District area of responsibility.

On June 28, 2022, the First Coast Guard District published a 60-day notification of Inquiry and Public Meetings; request for comments (87 FR 38418). This supplemental notice announced a schedule for six public meetings and sought additional public comments concerning more specific navigational safety issues. The notification requested responses to several general and port-specific questions that were based on analysis of historical traffic data and public comments received from the original Notice of Study. Of the six public meetings, four were conducted in both in-person and virtual formats, one was in-person only, and one was virtual only.

On January 3, 2023, the First Coast Guard District published a Notice of Availability of Draft Report; request for comments (88 FR 83). Due to a publication error, an additional notice (88 FR 2108) was issued on January 12, 2023, to ensure the public was afforded a full 30-day comment period.

A total of 42 comments were received during the study's 135 days of open comment period. Comments were submitted by representatives of the maritime community, federal and state governmental agencies, environmental groups, non-governmental organizations, and other stakeholders. Comments were provided during public meetings, via email, and submitted directly to the electronic docket. Oral comments provided during public meetings can be viewed in the individual meeting recordings posted to the ''Documents'' section of the public docket.

B. What is the study area? The study area includes regions of the Gulf of Maine, New Hampshire Seacoast, and Massachusetts Bay; an approximate 20,500 square nautical mile area. Specific geographic positions and a graphic representation of the study area can be found in the MNMPARS report.

C. How did the First Coast Guard District conduct this PARS? The First Coast Guard District conducted the MNMPARS in accordance with the Ports and Waterways Safety Act (PWSA), employing methodology from applicable USCG policies including the framework outlined in Appendix D of USCG Commandant Instruction (COMDTINST) 16003.2B, *Marine Planning to Operate and Maintain the Marine Transportation System (MTS) and Implement National Policy.*

D. Conclusions and proposed actions. The First Coast Guard District concluded that environmental factors, changes in fishery management and species distributions, port development projects, and offshore renewable energy infrastructure may result in the introduction of larger vessel classes,

increased traffic densities, and displacement of traditional transit routes. To mitigate a heightened risk of marine casualties, the First Coast Guard District provided 10 proposed actions within the MNMPARS report including implementation of 5 shipping safety fairways and 5 recommendations related to the siting and impact of offshore wind energy turbines.

III. Viewing the Report and Related Comments

To view the final MNMPARS report in the docket, go to *https://www.regulations.gov/,* and insert ''USCG–2022–0047'' in the ''search box''. Click ''Search''. Then, scroll to find the document entitled ''FINAL REPORT Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study'' under the document type ''Supporting & Related Material.''

The MNMPARS report is also available from the NAVCEN website at *https://www.navcen.uscg.gov/port-access-route-study-reports.*

A. *How do I find and browse comments and documents posted to the docket?* On the previous version of *Regulations.gov*, users browsed for comments on the Docket Details page. However, since comments are made on individual documents, not dockets, new *Regulations.gov* organizes comments under their corresponding document. To access comments and documents submitted to the MNMPARS go to *https://www.regulations.gov/* and insert ''USCG–2022–0047'' in the ''search box.'' Click ''Search.'' Then scroll down to and click on the most recent ''notice'' entitled ''Port Access Route Study: Approaches to Maine, New Hampshire, and Massachusetts.'' This will open to the ''Document Details'' page. Then click on the ''View Related Comments'' tab or the ''View More Documents'' tab to view all the comments and documents posted to the MNMPARS.

B. If you need additional help navigating the new Regulations.gov. For additional step by step instructions to view submitted comments or other documents please see the Frequently Asked Questions (FAQs) at *https://www.regulations.gov/faqs* or call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

C. *Privacy Act:* Anyone can search the electronic form of comments received into any of our dockets 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 a Privacy Act, system of records notice regarding DHS's eRulemaking in the March 11, 2020, issue of the **Federal Register** (85 FR 14226).

IV. Future Actions

As detailed in the final report, the First Coast Guard District recommends that multiple shipping safety fairways be implemented within the MNMPARS study area. Coast Guard Headquarters Assistant Commandant for Prevention, Office of Navigation Systems (CG–NAV) will consider these recommendations and determine whether to move forward with the rulemaking process.

Under the National Environmental Policy Act (NEPA), the Coast Guard serves as a cooperating agency to the Bureau of Ocean Energy Management (BOEM). In this capacity, the First Coast Guard District has and will continue to coordinate with BOEM throughout the various stages of planning and development of offshore renewable energy infrastructure (OREI) within the study area and will provide evaluations of the potential impacts any proposed OREI may have on the Marine Transportation System, safety of navigation, traditional waterway uses, and the Coast Guard's ability to conduct its 11 statutory missions.

The First Coast Guard District actively monitors all waterways subject to its jurisdiction to help ensure navigation safety. As such, the First Coast Guard District will continue to monitor the area of study for changing conditions and consider appropriate actions to promote waterway and user safety.

This notice is published under the authority of 5 U.S.C. 552(a).

Dated: March 27, 2023.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard Commander, First Coast Guard District.

[FR Doc. 2023–07149 Filed 4–5–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

[233D0102DM, DS6CS00000, DLSN00000.000000, DX.6CS25, DX6CS25, OMB Control No. 1093–0010]

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Youth Conservation Corps Application and Medical History

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Department of the Interior (Interior), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before June 5, 2023.

ADDRESSES: Send your comments on this ICR by mail to Jeffrey Parrillo, Departmental Information Collection Clearance Officer, 1849 C Street NW, Washington, DC 20240; or to *Jeffrey_Parrillo@ios.doi.gov* (email); or by at 202–208–7072 (telephone). Please reference OMB Control Number 1093–0010 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR by mail, contact George McDonald, Youth Programs Manager, Washington DC Area Support Office (WASO) or by email at *george_mcdonald@nps.gov;* or by telephone at (202) 208–3329. Please reference OMB Control Number 1093–0010 in the subject line of your comments. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provides the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the National Park Service (NPS); (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the NPS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the NPS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Youth Conservation Corps (YCC) is a summer youth employment program that engages young people in meaningful work experiences at national parks, forests, wildlife refuges, and fish hatcheries while developing an ethic of environmental stewardship and civic responsibility. YCC programs are generally eight to ten weeks and members are paid at least the state or federal minimum wage (whichever is higher) for a 40-hour work week. YCC opportunities provide paid daytime work activities with members who commute to the federal unit daily. Authorized by the Youth Conservation Corps Act of August 13, 1970, as amended (U.S. 1701–1706), participating agencies (National Park Service, U.S. Fish and Wildlife Service, Forest Service) use common forms: DI–4014, ''Youth Conservation Corps Application'' and DI–4015, ''Youth Conservation Corps Medical History'' to collect information to determine the eligibility of each youth for employment with the YCC. Parents or guardians must sign both forms if the applicant is under 18 years of age.

Title of Collection: Youth Conservation Corps Application and Medical History Form.

OMB Control Number: 1093–0010.

Form Number: DI–4014, ''Youth Conservation Corps Application,'' and DI–4015, ''Youth Conservation Corps Medical History Form.''

Type of Review: Renewal of a currently approved collection.

Respondents/Affected Public: Youth 15 through 18 years old seeking seasonal employment in the YCC Program.

Total Estimated Number of Annual Respondents: 11,409 (8,599/application 2,810/medical history).

Estimated Completion Time per Response: 25 minutes/application and 14 minutes/medical history form.

Total Estimated Number of Annual Burden Hours: 4,239 hours (3,583 hours/application and 656 hours/medical history forms).

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: None.

An agency may not conduct, or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Jeffrey Parrillo,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–07218 Filed 4–5–23; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM930000.L14400000.BJ0000.BX0000]

Notice of Filing of Plats of Survey; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed 30 days after the date of this publication in the Bureau of Land Management (BLM), New Mexico Office, Santa Fe, New Mexico. The surveys announced in this notice are necessary for the management of lands administered by the agency indicated.

ADDRESSES: These plats will be available for inspection in the New Mexico Office, Bureau of Land Management, 301 Dinosaur Trail, Santa Fe, New Mexico 85004–4427. Protests of a survey should be sent to the New Mexico Director at the above address.

FOR FURTHER INFORMATION CONTACT: Michael J. Purtee, Chief Cadastral Surveyor; (505) 761–8903; *mpurtee@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat, in four sheets, representing the dependent resurvey, survey, and metes and bounds surveys in the Canada de Cochiti Grant, the dependent resurvey in the Cochiti Pueblo Grant, the dependent resurvey and metes and bounds survey in Township 17 North, Range 5 East, and the original survey in Township 17 North, Range 6 East, accepted March 31, 2023, for Group 1203, New Mexico.

This plat was prepared at the request of the Bureau of Indian Affairs, Southwest Regional Office, New Mexico.

The plat, representing the dependent resurvey and survey, Township 19 North, Range 5 West, accepted March 20, 2023, for Group 1210, New Mexico.

This plat was prepared at the request of the Bureau of Indian Affairs, Navajo Regional Office, New Mexico.

The supplemental plat, within Township 21 South, Range 26 East, accepted February 21, 2023, for Group 1212, New Mexico.

This plat was prepared at the request of the Bureau of Land Management, Carlsbad Field Office, New Mexico.

A person or party who wishes to protest against any of these surveys must file a written notice of protest within 30 calendar days from the date of this publication with the New Mexico Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within 30 days after the protest is filed. Before including your address, or other personal information in your protest, please be aware that your entire protest, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. chap. 3.

Michael J. Purtee,

Chief Cadastral Surveyor of New Mexico.

[FR Doc. 2023–07242 Filed 4–5–23; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF INTERIOR

Bureau of Land Management

[BLM_UT_FRN_MO4500169560]

Notice of Temporary Restrictions on Motorized Vehicle Use for Specified Routes on Public Lands in Grand County, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of temporary restrictions.

SUMMARY: As authorized under the provisions of the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) is giving notice that temporary restrictions will be in effect on approximately 77 miles of routes crossing public lands administered by the Moab Field Office, to protect public land resources, reduce user conflicts, and minimize health and safety concerns during the Red Rock 4-Wheelers Incorporated's annual Easter Jeep Safari, approved under a 10-year Special Recreation Permit (SRP).

DATES: This action is in effect for the nine-day period prior to and including Easter each year from 2023 through 2032 for the Easter Jeep Safari. The Easter Jeep Safari route restrictions will take place April 1 through April 9, 2023.

ADDRESSES: Prior to the event every year, the BLM will post the dates for the Easter Jeep Safari, the dates of the temporary restrictions, and a map of the affected area at route trailheads at the Moab Field Office, 82 East Dogwood Avenue, Moab, Utah 84532, and the Moab Field Office's website: *www.blm.gov/office/moab-field-office.* The dates are also available upon request. Signs will also be placed along entrance roads for these routes (State Route 279 and Kane Creek Road) to inform users of the route restrictions prior to the event.

FOR FURTHER INFORMATION CONTACT: Jennifer Jones, Assistant Field Manager, Recreation, Moab Field Office, at email: *blm_ut_mb_mail@blm.gov,* the address above, or by telephone (435) 259–2100. 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: On Dec. 23, 2022, the BLM issued a decision record to renew Red Rock 4-Wheelers, Inc.'s, SRP for its annual Easter Jeep Safari organized event for a period of 10 years. This decision record also granted to Red Rock 4-Wheelers, Inc., exclusive motorized use of seven routes on public lands administered by the Moab Field Office during the event. Finally, the decision record limited two additional routes in this area to one-way travel during the event.

Based on an environmental assessment (DOI–BLM–UT–Y010–2022–0042–EA), the BLM concluded that limiting use of these seven routes exclusively to permitted motorized users and allowing only one-way travel on two additional routes for the nine-day period of the annual Easter Jeep Safari would prevent potential damage to wilderness characteristics, water quality, soils, visual resources, and vegetation by decreasing the amount of traffic concentrated on these narrow dirt routes. Additionally, it would decrease user conflict, while providing for a more-enjoyable experience during the annual Easter Jeep Safari for those motorized users holding an SRP. Similarly, one-way travel of two additional routes would reduce impacts to water quality, soils, visual resources, and vegetation by eliminating passing, which results in road widening. In addition, one-way travel would mitigate crowding along these two narrow routes, lessen user conflicts, and provide for a better experience for those motorized users holding an SRP.

Exclusive Use

During the nine-day restriction period, the Behind the Rocks, Cliff Hanger, Gold Bar Rim, Golden Spike, Moab Rim, Poison Spider Mesa, and Pritchett Canyon routes will be for the exclusive motorized use of Easter Jeep Safari participants and other commercial users with authorized SRPs valid for activities on these routes while official, scheduled event rides are occurring. When these routes are not in use for such rides, they will be open for public motorized use. Non-motorized uses on these routes will not be restricted.

One-Way Travel: During the nine-day restriction period, the Kane Creek Canyon and Steelbender routes will be restricted to one-way travel. On Kane Creek Canyon, motorized use must occur one-way from north to south (*i.e.,* from the Hurrah Pass/Kane Creek Canyon junction south to the end of the route at U.S. Highway 191). For the Steelbender route, motorized use must occur one-way from north to south (*i.e.,* from the Moab Golf Club area entry south to the southern end of the route near Flat Pass and Ken's Lake). This restriction applies to all motorized users for the entirety of the event.

Exceptions

Restrictions do not apply to motorized vehicle use by medical and rescue personnel in the performance of their official duties; official United States military and Federal, State, and local law enforcement purposes; Federal, State, and local officers and employees in the performance of their official duties; vendors with a valid BLM SRP; or as otherwise authorized by the BLM. Use of electric wheelchairs is also exempt.

Enforcement

Any person who violates the temporary restrictions may be tried before a United States Magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Utah law.

(Authority: 43 CFR 8360.0–7 and 43 CFR 8364.1)

Lance Porter,

Acting State Director.

[FR Doc. 2023–07228 Filed 4–5–23; 8:45 am]

BILLING CODE 4331–25–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 231S180110; S2D2S SS08011000 SX064A000 23XS501520; OMB Control Number 1029–0067]

Submission to the Office of Management and Budget for Review and Approval; Restrictions on Financial Interests of State Employees

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before June 5, 2023.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 4556–MIB, Washington, DC 20240, or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0067 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at 202–208–2716. 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. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Respondents are state employees who supply information on employment and financial interests. The purpose of the collection is to ensure compliance with section 517(g) of the Surface Mining Control and Reclamation Act of 1977, which places an absolute prohibition on employees of regulatory authorities having a direct or indirect financial interest in underground or surface coal mining operations.

Title of Collection: Restriction on financial interests of State employees.

OMB Control Number: 1029–0067.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State employees.

Total Estimated Number of Annual Respondents: 2,220.

Total Estimated Number of Annual Responses: 4,464.

Estimated Completion Time per Response: Varies from 5 to 30 minutes, depending on activity.

Total Estimated Number of Annual Burden Hours: 382.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Mark J. Gehlhar,

Information Collection Clearance Officer, Division of Regulatory Support.

[FR Doc. 2023–07219 Filed 4–5–23; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1356]

Certain Dermatological Treatment Devices and Components Thereof; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 1, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Serendia, LLC of Lake Forest, California. Supplements were filed on March 2, 13 and 14, 2023. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain dermatological treatment devices and components thereof by reason of the infringement of certain claims of U.S. Patent No. 9,480,836 (''the '836 Patent''); U.S. Patent No. 10,058,379 (''the '379 Patent''); U.S. Patent No. 11,406,444 (''the '444 Patent''); U.S. Patent No. 9,320,536 (''the '536 Patent''); U.S. Patent No. 9,775,774 (''the '' '774 Patent''); and U.S. Patent No. 10,869,812 (''the '812 Patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2559.

SUPPLEMENTARY INFORMATION:

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on March 31, 2023, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 2, 5–6, 9–14, 16–17, 19, and 22 of the '836 patent; claims 1–5, 7–10, and 15 of the '379 patent; claims 1–10 of the '444 patent; claims 1–2, 4–5, 8–9, 11–13, and 16–17 of the '536 patent; claims 1 and 6–15 of the '774 patent; and claims 1, 5–7, 9–10, and 12–19 of the '812 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and

Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''RF microneedling dermatological treatment devices and components thereof'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Serendia, LLC, 23792 Rockfield Blvd., Lake Forest, CA 92630.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Sung Hwan E&B Co., LTD., d/b/a SHEnB Co. LTD., SHENB Building, 148 Seongsui-ro, Seongdong-gu, 04796 Seoul, Republic of Korea

Aesthetics Biomedical, Inc., 4602 N 16th St., Suite 300, Phoenix, AZ 85016

Cartessa Aesthetics, LLC, 75 Broadhollow Road, Melville, NY 11747

Lutronic Corporation, Lutronic Center, 219 Sowon-ro, Deogyang-gu, Goyang-si, Gyeonggi-do 10534, Republic of Korea

Lutronic Aesthetics, Inc. AKA Lutronic, Inc., 19 Fortune Dr., Billerica, MA 01821

Lutronic, LLC, 19 Fortune Dr., Billerica, MA 01821

Ilooda Co., Ltd., Building B. 9 Floor, IS BIZ Tower Central 25, Deokcheon-ro 152beon-gil, Manan-gu, Anyang-si, Gyeonggi-do, Republic of Korea

Cutera, Inc., 3240 Bayshore Blvd., Brisbane, CA 94005

Jeisys Medical Inc., Daeryung Techno Town 8th, Gasang-dong, Room 307, 96 Gamasan-ro, Geumcheon-gu, Seoul 08501, Republic of Korea

Cynosure, LLC, 5 Carlisle Rd., Westford, MA 01886

Rohrer Aesthetics, LLC, 105 Citation Ct., Homewood, AL 35209

Rohrer Aesthetics, Inc., 105 Citation Ct., Homewood, AL 35209

EndyMed Medical Ltd., 7 Bareket Street, North Industrial Park, Caesarea, 3097612 Israel

EndyMed Medical, Ltd., 790 Madison Ave., Suite 402, New York, NY 10065

EndyMed Medical Inc., 4400 Route 9 South, Suite #1000, Freehold, NJ 07728

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the Administrative Law Judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2022).

By order of the Commission.

Issued: March 31, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–07159 Filed 4–5–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–865–867 (Fourth Review)]

Stainless Steel Butt-Weld Pipe Fittings From Italy, Malaysia, and the Philippines; Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty orders on stainless steel butt-weld pipe fittings from Italy, Malaysia, and the Philippines would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on November 1, 2022 (87 FR 65819) and determined on February 6, 2023 that it would conduct expedited reviews (88 FR 11954, February 24, 2023).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on March 31, 2023. The views of the Commission are contained in USITC Publication 5415 (March 2023), entitled *Stainless Steel Butt-Weld Pipe Fittings from Italy, Malaysia, and the Philippines: Investigation Nos. 731–TA–865–867 (Fourth Review).*

By order of the Commission.

Issued: March 31, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–07163 Filed 4–5–23; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1281]

Certain Video Security Equipment and Systems, Related Software, Components Thereof, and Products Containing Same; Notice of the Commission's Final Determination Finding No Violation of Section 337; Termination of the Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has found no violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Lynde Herzbach, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3228. 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 September 14, 2021, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based on a complaint filed by Motorola Solutions, Inc. of Chicago, Illinois (''Motorola Solutions''); Avigilon Corporation of British Columbia, Canada; Avigilon Fortress Corporation of British Columbia, Canada; Avigilon Patent Holding 1 Corporation of British Columbia, Canada (''Avigilon Patent Holding''); and Avigilon Technologies Corporation of British Columbia, Canada (collectively, ''Complainants''). *See* 86 FR 51182–83 (Sept. 14, 2021). The complaint alleges a violation of section 337 based upon the importation into the United States, sale for importation, or sale within the United States after importation of certain video security equipment and systems, related software, components thereof, and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 7,868,912 (''the '912 patent''); 10,726,312 (''the '312 patent''); and 8,508,607 (''the '607 patent'') (collectively, ''the Asserted Patents''). *Id.* The complaint further alleges that a domestic industry exists. *Id.* The notice of investigation (''NOI'') names Verkada Inc. of San Mateo, California (''Verkada'') as the only respondent. *Id.*

The complaint and NOI were previously amended to reflect the transfer of all right, title, and interest in: (1) the '312 patent from Avigilon Corporation to Motorola Solutions; (2) the '912 patent from Avigilon Fortress Corporation to Motorola Solutions; and (3) the '607 patent from Avigilon Patent Holding to Motorola Solutions. Order No. 7 (Dec. 28, 2021), *unreviewed by* 87 FR 4658–59 (Jan. 28, 2022). The complaint and NOI were further amended to add a new licensee, Avigilon USA Corporation of Dallas, Texas, as an additional complainant. *Id.*

The Commission previously terminated the investigation as to claims 4 and 10–12 of the '312 patent based on Complainants' partial withdrawal of the complaint. Order No. 58 (June 14, 2022), *unreviewed by* Comm'n Notice (June 30, 2022). The Commission also previously terminated the investigation as to claims 6, 15, 25, and 26 of the '607 patent based on Complainants' partial withdrawal of the complaint. Order No. 59 (July 13, 2022), *unreviewed by* Comm'n Notice (Aug. 4, 2022).

On October 24, 2022, the presiding administrative law judge (''ALJ'') issued a final initial determination (''FID'') finding that a violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain video security equipment and systems, related software, components thereof, and products containing same that infringe claims 6–11 of the '912 patent. The FID further finds no violation of section 337 with respect to the remaining asserted claims of the '912 patent, or as to the '312 patent or the '607 patent. The FID includes the ALJ's recommended determination on remedy, the public interest, and bonding should the Commission find a violation of section 337.

On November 23, 2022, Complainants and Verkada each filed a submission on the public interest pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50(a)(4)). No submissions were received in response to the Commission notice seeking public interest submissions. 87 FR 65827–28 (Nov. 1, 2022).

On January 12, 2023, the Commission determined to review the FID in part. 88 FR 3435–37 (Jan. 19, 2023). Specifically, the Commission determined to review the FID's findings: (1) regarding ''subject matter jurisdiction''; (2) that certain accused products infringe claims 6–11 of the '912 patent and finding a violation of section 337 as to those claims; and (3) that asserted claims 6–11 of the '912 patent are not invalid as anticipated or obvious. *Id.* The Commission asked the parties to address three questions related to the issues under review with respect to the '912 patent. *Id.*

On January 27, 2023, Complainants and Verkada each filed an initial written response to the Commission's request for briefing. On February 3, 2023, Complainants and Verkada each filed a reply submission.

Having reviewed the record of the investigation, including the FID and the parties' submissions, the Commission has determined to find no violation of section 337 with respect to the '912 patent. Specifically, the Commission has determined to: (1) vacate the FID's finding that the Commission has ''subject matter jurisdiction'' because ''subject matter jurisdiction'' does not apply to administrative agencies; (2) affirm and supplement the FID's finding that respondent Verkada failed to demonstrate the Video Surveillance and Monitoring (''VSAM'') testbed system as allegedly disclosed in multiple documents existed as prior art; (3) reverse the FID's finding that asserted claims 6–11 of the '912 patent are not anticipated by ''Event Detection and Analysis from Video Streams'' by Medioni et al., published in the IEEE Transactions on Pattern Analysis and Machine Intelligence, Vol. 23, No. 8 in August 2001 (''Medioni''); (4) affirm and supplement the FID's finding that asserted claims 6–11 of the '912 patent are not rendered obvious by Medioni in combination with the asserted VSAM testbed; and (5) take no position on the issue of infringement of claims 6–11 of the '912 patent.

The investigation is terminated with a finding of no violation of section 337. The Commission's reasoning in support of its determinations is set forth more fully in its opinion.

The Commission vote for this determination took place on March 31, 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 31, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–07165 Filed 4–5–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–539–C (Fifth Review)]

Uranium From Russia

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that termination of the suspended investigation on uranium from Russia would be likely to lead to continuation or recurrence of material injury to an industry in the United

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

States within a reasonably foreseeable time.

Background

The Commission instituted this review on September 1, 2022 (87 FR 53774) and determined on December 5, 2022 that it would conduct an expedited review (88 FR 11476, February 23, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on March 31, 2023. The views of the Commission are contained in USITC Publication 5416 (March 2023), entitled *Uranium from Russia: Investigation No. 731–TA–539–C (Fifth Review).*

By order of the Commission.

Issued: March 31, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–07166 Filed 4–5–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On March 31, 2023, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Central District of Illinois in the lawsuit entitled *United States* v. *River City Diesel LLC et al.,* Civil Action No. 1:22–cv–01289–JES–JEH.

The proposed Consent Decree resolves claims in the Complaint, filed on August 30, 2022, in this matter which sought injunctive relief and civil penalties for violations of Title II of the Clean Air Act by River City Diesel, LLC (''RCD''), RCD Performance, LLC (''RCDP''), Midwest Truck and 4WD Center, LLC (''Midwest Truck''), and Joshua L. Davis (collectively, ''Defendants''). The alleged violations relate to the manufacture, sale, and installation of aftermarket products for motor vehicles or motor vehicle engines and for tampering with motor vehicles and motor vehicle engines. The Complaint also alleged fraudulent transfers intended to avoid a debt of the United States in violation of the Federal Debt Collection Procedures Act. 28 U.S.C. 3304(b)(2); 28 U.S.C. 3304(b)(1)(A). The proposed Consent Decree requires injunctive relief and payment of a civil penalty of $600,000, which is based on Defendants' financial situation, to be made in two equal payments.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Todd Kim, and should refer to *United States* v. *River City Diesel LLC et al.,* D.J. Ref. No. 90–5–2–1–12233. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General U.S. DOJ—ENRD P.O. Box 7611 Washington, DC 20044–7611

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *http://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to:

Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $16.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Patricia McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–07158 Filed 4–5–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Standard on Process Safety Management of Highly Hazardous Chemicals

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before May 8, 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.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Standard on Process Safety Management of Highly Hazardous Chemicals ensures that employers collect the information necessary to control and reduce injuries and fatalities in workplaces that have the potential for highly hazardous chemical catastrophes. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on January 30, 2023 (88 FR 5923).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs

receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Standard on Process Safety Management of Highly Hazardous Chemicals.

OMB Control Number: 1218–0200.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 9,049.

Total Estimated Number of Responses: 929,528.

Total Estimated Annual Time Burden: 2,325,294 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Senior PRA Analyst.

[FR Doc. 2023–07256 Filed 4–5–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the Rosebud Mining Company.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before May 8, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0008 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0008.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–001–C.

Petitioner: Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania, 16201.

Mine: Coral Graceton Mine, MSHA ID No. 36–09595, located in Indiana County, Pennsylvania.

Regulation Affected: 30 CFR 75.1700, Oil and gas wells.

Modification Request: The petitioner requests a modification of 30 CFR 75.1700 as it relates to oil and gas wells at the mine. Specifically, the petitioner is petitioning to mine within the 300-feet barrier established by 30 CFR 75.1700.

The petitioner states that:

(a) The mine will use a room and pillar method of mining.

(b) A continuous mining machine with attached haulage develops main entries. After the mains are established, butts, rooms, and/or panels are developed off the mains. The length of the rooms, and/or panels can typically extend 600 feet, depending on permit boundaries, projections, and conditions.

(c) The permit for the Coral Graceton Mine contains oil or gas wells that have been depleted of production, producing wells, wells that may have been plugged not producing oil or gas, and coal bed methane wells.These wells would alter the mining projections for the life of the mine and not allow for the most efficient use of air available to the mine, if the barrier established by 30 CFR 75.1700 were to remain in place. The presence of the 300-feet barrier would also limit the safest and most efficient use of in-seam CBM wells.

(d) Marcellus and Utica wells which may not be mined through are not contained within the mine permit, and are not subject to this petition.

(e) Plugging oil and gas wells provides an environmental benefit by eliminating gas emissions into the atmosphere from gas wells that are no longer maintained.

The petitioner proposes the following alternative method:

(a) A safety barrier of 300 feet in diameter (150 feet between any mined area and a well) shall be maintained around all oil and gas wells (including all active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells) until approval to proceed with mining has been obtained from the District Manager.

(b) Prior to mining within the 300-feet safety barrier around any well that the mine plans to intersect, the mine operator shall provide to the District Manager a sworn affidavit or declaration executed by a company official stating that all mandatory procedures for cleaning out, preparing, and plugging each gas or oil well have been completed as described by the terms and conditions of the Proposed Decision and Order (PDO). The affidavit or declaration shall be accompanied by all logs described in the PDO and any other records the District Manager may request. Once approved by the District Manager, the mine operator may mine within the safety barrier of the well, subject to the terms of the PDO. If well intersection is not planned, the mine operator may request a permit to reduce the 300-feet diameter of the safety barrier that does not include intersection of the well. The District Manager may require documents and information to help verify the accuracy of the location of the well in respect to the mine maps and mining projections, including survey closure data, down-hole well deviation logs, and historical well intersection location data. If the District Manager approves, the mine operator may then mine within the safety barrier of the well. The petitioner proposes the following procedures for

cleaning out and preparing vertical oil and gas wells prior to plugging or re-plugging:

(1) The mine operator shall test for gas emissions inside the hole before cleaning out, preparing, plugging, and replugging oil and gas wells. The District Manager shall be contacted if gas is being produced.

(2) A diligent effort shall be made to clean the well to the original total depth. The mine operator shall contact the District Manager prior to stopping the operation to pull casing or clean out the total depth of the well. If this depth cannot be reached, and the total depth of the well is less than 4,000 feet, the operator shall completely clean out the well from the surface to at least 200 feet below the base of the lowest mineable coal seam, unless the District Manager requires cleaning to a greater depth based on the geological strata or pressure within the well. The operator shall provide the District Manager with all information it possesses concerning the geological nature of the strata and the pressure of the well. If the total depth of the well is 4,000 feet or greater, the operator shall completely clean out the well from the surface to at least 400 feet below the base of the lowest mineable coal seam. The operator shall remove all material from the entire diameter of the well, wall to wall. If the total depth of the well is unknown and there is no historical information, the mine operator must contact the District Manager before proceeding.

(3) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest minable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. In addition, a journal shall be maintained describing the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning cleaning and sealing the well. Invoices, work-orders, and other records relating to all work on the well shall be maintained as part of the logs and provided to MSHA upon request.

(4) When cleaning out the well as detailed in section (d)(2), the operator shall make a diligent effort to remove all of the casing in the well. After the well is completely cleaned out and all the casing removed, the well shall be plugged to the total depth by pumping expanding cement slurry and pressurizing to at least 200 pounds per square inch (psi). If the casing cannot be removed, it shall be cut, milled, or perforated or ripped at all mineable coal seam levels to facilitate the removal of any remaining casing in the coal seam by the mining equipment. Any casing which remains shall be perforated or ripped to permit the injection of cement into voids within and around the well.

(5) All casing remaining at mineable coal seam levels shall be perforated or ripped at least every 5 feet from 10 feet below the coal seam to 10 feet above the coal seam. Perforations or rips are required at least every 50 feet from 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the uppermost mineable coal seam. The mine operator shall take appropriate steps to ensure that the annulus between the casing and the well walls is filled with expanding (minimum 0.5 percent expansion upon setting) cement and contains no voids. If it is not possible to remove all of the casing, the operator shall notify the District Manager before any other work is performed. If the well cannot be cleaned out or the casing removed, the operator shall prepare the well as described from the surface to at least 200 feet below the base of the lowest mineable coal seam for wells less than 4,000 feet in depth and 400 feet below the lowest mineable coal seam for wells 4,000 feet or greater, unless the District Manager requires cleaning out and removal of casing to a greater depth based on the geological strata or the pressure within the well. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that all annuli in the well are already adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well. When multiple casing and tubing strings are present in the coal horizon(s), any remaining casing shall be ripped or perforated; then it shall be filled with expanding cement as previously detailed. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(6) If the District Manager concludes that the completely cleaned out well is emitting excessive amounts of gas, the operator must place a mechanical bridge plug in the well. It shall be placed in a competent stratum at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam, but above the top of the uppermost hydrocarbon-producing stratum, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well. The operator shall provide the District Manager with all information concerning the geological nature of the strata and the pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer shall be used. The mine operator shall document what has been done to ''kill the well'' and plug the carbon producing strata.

(7) If the upper-most hydrocarbon-producing stratum is within 300 feet of the base of the lowest minable coal seam, the operator shall properly place mechanical bridge plugs as described in section (d)(6) to isolate the hydrocarbon-producing stratum from the expanding cement plug. The operator shall place a minimum of 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well.

(e) The petitioner proposes the following procedures for plugging or re-plugging oil or gas wells to the surface after completely cleaning out the well as previously specified:

(1) The operator shall pump expanding cement slurry down the well to form a plug which runs from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam (or lower if required by the District Manager based on the geological strata or pressure within the well) to the surface. The expanding cement shall be placed in the well under a pressure of at least 200 psi. Portland cement or a lightweight cement mixture shall be used to fill the area from 100 feet above the top of the uppermost mineable coal seam (or higher if required by the District Manager that a higher distance is required due to the geological strata or the pressure within the well) to the surface.

(2) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger diameter casing, set in cement, shall extend at least 36 inches above the ground level with the API (American Petroleum Institute) well number engraved or welded on the casing. When the hole cannot be marked with a physical monument (*e.g.,* prime farmland), high-resolution GPS coordinates (one-half meter resolution) shall be required.

(f) The petitioner proposes the following procedures for plugging or re-plugging oil and gas wells for use as degasification wells after completely cleaning out the well as previously specified:

(1) The operator shall set a cement plug in the well by pumping an expanding cement slurry down the tubing to provide at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or pressure within the well. The expanding cement shall be placed in the well under a pressure of at least 200 psi. The top of the expanding cement shall extend at least 50 feet above the top of the coal seam being mined, unless the District Manager requires a greater distance based on the geological strata or pressure within the well.

(2) The operator shall securely grout into the bedrock of the upper portion of the degasification well a suitable casing to protect it. The remainder of the well may be cased or uncased.

(3) The operator shall fit the top of the degasification casing with a wellhead equipped as required by the District Manager in the approved ventilation plan. Such equipment may include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(4) Operation of the degasification well shall be addressed in the approved ventilation plan. This may include periodic tests of methane levels and limits on the minimum methane concentrations that may be extracted.

(5) After the area of the coal mine that is degassed by a well is sealed or the coal mine is abandoned, the operator shall plug all degasification wells using the following procedures:

(i) The operator shall insert a tube to the bottom of the well or, if not possible, to within 100 feet above the coal seam being mined. Any blockage must be removed to ensure that the tube can be inserted to this depth.

(ii) The operator shall set a cement plug in the well by pumping Portland cement or a lightweight cement mixture down the tubing until the well is filled to the surface.

(iii) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger casing, set in cement, shall extend at least 36 inches above the ground level with the API well number engraved or welded on the casing.

(g) The petitioner proposes the following alternative procedures for preparing and plugging or re-plugging oil or gas wells. The following provisions apply to all wells which the operator determines, and with which the MSHA District Manager agrees, cannot be completely cleaned out due to damage to the well caused by subsidence, caving, or other factors.

(1) The operator shall drill a hole adjacent and parallel to the well to a depth of at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or pressure within the well.

(2) The operator shall use a geophysical sensing device to locate any casing which may remain in the well.

(3) If the well contains casing(s), the operator shall drill into the well from the parallel hole. From 10 feet below the coal seam to 10 feet above the coal seam, the operator shall perforate or rip all casings at least every 5 feet. Beyond this distance, the operator shall perforate or rip at least every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the seam being mined, unless the District Manager requires a greater distance based on the geological strata or pressure within the well. The operator shall fill the annulus between the casings and between the casings and the well wall with expanding (minimum 0.5 percent expansion upon setting) cement and shall ensure that these areas contain no voids. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that the annulus of the well is adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well or fill these areas with cement. When multiple casing and tubing strings are present in the coal horizon(s), any casing which remains shall be ripped or perforated and filled with expanding cement as previously indicated. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(4) Where the operator determines, and the District Manager agrees, that there is insufficient casing in the well to allow the method previously outlined to be used, then the operator shall use a horizontal hydraulic fracturing technique to intercept the original well. From at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam to a point at least 50 feet above the seam being mined, the operator shall fracture in at least six places at intervals to be agreed upon by the operator and the District Manager after considering the geological strata and the pressure within the well. The operator shall pump expanding cement into the fractured well in sufficient quantities and in a manner which fills all intercepted voids.

(5) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest minable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. The operator shall obtain the logs from the adjacent hole rather than the well if the condition of the well makes it impractical to insert the equipment necessary to obtain the log.

(6) A journal shall be maintained that describes: the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning sealing the well. Invoices, workorders, and other records relating to all work on the well shall be also maintained as part of this journal and provided to MSHA upon request.

(7) After the operator has plugged the well, the operator shall plug the adjacent hole, from the bottom to the surface, with Portland cement or a lightweight cement mixture. The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger casing, set in cement, shall extend at least 36 inches above the ground level. A combination of the methods outlined previously may have to be used in a single well, depending upon the conditions of the hole and the presence of casings. The operator and the District Manager shall discuss the nature of each hole. The District Manager may require that more than one method be utilized. The mine operator may submit an alternative plan to the District Manager for approval to use different methods including certification by a registered petroleum engineer to support the proposed alternative methods to address wells that cannot be completely cleaned out.

(h) The petitioner proposed the following mandatory procedures when mining within a 100-feet diameter around a well.

(1) A representative of the operator, a representative of the miners, the appropriate State agency, or the MSHA District Manager may request that a conference be conducted prior to intersecting any plugged or replugged well. The party requesting the conference shall notify all other parties listed above within a reasonable time prior to the conference to provide opportunity for participation. The purpose of the conference shall be to review, evaluate, and accommodate any abnormal or unusual circumstance related to the condition of the well or surrounding strata when such conditions are encountered.

(2) The operator shall intersect a well on a shift approved by the District Manager. The operator shall notify the District Manager and the miners' representative in sufficient time prior to intersecting a well to provide an opportunity to have representatives present.

(3) When using continuous mining methods, the operator shall install drivage sights at the last open crosscut near the place to be mined to ensure intersection of the well. The drivage sites shall not be more than 50 feet from the well.

(4) The operator shall ensure that fire-fighting equipment including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the well intersection (when either the conventional or continuous mining method is used) is available and operable during all well intersections. The fire hose shall be located in the last open crosscut of the entry or room. The operator shall maintain the water line to the belt conveyor tailpiece along with a sufficient amount of fire hose to reach the farthest point of penetration on the section.

(5) The operator shall ensure that sufficient supplies of roof support and ventilation materials shall be available and located at the last open crosscut. In addition, emergency plugs and suitable sealing materials shall be available in the immediate area of the well intersection.

(6) Within 12 hours prior to intersecting the well, the operator shall test all equipment and check it for permissibility. Water sprays, water pressures, and water flow rates used for dust and spark suppression shall be examined and any deficiencies corrected.

(7) The operator shall calibrate the methane monitor(s) on the longwall, continuous mining machine, or cutting machine and loading machine within 12 hours prior to intersecting the well.

(8) When mining is in progress, the operator shall perform tests for methane with a handheld methane detector at least every 10 minutes from the time that mining with the continuous mining machine is within 30 feet of the well until the well is intersected. During the actual cutting process, no individual shall be allowed on the return side until the well intersection has been completed and the area has been examined and declared safe. The operator's most current approved ventilation plan shall be followed at all times unless the District Manager requires a greater air velocity for the intersect.

(9) When using continuous or conventional mining methods, the working place shall be free from accumulations of coal dust and coal spillages, and rock dust shall be placed on the roof, rib, and floor to within 20 feet of the face when intersecting the well.

(10) When the well is intersected, the operator shall deenergize all equipment, and thoroughly examine and determine the area to be safe before permitting mining to resume.

(11) After a well has been intersected and the working place determined to be safe, mining shall continue inby the well a sufficient distance to permit adequate ventilation around the area of the well.

(12) When necessary, torches shall be used for inadequately or inaccurately cut or milled casings. No open flame shall be permitted in the area until adequate ventilation has been established around the well bore and methane levels of less than 1.0 percent are present in all areas that will be exposed to flames and sparks from the torch. The operator shall apply a thick layer of rock dust to the roof, face, floor, ribs, and any exposed coal within 20 feet of the casing prior to the use of torches.

(13) Non-sparking (brass) tools shall be located on the working section and shall be used exclusively to expose and examine cased wells.

(14) No person shall be permitted in the area of the well intersection except those engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, or personnel from the appropriate State agency.

(15) The operator shall alert all personnel in the mine to the planned intersection of the well prior to their going underground if the planned intersection is to occur during their shift. This warning shall be repeated for all shifts until the well has been mined through.

(16) The well intersection shall be under the direct supervision of a certified individual. Instructions concerning the well intersection shall be issued only by the certified individual in charge.

(17) If the mine operator cannot find the well in the middle of the panel or room and misses the anticipated intersection, mining shall cease and the District Manager shall be notified.

(i) A copy of the PDO shall be maintained at the mine and be available to the miners.

(1) If the well is not plugged to the total depth of all minable coal seams identified in the core hole logs, any coal seams beneath the lowest plug shall remain subject to the barrier requirements of 30 CFR 75.1700.

(2) All necessary safety precautions and safe practices required by MSHA regulations and State regulatory agencies with jurisdiction over the plugging site shall be followed.

(j) All miners involved in the plugging or re-plugging operations shall be trained on the contents of the PDO prior to starting the process.

(k) Mechanical bridge plugs should incorporate the best available technologies required or recognized by the State regulatory agency and/or oil and gas industry.

(l) Within 30 days after the PDO becomes final, the operator shall submit proposed revisions for its approved 30 CFR part 48 training plan to the District Manager. These proposed revisions shall include initial and refresher training on compliance with the terms and conditions stated in the PDO. The operator shall provide all miners involved in well intersection with training on the requirements of the PDO prior to mining within 150 feet of a well intended to be mined through.

(m) The responsible person required under 30 CFR 75.1501 shall be responsible for well intersection emergencies. The well intersection procedures shall be reviewed by the responsible person prior to any planned intersection.

(n) Within 30 days after the PDO becomes final, the operator shall submit proposed revisions for its approved mine emergency evacuation and firefighting program of instruction required under 30 CFR 75.1502. The operator shall revise the program of instruction to include the hazards and evacuation procedures to be used for well intersections. All underground miners shall be trained on the revised plan within 30 days of submittal.

(o) The procedure as specified in 30 CFR 48.3 for approval of proposed revisions to already approved training plans shall apply.

(p) In support of the proposed alternative method, the petitioner also has submitted a General Rip/Milling Diagram of Gas Well Casing.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–07244 Filed 4–5–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the Rosebud Mining Company.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before May 8, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0009 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments for MSHA–2023–0009.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov*.
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–002–C.

Petitioner: Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania, 16201.

Mine: Cherry Tree Mine, MSHA ID No. 36–09224, located in Clearfield County, Pennsylvania.

Regulation Affected: 30 CFR 75.1700, Oil and gas wells.

Modification Request: The petitioner requests a modification of 30 CFR 75.1700 as it relates to oil and gas wells at the mine. Specifically, the petitioner is petitioning to mine within the 300-feet barrier established by 30 CFR 75.1700.

The petitioner states that:

(a) The mine will use a room and pillar method of mining.

(b) A continuous mining machine with attached haulage develops main entries. After the mains are established, butts, rooms, and/or panels are developed off the mains. The length of the rooms, and/or panels can typically extend 600 feet, depending on permit boundaries, projections, and conditions.

(c) The permit for the Cherry Tree Mine contains oil or gas wells that have been depleted of production, producing wells, wells that may have been plugged not producing oil or gas, and coal bed methane wells. These wells would alter the mining projections for the life of the mine and not allow for the most efficient use of air available to the mine, if the barrier established by 30 CFR 75.1700 were to remain in place. The presence of the 300-feet barrier would also limit the safest and most efficient use of in-seam CBM wells.

(d) Marcellus and Utica wells which may not be mined through are not contained within the mine permit, and are not subject to this petition.

(e) Plugging oil and gas wells provides an environmental benefit by eliminating gas emissions into the atmosphere from gas wells that are no longer maintained.

The petitioner proposes the following alternative method:

(a) A safety barrier of 300 feet in diameter (150 feet between any mined area and a well) shall be maintained around all oil and gas wells (including all active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells) until approval to proceed with mining has been obtained from the District Manager.

(b) Prior to mining within the 300-feet safety barrier around any well that the mine plans to intersect, the mine operator shall provide to the District Manager a sworn affidavit or declaration executed by a company official stating that all mandatory procedures for cleaning out, preparing, and plugging each gas or oil well have been completed as described by the terms and conditions of the Proposed Decision and Order (PDO). The affidavit or declaration shall be accompanied by all logs described in the PDO and any other records the District Manager may request. Once approved by the District Manager, the mine operator may mine within the safety barrier of the well, subject to the terms of the PDO. If well intersection is not planned, the mine operator may request a permit to reduce the 300-feet diameter of the safety barrier that does not include intersection of the well. The District Manager may require documents and information to help verify the accuracy of the location of the well in respect to the mine maps and mining projections, including survey closure data, down-hole well deviation logs, and historical well intersection location data. If the District Manager approves, the mine operator may then mine within the safety barrier of the well. The petitioner proposes the following procedures for cleaning out and preparing vertical oil and gas wells prior to plugging or re-plugging:

(1) The mine operator shall test for gas emissions inside the hole before

cleaning out, preparing, plugging, and replugging oil and gas wells. The District Manager shall be contacted if gas is being produced.

(2) A diligent effort shall be made to clean the well to the original total depth. The mine operator shall contact the District Manager prior to stopping the operation to pull casing or clean out the total depth of the well. If this depth cannot be reached, and the total depth of the well is less than 4,000 feet, the operator shall completely clean out the well from the surface to at least 200 feet below the base of the lowest mineable coal seam, unless the District Manager requires cleaning to a greater depth based on the geological strata or pressure within the well. The operator shall provide the District Manager with all information it possesses concerning the geological nature of the strata and the pressure of the well. If the total depth of the well is 4,000 feet or greater, the operator shall completely clean out the well from the surface to at least 400 feet below the base of the lowest mineable coal seam. The operator shall remove all material from the entire diameter of the well, wall to wall. If the total depth of the well is unknown and there is no historical information, the mine operator must contact the District Manager before proceeding.

(3) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest minable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. In addition, a journal shall be maintained describing the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning cleaning and sealing the well. Invoices, work-orders, and other records relating to all work on the well shall be maintained as part of the logs and provided to MSHA upon request.

(4) When cleaning out the well as detailed in section (d)(2), the operator shall make a diligent effort to remove all of the casing in the well. After the well is completely cleaned out and all the casing removed, the well shall be plugged to the total depth by pumping expanding cement slurry and pressurizing to at least 200 pounds per square inch (psi). If the casing cannot be removed, it shall be cut, milled, or perforated or ripped at all mineable coal seam levels to facilitate the removal of any remaining casing in the coal seam by the mining equipment. Any casing which remains shall be perforated or ripped to permit the injection of cement into voids within and around the well.

(5) All casing remaining at mineable coal seam levels shall be perforated or ripped at least every 5 feet from 10 feet below the coal seam to 10 feet above the coal seam. Perforations or rips are required at least every 50 feet from 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the uppermost mineable coal seam. The mine operator shall take appropriate steps to ensure that the annulus between the casing and the well walls is filled with expanding (minimum 0.5 percent expansion upon setting) cement and contains no voids. If it is not possible to remove all of the casing, the operator shall notify the District Manager before any other work is performed. If the well cannot be cleaned out or the casing removed, the operator shall prepare the well as described from the surface to at least 200 feet below the base of the lowest mineable coal seam for wells less than 4,000 feet in depth and 400 feet below the lowest mineable coal seam for wells 4,000 feet or greater, unless the District Manager requires cleaning out and removal of casing to a greater depth based on the geological strata or the pressure within the well. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that all annuli in the well are already adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well. When multiple casing and tubing strings are present in the coal horizon(s), any remaining casing shall be ripped or perforated; then it shall be filled with expanding cement as previously detailed. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(6) If the District Manager concludes that the completely cleaned out well is emitting excessive amounts of gas, the operator must place a mechanical bridge plug in the well. It shall be placed in a competent stratum at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam, but above the top of the uppermost hydrocarbon-producing stratum, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well. The operator shall provide the District Manager with all information concerning the geological nature of the strata and the pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer shall be used. The mine operator shall document what has been done to ''kill the well'' and plug the carbon producing strata.

(7) If the upper-most hydrocarbon-producing stratum is within 300 feet of the base of the lowest minable coal seam, the operator shall properly place mechanical bridge plugs as described in section (d)(6) to isolate the hydrocarbon-producing stratum from the expanding cement plug. The operator shall place a minimum of 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well.

(e) The petitioner proposes the following procedures for plugging or re-plugging oil or gas wells to the surface after completely cleaning out the well as previously specified:

(1) The operator shall pump expanding cement slurry down the well to form a plug which runs from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam (or lower if required by the District Manager based on the geological strata or pressure within the well) to the surface. The expanding cement shall be placed in the well under a pressure of at least 200 psi. Portland cement or a lightweight cement mixture shall be used to fill the area from 100 feet above the top of the uppermost mineable coal seam (or higher if required by the District Manager that a higher distance is required due to the geological strata or the pressure within the well) to the surface.

(2) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger diameter casing, set in cement, shall extend at least 36 inches above the ground level with the API (American Petroleum Institute) well number engraved or welded on the casing. When the hole cannot be marked with a physical monument (*e.g.,* prime farmland), high-resolution GPS coordinates (one-half meter resolution) shall be required.

(f) The petitioner proposes the following procedures for plugging or re-plugging oil and gas wells for use as degasification wells after completely

cleaning out the well as previously specified:

(1) The operator shall set a cement plug in the well by pumping an expanding cement slurry down the tubing to provide at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or pressure within the well. The expanding cement shall be placed in the well under a pressure of at least 200 psi. The top of the expanding cement shall extend at least 50 feet above the top of the coal seam being mined, unless the District Manager requires a greater distance based on the geological strata or pressure within the well.

(2) The operator shall securely grout into the bedrock of the upper portion of the degasification well a suitable casing to protect it. The remainder of the well may be cased or uncased.

(3) The operator shall fit the top of the degasification casing with a wellhead equipped as required by the District Manager in the approved ventilation plan. Such equipment may include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(4) Operation of the degasification well shall be addressed in the approved ventilation plan. This may include periodic tests of methane levels and limits on the minimum methane concentrations that may be extracted.

(5) After the area of the coal mine that is degassed by a well is sealed or the coal mine is abandoned, the operator shall plug all degasification wells using the following procedures:

(i) The operator shall insert a tube to the bottom of the well or, if not possible, to within 100 feet above the coal seam being mined. Any blockage must be removed to ensure that the tube can be inserted to this depth.

(ii) The operator shall set a cement plug in the well by pumping Portland cement or a lightweight cement mixture down the tubing until the well is filled to the surface.

(iii) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger casing, set in cement, shall extend at least 36 inches above the ground level with the API well number engraved or welded on the casing.

(g) The petitioner proposes the following alternative procedures for preparing and plugging or re-plugging oil or gas wells. The following provisions apply to all wells which the operator determines, and with which the MSHA District Manager agrees, cannot be completely cleaned out due to damage to the well caused by subsidence, caving, or other factors.

(1) The operator shall drill a hole adjacent and parallel to the well to a depth of at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or pressure within the well.

(2) The operator shall use a geophysical sensing device to locate any casing which may remain in the well.

(3) If the well contains casing(s), the operator shall drill into the well from the parallel hole. From 10 feet below the coal seam to 10 feet above the coal seam, the operator shall perforate or rip all casings at least every 5 feet. Beyond this distance, the operator shall perforate or rip at least every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the seam being mined, unless the District Manager requires a greater distance based on the geological strata or pressure within the well. The operator shall fill the annulus between the casings and between the casings and the well wall with expanding (minimum 0.5 percent expansion upon setting) cement and shall ensure that these areas contain no voids. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that the annulus of the well is adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well or fill these areas with cement. When multiple casing and tubing strings are present in the coal horizon(s), any casing which remains shall be ripped or perforated and filled with expanding cement as previously indicated. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(4) Where the operator determines, and the District Manager agrees, that there is insufficient casing in the well to allow the method previously outlined to be used, then the operator shall use a horizontal hydraulic fracturing technique to intercept the original well. From at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam to a point at least 50 feet above the seam being mined, the operator shall fracture in at least six places at intervals to be agreed upon by the operator and the District Manager after considering the geological strata and the pressure within the well. The operator shall pump expanding cement into the fractured well in sufficient quantities and in a manner which fills all intercepted voids.

(5) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest minable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. The operator shall obtain the logs from the adjacent hole rather than the well if the condition of the well makes it impractical to insert the equipment necessary to obtain the log.

(6) A journal shall be maintained that describes: the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning sealing the well. Invoices, workorders, and other records relating to all work on the well shall be also maintained as part of this journal and provided to MSHA upon request.

(7) After the operator has plugged the well, the operator shall plug the adjacent hole, from the bottom to the surface, with Portland cement or a lightweight cement mixture. The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger casing, set in cement, shall extend at least 36 inches above the ground level. A combination of the methods outlined previously may have to be used in a single well, depending upon the conditions of the hole and the presence of casings. The operator and the District Manager shall discuss the nature of each hole. The District Manager may require that more than one method be utilized. The mine operator may submit an alternative plan to the District Manager for approval to use different methods including certification by a registered petroleum engineer to support the proposed alternative methods to address wells that cannot be completely cleaned out.

(h) The petitioner proposed the following mandatory procedures when mining within a 100-feet diameter around a well.

(1) A representative of the operator, a representative of the miners, the appropriate State agency, or the MSHA District Manager may request that a conference be conducted prior to intersecting any plugged or replugged well. The party requesting the conference shall notify all other parties listed above within a reasonable time prior to the conference to provide opportunity for participation. The purpose of the conference shall be to review, evaluate, and accommodate any abnormal or unusual circumstance related to the condition of the well or surrounding strata when such conditions are encountered.

(2) The operator shall intersect a well on a shift approved by the District Manager. The operator shall notify the District Manager and the miners' representative in sufficient time prior to intersecting a well to provide an opportunity to have representatives present.

(3) When using continuous mining methods, the operator shall install drivage sights at the last open crosscut near the place to be mined to ensure intersection of the well. The drivage sites shall not be more than 50 feet from the well.

(4) The operator shall ensure that fire-fighting equipment including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the well intersection (when either the conventional or continuous mining method is used) is available and operable during all well intersections. The fire hose shall be located in the last open crosscut of the entry or room. The operator shall maintain the water line to the belt conveyor tailpiece along with a sufficient amount of fire hose to reach the farthest point of penetration on the section.

(5) The operator shall ensure that sufficient supplies of roof support and ventilation materials shall be available and located at the last open crosscut. In addition, emergency plugs and suitable sealing materials shall be available in the immediate area of the well intersection.

(6) Within 12 hours prior to intersecting the well, the operator shall test all equipment and check it for permissibility. Water sprays, water pressures, and water flow rates used for dust and spark suppression shall be examined and any deficiencies corrected.

(7) The operator shall calibrate the methane monitor(s) on the longwall, continuous mining machine, or cutting machine and loading machine within 12 hours prior to intersecting the well.

(8) When mining is in progress, the operator shall perform tests for methane with a handheld methane detector at least every 10 minutes from the time that mining with the continuous mining machine is within 30 feet of the well until the well is intersected. During the actual cutting process, no individual shall be allowed on the return side until the well intersection has been completed and the area has been examined and declared safe. The operator's most current approved ventilation plan shall be followed at all times unless the District Manager requires a greater air velocity for the intersect.

(9) When using continuous or conventional mining methods, the working place shall be free from accumulations of coal dust and coal spillages, and rock dust shall be placed on the roof, rib, and floor to within 20 feet of the face when intersecting the well.

(10) When the well is intersected, the operator shall deenergize all equipment, and thoroughly examine and determine the area to be safe before permitting mining to resume.

(11) After a well has been intersected and the working place determined to be safe, mining shall continue inby the well a sufficient distance to permit adequate ventilation around the area of the well.

(12) When necessary, torches shall be used for inadequately or inaccurately cut or milled casings. No open flame shall be permitted in the area until adequate ventilation has been established around the well bore and methane levels of less than 1.0 percent are present in all areas that will be exposed to flames and sparks from the torch. The operator shall apply a thick layer of rock dust to the roof, face, floor, ribs, and any exposed coal within 20 feet of the casing prior to the use of torches.

(13) Non-sparking (brass) tools shall be located on the working section and shall be used exclusively to expose and examine cased wells.

(14) No person shall be permitted in the area of the well intersection except those engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, or personnel from the appropriate State agency.

(15) The operator shall alert all personnel in the mine to the planned intersection of the well prior to their going underground if the planned intersection is to occur during their shift. This warning shall be repeated for all shifts until the well has been mined through.

(16) The well intersection shall be under the direct supervision of a certified individual. Instructions concerning the well intersection shall be issued only by the certified individual in charge.

(17) If the mine operator cannot find the well in the middle of the panel or room and misses the anticipated intersection, mining shall cease and the District Manager shall be notified.

(i) A copy of the PDO shall be maintained at the mine and be available to the miners.

(1) If the well is not plugged to the total depth of all minable coal seams identified in the core hole logs, any coal seams beneath the lowest plug shall remain subject to the barrier requirements of 30 CFR 75.1700.

(2) All necessary safety precautions and safe practices required by MSHA regulations and State regulatory agencies with jurisdiction over the plugging site shall be followed.

(j) All miners involved in the plugging or re-plugging operations shall be trained on the contents of the PDO prior to starting the process.

(k) Mechanical bridge plugs should incorporate the best available technologies required or recognized by the State regulatory agency and/or oil and gas industry.

(l) Within 30 days after the PDO becomes final, the operator shall submit proposed revisions for its approved 30 CFR part 48 training plan to the District Manager. These proposed revisions shall include initial and refresher training on compliance with the terms and conditions stated in the PDO. The operator shall provide all miners involved in well intersection with training on the requirements of the PDO prior to mining within 150 feet of a well intended to be mined through.

(m) The responsible person required under 30 CFR 75.1501 shall be responsible for well intersection emergencies. The well intersection procedures shall be reviewed by the responsible person prior to any planned intersection.

(n) Within 30 days after the PDO becomes final, the operator shall submit proposed revisions for its approved mine emergency evacuation and firefighting program of instruction required under 30 CFR 75.1502. The operator shall revise the program of instruction to include the hazards and evacuation procedures to be used for well intersections. All underground miners shall be trained on the revised plan within 30 days of submittal.

(o) The procedure as specified in 30 CFR 48.3 for approval of proposed

revisions to already approved training plans shall apply.

(p) In support of the proposed alternative method, the petitioner also has submitted a General Rip/Milling Diagram of Gas Well Casing.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–07252 Filed 4–5–23; 8:45 am]

BILLING CODE 4520–43–P

MORRIS K. UDALL AND STEWART L. UDALL FOUNDATION

Sunshine Act Meetings

TIME AND DATE: 1 p.m. to 5 p.m. (PDT), Thursday, April 20, 2023, and 9 a.m. to 11:30 a.m. (PDT), Friday, April 21, 2023.

PLACE: Morris K. Udall and Stewart L. Udall Foundation, 434 E University Blvd., Suite 300, Tucson, AZ 85705.

STATUS: This meeting of the Board of Trustees will be open to the public. Members of the public who would like to attend this meeting may request remote access by contacting David Brown at *brown@udall.gov* prior to April 20, 2023, to obtain the teleconference connection information.

MATTERS TO BE CONSIDERED: April 20, 2023: (1) Call to Order and Chair's Remarks; (2) Trustee Remarks; (3) Executive Director's Remarks; (4) Consent Agenda Approval (Minutes of the December 7, 2022, Board of Trustees Meeting; Board Reports submitted for Data and Information Technology, Education Programs, Finance and Internal Controls, John S. McCain III National Center for Environmental Conflict Resolution, and Udall Center for Studies in Public Policy, including the Native Nations Institute for Leadership, Management, and Policy and The University of Arizona Libraries, Special Collections; and Board takes notice of any new and updated personnel policies and internal control methodologies); (5) Stewart L. Udall Parks in Focus® Overview; and (6) Recognition of Robert Varady, Udall Center for Studies in Public Policy, The University of Arizona. April 21, 2023: (7) Annual Trustee Ethics Training; (8) Future Trustee Data and Information Technology Requirements; and (9) Other Business (including updates on Udall Foundation reauthorization and appropriations legislation and timing, location, and topical focus of the Fall 2023 Board of Trustees Meeting).

CONTACT PERSON FOR MORE INFORMATION: David P. Brown, Executive Director, 434 E University Blvd., Suite 300, Tucson, AZ 85705, (520) 901–8560.

Dated: April 3, 2023.

David P. Brown,

Executive Director, Morris K. Udall and Stewart L. Udall Foundation, and Federal Register Liaison Officer.

[FR Doc. 2023–07285 Filed 4–4–23; 11:15 am]

BILLING CODE 6820–FN–P

NATIONAL SCIENCE FOUNDATION

Request for Recommendations for Membership on Directorate and Office Advisory Committees

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) requests recommendations for membership on its scientific and technical Federal advisory committees. Recommendations should consist of the name of the submitting individual, the organization or the affiliation providing the member nomination, the name of the recommended individual, the recommended individual's curriculum vita, an expression of the individual's interest in serving, and the following recommended individual's contact information: employment address, telephone number, fax number, and email address. Self-recommendations are accepted. If you would like to make a membership recommendation for any of the NSF scientific and technical Federal advisory committees, please send your recommendation to the appropriate committee contact person listed in the chart below.

ADDRESSES: The mailing address for the National Science Foundation is 2415 Eisenhower Avenue, Alexandria, VA 22314. Web links to individual committee information may be found on the NSF website: NSF Advisory Committees.

SUPPLEMENTARY INFORMATION: Each Directorate and Office has an external advisory committee that typically meets twice a year to review and provide advice on program management; discuss current issues; and review and provide advice on the impact of policies, programs, and activities in the disciplines and fields encompassed by the Directorate or Office. In addition to Directorate and Office advisory committees, NSF has several committees that provide advice and recommendations on specific topics including astronomy and astrophysics; environmental research and education; equal opportunities in science and engineering; cyberinfrastructure; international science and engineering; and business and operations.

A primary consideration when formulating committee membership is recognized knowledge, expertise, or demonstrated ability.[1] Other factors that may be considered are balance among diverse institutions, regions, and groups underrepresented in science, technology, engineering, and mathematics. Committee members serve for varying term lengths, depending on the nature of the individual committee. Although we welcome the recommendations we receive, we regret that NSF will not be able to acknowledge or respond positively to each person who contacts NSF or has been recommended. NSF intends to publish a similar notice to this on an annual basis. NSF will keep recommendations active for 12 months from the date of receipt.

The chart below is a listing of the committees seeking recommendations for membership. Recommendations should be sent to the contact person identified below. The chart contains web addresses where additional information about individual committees is available.

Advisory committee	Contact person
Advisory Committee for Biological Sciences, *https://www.nsf.gov/bio/advisory.jsp*.	Montona Futrell-Griggs, Directorate for Biological Sciences; phone: (703) 292–8400; email: *mfutrell@nsf.gov;* fax: (703) 292–9154.
Advisory Committee for Computer and Information Science and Engineering, *https://www.nsf.gov/cise/advisory.jsp*.	Brenda Williams, Directorate for Computer and Information Science and Engineering; phone: (703) 292–4554; email: *bwilliam@nsf.gov;* fax: (703) 292–9454.

[1] Federally registered lobbyists are not eligible for appointment to these Federal advisory committees.

Advisory committee	Contact person
Advisory Committee for Cyberinfrastructure *https://www.nsf.gov/cise/aci/advisory.jsp*.	Carl Anderson, Division of Advanced Cyberinfrastructure; phone: (703) 292–4545; email: *cnanders@nsf.gov;* fax: (703) 292–9060.
Advisory Committee for Education and Human Resources, *https://www.nsf.gov/ehr/advisory.jsp*.	Bonnie Green, Directorate for Education and Human Resources; phone: (703) 292–8600; email: *bongreen@nsf.gov;* fax: (703) 292–9179.
Advisory Committee for Engineering, *https://www.nsf.gov/eng/advisory.jsp*.	Cecile Gonzalez, Directorate for Engineering; phone: (703) 292–8300; email: *cjgonzal@nsf.gov;* fax: (703) 292–9467.
Advisory Committee for Geosciences, *https://www.nsf.gov/geo/advisory.jsp*.	Melissa Lane, Directorate for Geosciences; phone: (703) 292–8500; email: *mlane@nsf.gov;* fax: (703) 292–9042.
Advisory Committee for International Science and Engineering, *https://www.nsf.gov/od/oise/advisory.jsp*.	Christopher Street, Office of International Science and Engineering, phone: (703) 292–8568; email: *ac-ise@nsf.gov;* fax: (703) 292–9481.
Advisory Committee for Mathematical and Physical Sciences, *https://www.nsf.gov/mps/advisory.jsp*.	Angela Harris, Directorate for Mathematical and Physical Sciences; phone: (703) 292–8800; email: *amharris@nsf.gov;* fax: (703) 292–9151.
Advisory Committee for Social, Behavioral & Economic Sciences, *https://www.nsf.gov/sbe/advisory.jsp*.	John Garneski, Directorate for Social, Behavioral & Economic Sciences; phone: (703) 292–8700; email: *jgarnesk@nsf.gov;* fax: (703) 292–9083.
Advisory Committee for Polar Programs, *https://www.nsf.gov/geo/opp/advisory.jsp*.	Sara Eckert, Office of Polar Programs; phone: (703) 292–8030; email: *seckert@nsf.gov;* fax: (703) 292–9081.
Committee on Equal Opportunities in Science and Engineering, *https://www.nsf.gov/od/oia/activities/ceose/*.	Bernice Anderson, Office of Integrative Activities; phone: (703) 292–8040; email: *banderso@nsf.gov;* fax: (703) 292–9040.
Advisory Committee for Business and Operations, *https://www.nsf.gov/oirm/bocomm/*.	Jeffrey Rich, Office of Information and Resource Management; phone: (703) 292–8100; email: *jrich@nsf.gov;* fax: (703) 292–9369. Maria Koszalka, Office of Budget, Finance and Award Management; phone: (703) 292–4588; email: *mkosalka@nsf.gov*.
Advisory Committee for Environmental Research and Education, *https://www.nsf.gov/ere/ereweb/advisory.jsp*.	Arnoldo Valle-Levinson, Office of Integrative Activities; phone: (703) 292–8040; email: *acerepoc@nsf.gov;* fax: (703) 292–9040.
Astronomy and Astrophysics Advisory Committee, *https://www.nsf.gov/mps/ast/aaac.jsp*.	Carrie Black, Division of Astronomical Sciences; phone: (703) 292–2426; email: *cblack@nsf.gov;* fax: (703) 292–9452.

Dated: March 31, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–07116 Filed 4–5–23; 8:45 am]

BILLING CODE 7555–01–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International 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 Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: April 6, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on March 27, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 17 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–125 and CP2023–128.

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–06777 Filed 4–5–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service®.

ACTION: Notice of modified systems of records.

SUMMARY: The United States Postal Service® (USPS) is proposing to revise two Customer Privacy Act Systems of Records (SORs). These modifications are being proposed to promote transparency and to support the administration and enforcement of regulations pertaining to articles found in the mail bearing counterfeit postage.

DATES: These revisions will become effective without further notice on May 8, 2023 unless responses to comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*uspsprivacyfedregnotice@usps.gov*). To facilitate public inspection, arrangements to view copies of written comments received will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and Records Management Officer, Privacy and Records Management Office, at *uspsprivacyfedregnotice@usps.gov* or 202–268–2000.

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records. The Postal Service has determined that Customer Privacy Act Systems of Records, USPS SOR 820.200, Mail Management and Tracking Activity and USPS SOR 870.200, Postage Validation Imprint (PVI), Electronic Verification System (eVS), Postage Meter, and PC Postage Customer Data and Transaction Records, should be revised to support the detection and handling of articles found in the mail bearing counterfeit

postage. Counterfeit postage is any marking or indicia that has been made, printed, or otherwise created without authorization from the Postal Service that is printed or applied, or otherwise affixed, on an article placed in the mails that indicates or represents that valid postage has been paid to mail the article.

I. Background

The Postal Service is implementing an initiative to identify and mitigate the use of counterfeit postage on articles found in the mail, including packages. The knowing use of counterfeit postage is a crime that reflects an intentional effort to defraud the Postal Service. As information, the Postal Service is providing public notice of amended regulations in a separate **Federal Register** notice regarding articles found in the mail with counterfeit postage (Document Citation: 88 FR 10068, Publication Date: February 16, 2023).

II. Rationale for Changes to USPS Privacy Act Systems of Records

Items found in the mail bearing counterfeit postage will be considered abandoned and disposed of at the discretion of the Postal Service, rather than be returned to the sender as the affixing of counterfeit postage reflects the non-payment of postage or an intentional effort to avoid paying postage. Upon detection, a record of the mailpiece or package displaying counterfeit postage will be created to facilitate the administration and enforcement of counterfeit postage regulations and the disposition of those articles.

III. Description of the Modified System of Records

The Postal Service is proposing modifications to USPS SOR 820.200, Mail Management and Tracking Activity, as indicated in the summary of changes below:

- Added PURPOSE(S) #12 and #13.
- Added new CATEGORIES OF RECORDS IN THE SYSTEM #8.
- Added Tracking number, Mailer Identification (MID) Number, Intelligent Mail barcode (IMb), and Intelligent Mail Package barcode (IMPb) to POLICIES AND PRACTICES FOR RETRIEVAL OF RECORD.
- Added new retention period #8 to POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS.

The Postal Service is also proposing modifications to USPS SOR 870.200, Postage Validation Imprint (PVI), Electronic Verification System (eVS), Postage Meter, and PC Postage Customer Data and Transaction Records, as indicated in the summary of changes listed below:

- Added PURPOSE(S) #3 and #4
- Added new CATEGORIES OF RECORDS IN THE SYSTEM as #4
- Added Tracking number, Mailer Identification (MID) Number, Intelligent Mail barcode (IMb), and Intelligent Mail Package barcode (IMPb) to POLICIES AND PRACTICES FOR RETRIEVAL OF RECORD.
- Added new retention period #4 to POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS.

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed revisions has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect these amended systems of records to have any adverse effect on individual privacy rights. The notices for USPS SOR 820.200, Mail Management and Tracking Activity and SOR 870.200 Postage Validation Imprint (PVI), Electronic Verification System (eVS), Postage Meter, and PC Postage Customer Data and Transaction Records are provided below in their entirety:

SYSTEM NAME AND NUMBER:

USPS 820.200, Mail Management and Tracking Activity.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

USPS Headquarters; Integrated Business Solutions Services Centers; USPS IT Eagan Host Computing Services Center; and Mail Transportation Equipment Service Centers.

SYSTEM MANAGER(S):

Chief Information Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–1500.

Chief Customer and Marketing Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–4016.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, and 404.

PURPOSE(S) OF THE SYSTEM:

1. To provide mail acceptance, induction, and scheduling services.
2. To fulfill orders for mail transportation equipment.
3. To provide customers with information about the status of mailings within the USPS network or other carrier networks.
4. To provide customers with mail or package delivery options.
5. To provide business mailers with information about the status of mailings within the USPS mail processing network.
6. To help mailers identify performance issues regarding their mail.
7. To provide delivery units with information needed to fulfill requests for mail redelivery and hold mail service at the address and for the dates specified by the customer.
8. To enhance the customer experience by improving the security of Change of Address (COA) and Hold Mail processes.
9. To protect USPS customers from becoming potential victims of mail fraud and identity theft.
10. To identify and mitigate potential fraud in the COA and Hold Mail processes.
11. To verify a customer's identity when applying for COA and Hold Mail services.
12. To support the administration and enforcement of regulations pertaining to articles found in the mail bearing counterfeit postage.
13. To identify and mitigate potential fraud related to the payment of postage used for shipping and mailing services.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Customers who use USPS mail management and tracking services.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Customer information:* Customer or contact name, mail and email address(es), title or role, phone number(s), text message number, and cell phone carrier.
2. *Identification information:* Customer ID(s), last four digits of Social Security Number (SSN), D–U–N–S Number; mailer and mailing ID, advertiser name/ID, username, and password.
3. *Data on mailings:* Paper and electronic data on mailings, including postage statement data (such as volume, class, rate, postage amount, date and time of delivery, mailpiece count), destination of mailing, delivery status, mailing problems, presort information, reply mailpiece information, container label numbers, package label, Special Services label, article number, and permit numbers.
4. *Payment information:* Credit and/or debit card number, type, and expiration date; ACH information.
5. *Customer preference data:* Hold mail begin and end date, redelivery date, delivery options, shipping and pickup preferences, drop ship codes,

comments and instructions, mailing frequency, preferred delivery dates, and preferred means of contact.

6. *Product Usage Information:* Special Services label and article number.

7. *Mail images:* Images of mailpieces captured during normal mail processing operations.

8. *Counterfeit (CF) Postage Information: Tracking number,* Scan Event Data (Date, Time, Scan ID, Device ID, Scan Source, event code, reason code), *Product or Service Classification (Service type code, Extra Services Code), Packaging Product Code (i.e., "PS00011000001, PS00011132700, etc.), Sender address, Recipient address, Destination ZIP Code, Country Code, Intelligent Mail barcode (IMb), Intelligent Mail Package barcode (IMpb), Mailer Identification (MID) number, Indicia Type (Retail, Permit, PC Postage, etc.) Permit/Payment Account Number, Meter, IBI or IMI number, Postage Amount, Date of Mailing,* Date Article was intercepted as CF, Date article was validated as CF, Location where item is stored, Date Article was Disposed of, *Weight, Shape and Size (L_W_H) of Article, USPS Facility (tracking data site), USPS Mail Processing Operation information (operation code).*

RECORD SOURCE CATEGORIES:

Customers and, for call center operations, commercially available sources of names, addresses, and telephone numbers.

Records of articles found in the mail bearing counterfeit postage.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Standard routine uses 1. through 7., 10., and 11. apply.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated databases, computer storage media, and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

By customer name, by customer ID(s), by logon ID, by mailing address(es), by 11-digit ZIP Code, by Tracking number, by Mailer Identification (MID) Number, by Intelligent Mail barcode (IMb) and by Intelligent Mail Package barcode (IMpb).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. Records are retained for up to 30 days.

2. Records related to ePubWatch, Confirmation Services and hold mail services are retained for up to 1 year.

3. Special Services and drop ship records are retained 2 years.

4. ACH records are retained up to 2 years.

5. Mailpiece images will be retained up to 3 days.

6. Other records are retained 4 years after the relationship ends.

7. USPS and other carrier network tracking records are retained for up to 30 days for mail and up to 90 days for packages and special services.

8. Records pertaining to counterfeit postage information are retained for 3 calendar years.

Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections.

Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software. Online data transmissions are protected by encryption.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedures below and Record Access Procedures above.

NOTIFICATION PROCEDURES:

Customers wanting to know if information about them is maintained in this system of records must address inquiries in writing to the system manager. Inquiries should contain name, customer ID(s), if any, and/or logon ID.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

December 27, 2018, 83 FR 66768; June 05, 2017, 82 FR 25819; August 25, 2016, 81 FR 58542; January 21, 2014, 79 FR 3423; August 03, 2012, 77 FR 46528; June 27, 2012, 77 FR 38342; October 24, 2011, 76 FR 65756; April 29, 2005, 70 FR 22516.

SYSTEM NAME AND NUMBER:

USPS 870.200, Postage Validation Imprint (PVI), Electronic Verification System (eVS), Postage Meter, and PC Postage Customer Data and Transaction Records.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

USPS Headquarters, USPS facilities, Integrated Business Solutions Services Centers, and partner locations.

SYSTEM MANAGER(S):

Vice President, Technology Applications, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, and 404; 39 CFR part 501.

PURPOSE(S) OF THE SYSTEM:

1. To enable responsible administration of postage evidencing system activities.

2. To enhance understanding and fulfillment of customer needs.

3. To support the administration and enforcement of regulations pertaining to articles found in the mail bearing counterfeit postage.

4. To identify and mitigate potential fraud related to the payment of postage used for shipping and mailing services.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Postage evidencing system users.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Customer information:* Contact name, address, and telephone number; registration identifiers; company name; and change of address information.

2. *Identification information:* Customer/system ID(s), IP address(es), date of device installation, device ID number, device model number, and certificate serial number.

3. *Mailing and transaction information:* Tracking ID, package identification code (PIC), customer-provided package/transaction attribute data, postage paid, contract pricing, package attribute data, USPS collection and source system identifiers, mailpiece images, and package destination and origin.

4. *Counterfeit (CF) Postage Information: Tracking number,* Scan Event Data (Date, Time, Scan ID, Device ID, Scan Source, event code, reason code), *Product or Service Classification (Service type code, Extra Services Code), Packaging Product Code (i.e., ''PS00011000001, PS00011132700, etc.), Sender address, Recipient address, Destination ZIP Code, Country Code, Intelligent Mail barcode (IMb), Intelligent Mail Package barcode (IMpb), Mailer Identification (MID) number, Indicia Type (Retail, Permit, PC Postage, etc.) Permit/Payment Account Number, Meter, IBI or IMI number, Postage Amount, Date of Mailing,* Date Article was intercepted as CF, Date article was validated as CF, Location where item is stored, Date Article was Disposed of, *Weight, Shape and Size (L_W_H) of Article, USPS Facility (tracking data site), USPS Mail Processing Operation information (operation code).*

RECORD SOURCE CATEGORIES:

Customers; authorized service providers of postage evidencing systems; and USPS personnel.

Records of articles found in the mail bearing counterfeit postage.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Standard routine uses 1. through 7., 10., and 11. apply. In addition:

a. The name and address of an authorized user of a postage meter or PC Postage product (postage evidencing systems), printing a specified indicium will be furnished to any person provided the user is using the postage meter or PC Postage product for business purposes.

b. Customer-specific records and related sampling systems in this system may be disclosed to eVS customers, indicia providers, and PC Postage providers, including approved shippers, for revenue assurance to ensure accuracy of postage payment across payment systems, and to otherwise enable responsible administration of postage evidencing system activities.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated databases, computer storage media, and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

By customer name and by numeric file of postage evidencing systems ID number by customer ID(s), by Tracking number, by Mailer Identification (MID) Number, by Intelligent Mail barcode (IMb) and by Intelligent Mail Package barcode (IMPb).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. ACH records are retained up to 2 years. Records of payment are retained up to 7 years.

2. Other records in this system are retained up to 7 years after a customer ceases using a postage evidencing system.

3. Within the Postal Service and directly to eVS customers, or through third-party software providers (including meter and PC Postage providers) for the purpose of enabling responsible administration of revenue assurance and other postage evidencing system activities, facilitating remediation of postage disparities, and meeting SOX compliance requirements, in accordance with 39 CFR part 501.

4. Records pertaining to counterfeit postage information are retained for 3 calendar years.

Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on site audits and inspections.

Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedures below and Record Access Procedures above.

NOTIFICATION PROCEDURES:

Customers wanting to know if information about them is maintained in this system of records must address inquires in writing to: Manager, Finance and Payment Technology, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260. Inquiries should include the individual's name and customer ID.

HISTORY:

December 10, 2014, 79 FR 733454; June 27, 2012, 77 FR 38342; October 24, 2011, 76 FR 65756; April 29, 2005, 70 FR 22516.

Tram T. Pham,

Attorney, Ethics and Compliance.

[FR Doc. 2023–07138 Filed 4–5–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34874; File No. 812–15394]

Invesco Dynamic Credit Opportunity Fund, et al.

March 31, 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 amend a previous order granted by the Commission that permits 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: Invesco Dynamic Credit Opportunity Fund, Invesco Senior Income Trust, Invesco Advisers, Inc., Invesco Senior Secured Management, Inc., Invesco Direct Lending (L) II Holdco, L.P., Invesco Direct Lending (UL) II Holdco, L.P., and Invesco Private Credit Opportunities, Holdco, LLC.

FILING DATES: The application was filed on October 7, 2022, and amended on November 10, 2022, and February 16, 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, April 25, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Michael W. Mundt, Esq., Stradley Ronon Stevens & Young, LLP, at *MMundt@stradley.com;* Matthew R. DiClemente, Esq., Stradley Ronon Stevens & Young, LLP, at *MDiClemente@stradley.com;* and Melanie Ringold, Esq., Head of Legal, Americas, Invesco Ltd., 11 Greenway Plaza, Suite 1000, Houston, TX 77046.

FOR FURTHER INFORMATION CONTACT: Kieran G. Brown, Senior Counsel, or Terri 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 16, 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. 2023–07157 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97235; File No. SR–CBOE–2022–057]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Withdrawal of Proposed Rule Change To Increase the Position and Exercise Limits for Options on Apple Inc. Stock ("AAPL")

March 31, 2023.

On November 7, 2022, Cboe Exchange, Inc. filed with the Securities and Exchange Commission (the "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to increase the position and exercise limits for options on Apple Inc. stock ("AAPL"). The proposed rule change was published for comment in the **Federal Register** on November 25, 2022.[3] The Commission received no comment letters regarding the proposed rule change.

On December 22, 2022, pursuant to section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] On February 22, 2023, the Commission instituted proceedings under section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On March 30, 2023, the Exchange withdrew the proposed rule change (SR–CBOE–2022–057).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07143 Filed 4–5–23; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 96353 (Nov. 18, 2022), 87 FR 72568.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 96570 (Dec. 22, 2022), 87 FR 80212 (Dec. 29, 2022).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 96965 (Feb. 22, 2023), 88 FR 12705 (February 28, 2023).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97237; File No. SR–FINRA–2023–006]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt Supplementary Material .19 (Residential Supervisory Location) Under FINRA Rule 3110 (Supervision)

March 31, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 29, 2023, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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

FINRA is proposing to adopt new Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision) that would align FINRA's definition of an office of supervisory jurisdiction ("OSJ") and the classification of a location that supervises activities at non-branch locations with the existing residential exclusions set forth in the branch office definition to treat a private residence at which an associated person engages in specified supervisory activities as a non-branch location, subject to safeguards and limitations. In accordance with Rule 3110(c), as a non-branch location, a Residential Supervisory Location (or "RSL") would become subject to inspections on a regular periodic schedule, which is presumed to be at least every three years,[3] rather than an annual inspection requirement required of OSJs and other supervisory branch offices.[4] FINRA believes the proposal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* FINRA Rules 3110(c)(1)(C) and 3110.13.

[4] SEC staff and FINRA have interpreted FINRA rules to require member firms to conduct on-site inspections of branch offices and unregistered offices (*i.e.,* non-branch locations) in accordance with the periodic schedule described under Rule 3110(c)(1). *See* SEC National Examination Risk Alert, Volume I, Issue 2 (November 30, 2011), *https://www.sec.gov/about/offices/ocie/riskalert-bdbranchinspections.pdf,* and *Regulatory Notice* 11–54 (November 2011) (joint SEC and FINRA guidance stating, a "broker-dealer must conduct on-

strikes an appropriate balance to preserve investor protection while developing a risk-based approach for designating residential supervisory locations that includes key safeguards with respect to, among other things, books and records of the member, while excluding locations where higher risk activities may take place or associated persons that may pose higher risk are assigned. Subject to further modifications as described further below, the terms of the proposed rule change herein are largely similar to the proposed rule change FINRA filed with the SEC in July 2022.[5] FINRA withdrew the 2022 RSL Rule Filing on March 29, 2023 to consider whether modifications and clarifications to the filing would be appropriate in response to concerns raised by commenters.[6]

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

a. Background

Early in 2020, the COVID–19 pandemic prompted FINRA and other regulators to provide temporary relief to member firms from certain regulatory requirements to address the public health crisis.[7] In response to the pandemic, many private and government employers closed their offices and their employees continued with their work from alternative locations such as private residences. FINRA believes this model will endure, irrespective of the state of the pandemic. The pandemic accelerated reliance on technological advances in surveillance and monitoring capabilities and prompted significant changes in lifestyles and work habits, including the growing expectation for workplace flexibility. Moreover, the technology advancements that facilitated the transition to working outside the conventional office setting on a broad scale has not only effected a profound change in lifestyle and workplace practices for member firms, but provided FINRA an opportunity to consider aspects of Rule 3110 that may benefit from modernization.[8] As such, FINRA believes measured changes to its regulatory approach would allow firms to effectively and more efficiently carry out their supervisory responsibilities to review the activities of each office or location while preserving investor protections.

i. Rule Filing History

In the 2022 RSL Rule Filing, FINRA had proposed establishing a new non-branch location—the Residential Supervisory Location—that would be subject to a host of safeguards and conditions derived from the existing exclusions to the branch office definition under Rule 3110(f)(2)(A). The SEC twice published the 2022 RSL Rule Filing for comment, which elicited responses from many individuals, broker-dealers, and trade organizations and other associations, including the North American Securities Administrators Association, Inc. (''NASAA'') and the Public Investors Advocate Bar Association (''PIABA'').[9] FINRA submitted two letters responding to the comments received by the SEC but did not amend the filing.[10]

All commenters supported the overall intent of the 2022 RSL Rule Filing to allow greater flexibility based on the risks presented, except for NASAA and PIABA. Many commenters expressed strong support for FINRA's willingness to evolve its longstanding branch office definition under Rule 3110(f)(2)(A) based on lessons learned during the COVID–19 pandemic and evolving technology and workforce arrangements. A fundamental concern from NASAA and PIABA, however, pertained more generally to firms' ability to supervise associated persons who work from remote offices or locations, a permissible arrangement under specified circumstances that predated the pandemic. In particular, NASAA expressed general concern about ''reducing firms' longstanding supervisory obligations[.]'' [11] Among others, the comments sought to adjust the terms of some of the safeguards and conditions relating to books and records; create a more formalized system to help firms identify and track

site inspections of each of its office locations; [OSJs] and non-OSJ branches that supervise non-branch locations at least annually, all non-supervising branch offices at least every three years; and non-branch offices periodically.'') (citation defining an OSJ omitted). *See also* SEC Division of Market Regulation, Staff Legal Bulletin No. 17: Remote Office Supervision (March 19, 2004) (stating, in part, that broker-dealers that conduct business through geographically dispersed offices have not adequately discharged their supervisory obligations where there are no on-site routine or ''for cause'' inspections of those offices), *https://www.sec.gov/interps/legal/mrslb17.htm.*

[5] *See* Securities Exchange Act Release No. 95379 (July 27, 2022), 87 FR 47248 (August 2, 2022) (Notice of Filing of File No. SR–FINRA–2022–019) (''2022 RSL Rule Filing''); *see also* Exhibit 2a.

[6] *See* Exhibit 2d.

[7] Among the temporary regulatory relief provided, FINRA adopted relief pertaining to branch office registration requirements through Form BR (Uniform Branch Office Registration Form) and FINRA Rule 3110(c) inspection requirements. Specifically, FINRA temporarily suspended the requirement for member firms to submit branch office applications on Form BR for any newly opened temporary office locations or space-sharing arrangements established as a result of the pandemic. *See Regulatory Notice* 20–08 (March 2020) (''*Notice* 20–08''). With respect to inspection obligations, FINRA adopted temporary Rule 3110.16 that provided additional time for member firms to complete their calendar year 2020 inspection obligations. *See* Securities Exchange Act Release No. 89188 (June 30, 2020), 85 FR 40713 (July 7, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–019). In response to the ongoing public health crisis, FINRA subsequently adopted temporary FINRA Rule 3110.17, providing member firms the option to conduct inspections of their branch offices and non-branch locations remotely, subject to specified terms therein. *See* Securities Exchange Act Release No. 90454 (November 18, 2020), 85 FR 75097 (November 24, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–040). Currently, FINRA Rule 3110.17 expires on December 31, 2023. *See* Securities Exchange Act Release No. 96241 (November 4, 2022), 87 FR 67969 (November 10, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2022–030).

[8] In general, FINRA has had a longstanding practice of periodically reviewing its rules to ensure that they continue to promote their intended investor protection objectives in a manner that is effective and efficient, without imposing undue burdens, particularly in light of technological, industry and market changes. *See generally Special Notices to Members* 01–35 (May 2001) (''*Notice* 01–35'') (requesting comment on steps that can be taken to streamline FINRA (then NASD) rules) and 02–10 (January 2002) (''*Notice* 02–10'') (requesting information on steps that can be taken to streamline FINRA (then NASD) rules). *See also Regulatory Notice* 14–14 (April 2014) (requesting comment on the effectiveness and efficiency of FINRA's communications with the public rules) and *Regulatory Notice* 14–15 (April 2014) (requesting comment on the effectiveness and efficiency of FINRA's gifts, gratuities and non-cash compensation rules), both launching FINRA's Retrospective Rule Review Program.

[9] *See* Submitted Comments to 2022 RSL Rule Filing, *https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019.htm.*

[10] *See* Exhibits 2b and 2c.

[11] *See* Letter from Andrew Hartnett, President, NASAA, to J. Lynn Taylor, Assistant Secretary, SEC, dated November 25, 2022, (''NASAA II'') *https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20151667-320142.pdf.*

their residential supervisory locations; and broaden the ineligibility criteria, such as the one relating to an associated person's specified regulatory or disciplinary events to encompass any state law pertaining to securities regulation. March 30, 2023 is the date by which the SEC is required to either approve or disapprove the 2022 RSL Rule Filing. However, on March 29, 2023, FINRA withdrew the 2022 RSL Rule Filing from the SEC in order to consider whether modifications and clarifications to the filing would be appropriate in response to concerns raised by commenters.

ii. Key Changes to Current Proposal

While the proposed rule change retains many of the terms of the 2022 RSL Rule Filing, as described further below, this proposal makes key adjustments that take into account the concerns expressed by commenters in the following areas by:

(1) enhancing the conditions for RSL designation relating to books and records to provide, among things, that records are not physically or electronically maintained and preserved at the location;

(2) expanding the list of criteria that would make a firm ineligible to rely on proposed Rule 3110.19 to include, among other things, a member firm that has been suspended or a firm that has been a FINRA member for less than 12 months;

(3) adjusting the ineligibility criterion that would make an office or location ineligible to rely on proposed Rule 3110.19 where an associated person is the subject of an investigation or other action relating to a failure to supervise; and

(4) requiring firms to provide, on a quarterly basis, a current list to FINRA of all locations designated as RSLs.

iii. Impact on Diversity, Equity and Inclusion (''DEI'') Efforts

Firms have noted that the flexibility hybrid work offers has made a positive impact in attracting more diverse talent, and retaining existing talent.[12] These views are consistent with those expressed by several commenters in response to the 2022 RSL Rule Filing as well.[13] For example, several firms stated that the move to a hybrid approach for the industry has also allowed them to hire broadly across the entire country instead of localized markets, which profoundly impacts and strengthens a firm's diversity and inclusion hiring efforts.[14] Having the ability to offer workplace flexibility is key to maintaining employee engagement and retention; otherwise, workers with transferrable skills are likely to seek positions in other industries that allow for remote or hybrid work. Similarly, one group of commenters, composed mostly of small member firms, stated that ''[t]he expectations of a modern-day workforce have rapidly evolved from decades old status quo into a modern Work From Anywhere (WFA), DEI-enhancing era. Major online job posting portals now have a filter specifically for 'Remote/Work from Home'.'' (citation omitted).[15] Notably, a report from the U.S. Government Accountability Office highlighted that data from the Equal Employment Opportunity Commission for the period 2018–2020 that showed both minorities and women in management positions in the financial services industry remained underrepresented with Black and Hispanic representation at about 3% and 4%, respectively, and female representation at 32% in that period.[16] In proposing to adopt Rule 3110.19, FINRA believes that reducing barriers to entry that may be part of the current regulatory framework can be achieved while continuing to preserve investor protection.

iv. Renewal of Proposed Rule Change To Adopt Proposed Rule 3110.19

FINRA reaffirms its belief that the current environment merits a reevaluation of the regulatory benefit of requiring firms to designate a private residence, at which specified supervisory functions occur, as an OSJ or branch office. In recognition of the significant technology and industry changes that have enhanced the efficiencies of day-to-day supervision of associated persons and impacted workplace arrangements, FINRA is renewing its proposal to adopt new Supplementary Material .19 under Rule 3110 to establish a Residential Supervisory Location that would be treated as a non-branch location (*i.e.,* an unregistered office), subject to specified investor protection safeguards and limitations. The most significant regulatory effect of the proposed rule change would be that, as a non-branch location, a Residential Supervisory Location would become subject to inspections on a regular periodic schedule, which is presumed to be at least every three years, rather than an annual inspection requirement required of OSJs and other supervisory branch offices.[17]

v. Evolution of OSJ and Branch Office Definitions

FINRA has periodically assessed the manner in which firms may effectively and efficiently carry out their supervisory responsibilities considering evolving business models and practices, advances in technology, and regulatory benefits. As detailed below, since the late 1980s, the OSJ and branch office definitions have undergone several revisions to address regulatory need and efficiency (*e.g.,* rule alignment with other regulators, access to more robust information), evolving with technological and industry changes while also remaining focused on promoting investor protection.

Under FINRA's (then NASD's) Rules of Fair Practice,[18] an OSJ was defined as ''any office designated as directly responsible for the review of the activities of registered representatives or associated persons in such office and/or any other offices of the member[,]'' and a branch office was one that was ''owned or controlled by a member, and which is engaged in the investment banking or securities business.''[19] Further, a place of business of a member firm's associated person was considered a branch office if the member: ''directly or indirectly contributes a substantial portion of the operating expenses of any place used by a person associated with a member who is engaged in the investment banking or securities business, whether it be commercial office space or a residence. Operating expenses, for purposes of this standard, shall include items normally associated with the cost of operating the business such as rent and taxes.''[20] In addition, such location was a branch office if the member ''authorizes a listing in any

[12] *See generally* Submitted Comments to *Regulatory Notice* 20–42 (December 2020) (''*Notice* 20–42''), *https://www.finra.org/rules-guidance/notices/20-42#comments.*

[13] *See* Exhibit 2b.

[14] *See* Exhibit 2b.

[15] *See* Letter from Jennifer L. Szaro, Chief Compliance Officer, XML Securities, LLC, et al. (collectively referred to as the ''Group of 16''), to Vanessa A. Countryman, Secretary, SEC, dated October 25, 2022, *https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20147525-313736.pdf.*

[16] *See* U.S. Government Accountability Office, Financial Services Industry, Overview of Representation of Minorities and Women and Practices to Promote Diversity (GAO–23–106427) (December 2022), *www.gao.gov/assets/gao-23-106427.pdf.*

[17] *See* note 3, supra.

[18] Then NASD adopted Rules of Fair Practice when it was founded in 1939 under provisions of the 1938 Maloney Act amendments to the Exchange Act.

[19] *See Notice to Members* 87–41 (June 1987) (''*Notice* 87–41'') (setting forth the proposed rule text changes to Article III, Section 27 of the NASD Rules of Fair Practice for the OSJ definition and Article I, Section (c) of the NASD By-Laws for the branch office definition, among other provisions).

[20] *See Notice* 87–41.

publication or any other media, including a professional dealer's digest or a telephone directory, which listing designates a place as an office or if the member designates a place as an office or if the member designates any such place with an organization as an office.'' [21] The term ''branch office'' was established ''merely to designate and identify for registration purposes the various offices of a member other than the main office and as such [were] required to be registered and as to which a registration fee should be paid.'' [22]

Over the years, these terms have undergone several modifications, driven by changes in regulatory need and business models. In particular, the subsequent amendments focused on providing regulators robust information when conducting examinations that readily identified the appropriate individuals and records at a firm. In response to such changes, the OSJ and branch office definitions were refined and exemptions from branch office registration were added.

In 1988, as part of several supervisory enhancements, the OSJ and branch office definitions were significantly amended in response to general concerns about member firms' associated persons engaging in the offer and sale of securities to the public without adequate ongoing supervision and regular examination by member firms.[23] The amendments substantially expanded the specificity of FINRA Rule 3110 (formerly, Article III, Section 27 of the NASD Rules of Fair Practice) with respect to a member's supervisory obligations and the new standards focused on ''the creation of a supervisory 'chain of command,' in which qualified supervisory personnel are appointed to carry out the firm's supervisory obligations[.]'' [24] The newly amended OSJ definition focused on an office at which ''the approval [of specified functions] that constitutes formal action by the member takes place.'' [25] The amendments also added more prescriptive requirements with respect to OSJs such as requiring a firm to designate as an OSJ an office that meets the OSJ definition and any other location for which such designation would be appropriate; designate one or more registered principals in each OSJ; maintain written supervisory procedures describing the supervisory system implemented and listing the titles, registration status, and locations of the required supervisory personnel and the specific responsibilities associated with each; and keep and maintain the firm's supervisory procedures, or the relevant parts thereof, at each OSJ and at each other location where supervisory activities are conducted on behalf of the firm.[26]

With respect to the branch office definition, the amendments also refined it from any location ''owned or controlled by a member, and which [was] engaged in the investment banking or securities business'' [27] to ''any business location held out to the public or customers by any means as a location at which the investment banking or securities business is conducted on behalf of the member, excluding any location identified solely in a telephone directory line listing or on a business card or letterhead, which listing, card, or letterhead also sets forth the address and telephone number of the office of the member responsible for supervising the activities of the identified location.'' [28]

These definitional amendments were intended to address concerns about the absence of on-site supervision by registered principals at a firm's business location.[29] The amendments required a ''minimum supervisory structure that facilitate[d] closer supervision by principals with clear responsibilities.'' [30] In addition, the revisions required OSJ designation for ''any office at which the approval that constitutes formal action by the member takes place.'' [31] Further, FINRA noted that the enhancements to the supervisory practices and definitions reflected its ''continuing commitment to facilitate more effective supervision by members while accommodating their diverse modes of operation.'' [32] FINRA believes the definitional amendments brought focus to where final approval of certain functions was occurring so both the firm and regulators would be able to readily identify the principal who was designated to review a specific function and also where original books and records related to such supervision would be kept. At that time, books and records (*e.g.,* account documents, communications, order tickets, trade blotters) were generally made and preserved in hard copy paper format, not electronically, and stored in files at such offices.

In 1992, FINRA further amended the branch office definition to allow additional locations that were not being held out to the public to be exempt from branch office registration.[33] FINRA noted that the exclusions were intended as a reasonable accommodation to member firms with widely dispersed sales personnel selling limited product lines such as variable contracts and mutual funds.[34] In the approval order, the Commission recognized that the amended definition would eliminate the requirement to register as a branch office unless the securities activity at the office required ''continuous and direct supervision of a principal, or the location is being held out to the public as a place where a full range of securities activity is being conducted. Having considered the proposal, the Commission believe[d] the rule change will assist [FINRA] members in meeting their obligation to supervise off-site registered representatives under applicable securities laws, regulations and [FINRA] rules.'' [35]

In 2001, FINRA launched an initiative to modernize its rules.[36] Based on input from member firms, FINRA identified the branch office definition as a rule that could benefit from modernization

[21] *See Notice* 87–41.

[22] *See Notice* 87–41.

[23] *See* Securities Exchange Act Release No. 26177 (October 13, 1988), 53 FR 41008 (October 19, 1988) (Order Approving File No. SR–NASD–88–31). *See also Notice to Members* 88–84 (November 1988) (''*Notice* 88–84'') (announcing SEC approval of File No. SR–NASD–88–31).

[24] *See Notice to Members* 88–11 (February 1988) (''*Notice* 88–11'') (requesting comments on proposed amendments to Article III, Section 27 of the NASD Rules of Fair Practice regarding supervision and the OSJ and branch office definitions).

[25] *See Notice* 88–11. Largely similar to current Rule 3110(f)(1)(A) through (G), the specified functions were: ''(1) Order execution and/or market making; (2) Structuring of public offerings or private placements; (3) Maintaining custody of customers' funds and/or securities; (4) Final acceptance (approval) of new accounts on behalf of the member, (5) Review and endorsement of customer orders pursuant to the provisions of proposed Article III, Section 27(d); (6) Final approval of advertising or sales literature for use by persons associated with the member, pursuant to Article III, Section 35(b)(l) of the Rules of Fair Practice; or (7) Responsibility for supervising the activities of persons associated with the member at one or more other offices of the member.'' *See Notice* 88–84.

[26] *See Notice* 88–84. *See generally* Rule 3110(a) and (b).

[27] *See Notice* 87–41.

[28] *See Notice* 88–84.

[29] *See Notice* 87–41.

[30] *See Notice* 87–41.

[31] *See Notice* 88–11.

[32] *See Notice* 88–11.

[33] In general, these amendments codified interpretations pertaining to the branch office definitions and their exclusions by clarifying that the address and telephone number of the appropriate OSJ or branch office must be provided in advertisements and sales literature, not the address of a non-branch location. *See* Securities Exchange Act Release No. 30509 (March 24, 1992), 57 FR 10936 (March 31, 1992) (Order Approving File No. SR–NASD–91–42).

[34] *See Notice to Members* 92–18 (April 1992) (announcing SEC approval of File No. SR–NASD–91–42).

[35] *See* Securities Exchange Act Release No. 30509 (March 24, 1992), 57 FR 10936, 10937 (March 31, 1992) (Order Approving File No. SR–NASD–91–42).

[36] *See Notice* 01–35.

in light of the SEC's amendment to the term ''office'' in the SEC's Books and Records Rules,[37] the branch office definition used by the New York Stock Exchange (''NYSE'') and state regulators, new business practices that were developing based on technological innovations, and the potential to create a uniform branch office registration system.[38] FINRA expressly noted that a factor to be considered in modernizing rules included instances ''where the regulatory burden of a rule significantly outweigh[ed] the benefit, or the rule no longer work[ed] efficiently given new technologies.''[39]

Until 2005, member firms were required to complete Schedule E to the Form BD (''Schedule E'') to register or report branch offices to the SEC, FINRA, and the state in which they conducted a securities business that required branch office registration. While Schedule E captured certain data with respect to branch offices, it did not adequately fulfill the evolving needs of regulators. For example, Schedule E did not link an individual registered representative with a particular branch office, which made it more difficult for regulators to track the appropriate individuals for examinations.

As technology advanced and business models changed, FINRA continued its commitment to modernizing the rule while preserving investor protections. By 2005, this initiative led to the establishment of a national standard, a uniform definition of a branch office, that was the product of a coordinated effort among regulators to reduce inconsistencies in the definitions used by the SEC, FINRA, the NYSE, NASAA, and state securities regulators to identify locations where broker-dealers conduct securities or investment banking business.[40] Moreover, the adoption of a uniform definition facilitated the development of a centralized branch office registration system through the Central Registration Depository and the creation of a uniform form to register or report branch offices electronically with multiple regulators.[41] With the launch of this new technology, firms and regulators could efficiently identify each branch location, which would be assigned a unique branch office number by the system, the individuals assigned to such location, and the designated supervisor(s) for such location. This new centralized branch office registration system allowed firms and regulators to efficiently locate offices and individuals, and moreover closed gaps in information, created significant efficiencies and lessened the burden on firms and regulators.

At the time these definitional changes were underway, technology had progressed with the advent of faster internet, Wi-Fi, the emergence of web-based platforms, and more portable computers to enhance workplace connectivity that allowed for expanded remote work options. In recognition of the evolving and growing trend in the financial industry and workforce generally to work from home, the uniform branch office definition adopted numerous exclusions, including the current primary residence exclusion. The limitations on use of a primary residence closely tracks the limitations on the use of a private residence in the SEC's Books and Records Rules,[42] which provide that a broker-dealer is not required to maintain records at an office that is a private residence if only one associated person (or multiple associated persons if members of the same family) regularly conducts business at the office, the office is not held out to the public as an office, and neither customer funds nor securities are handled at the office. At the same time, FINRA adopted IM–3010–1 (Standards for Reasonable Review) (now Rule 3110.12 (Standards for Reasonable Review)), as a further safeguard.[43] That rule clarified the high standards firms must observe regarding supervisory obligations and emphasized the requirement that members already had to establish reasonable supervisory procedures and conduct reviews of locations taking into consideration, among other things: the firm's size, organizational structure, scope of business activities, number and location of offices, the nature and complexity of products and services offered, the volume of business done, the number of associated persons assigned to a location, whether a location has a principal on-site, whether the office is a non-branch location, and the disciplinary history of the registered person.

During the almost two decades since the adoption of the uniform branch office definition and its related exclusions, regulators have utilized advancements in technology to support their examinations and otherwise further investor protections, and firms have embraced and adopted numerous technologies to enhance their regulatory and compliance programs. The rapid explosion of new technologies in the last 20 years, and the widespread use such of technology (*e.g.,* personal computers, email, mobile phones, electronic communication systems with audio and visual capabilities, cloud storage of books and records), and the ability to use risk-based surveillance and compliance tools and systems, have fundamentally altered the landscape of how the broker-dealer business is conducted.

These earlier amendments evidence the need to keep the regulatory framework current. FINRA believes that with evolving changes in business models and the significant advance of technological tools that are now readily available, some functions can be exempt from registration, subject to specified conditions, without compromising a reasonably designed supervisory system. Moreover, FINRA believes the proposed rule change to classify some private residences as non-branch locations, subject to specified controls, will not result in a loss of the important regulatory information that the rules were designed, in part, to provide regarding the locations or associated persons. That information will continue to be collected through our regulatory requirements and systems such as the branch office registration system and Form BR and other uniform registration forms.[44] Further, as a non-branch location, an RSL would be subject to an inspection on a regular periodic schedule which FINRA believes would still achieve the purpose of the inspection requirement; that is, to help firms assess whether their supervisory systems and procedures are being followed.[45]

[37] 17 CFR 240.17a–3 and 240.17a–4. *See generally Notice to Members* 01–80 (December 2001) (describing amendments to the SEC Books and Records Rules).

[38] *See Notice* 02–10.

[39] *See Notice* 01–35.

[40] *See* Securities Exchange Act Release No. 52403 (September 9, 2005), 70 FR 54782 (September 16, 2005) (Order Approving File No. SR–NASD–2003–104) (''Uniform Definition of Branch Office'').

[41] *See* Form BR.

[42] *See* note 37, *supra.*

[43] *See* note 40, *supra.*

[44] For example, under Form U4 (Uniform Application for Securities Industry Registration or Transfer), if an individual's ''Office of Employment Address'' is an unregistered location, the firm must report the address of such location as the individual's ''located at'' address and must report the branch office that supervises that non-registered location as the ''supervised from'' location. *See* Form U4, Section 1 (General Information). Similar to Form BR, Form U4 solicits information about an individual's other business activities. *See* Form U4, Section 13 (Other Business) and Form BR, Section 3 (Other Business Activities/Names/websites). Form BD (Uniform Application for Broker-Dealer Registration) captures the types of business in which a firm is engaged. *See* Form BD, Item 12; *see also* Form BR, Section 2 (Registration/Notice Filing/Type of Office/Activities), Item D.

[45] *See Notice to Members* 99–45 (June 1999) (''*Notice* 99–45'').

vi. Evolution of the Review and Inspection of Activities Occurring at Offices and Locations

Under FINRA's (then NASD's) Rules of Fair Practice, a member firm was required to ''review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities and abuses and at least an annual inspection of each [OSJ].'' [46] Alongside the supervisory enhancements that occurred in the 1980s, including the definitional changes described above, FINRA expanded the review requirement to include not only the activities of each office, but also the businesses in which a member firm engages. The expanded review requirement included a periodic examination of customer accounts to detect and prevent irregularities and abuses, an annual inspection of each OSJ, and inspection of branch offices in accordance with a regular schedule as set forth in the member's supervisory procedures.[47] As with the definitional changes, these enhancements were intended to address concerns about the adequacy of ongoing supervision and regular examination of associated persons engaged in the offer and sale of securities to the public at locations away from a member firm's office.[48]

FINRA guidance during this period, moreover, focused on the need for effective supervision of the securities-related activities of ''off-site representatives,'' and advised firms that an inspection should include, among other things, a ''review of any on-site customer account documentation and other books and records, meetings with individual registered representatives to discuss the products they are selling and their sales methods, and an examination of correspondence and sales literature.'' [49] This guidance about the effective supervision of ''off-site representatives'' was pragmatic at a time when business activities were conducted primarily using paper documents [50] that were created and stored locally at an office or location; registered persons were interacting with their customers largely through in-person meetings, paper-based correspondence transmitted through the postal service, and landline telephone calls; and supervisory personnel were conducting supervision through manual reviews of paper files (*e.g.,* exception reports bearing a supervisor's handwritten comments and initials).

Today, supervisory functions such as approving new customer accounts, reviewing and endorsing customer orders and approving retail communications, in large part, occur through traceable digital channels. Based on FINRA's examination experience over decades, making and preserving records electronically have increasingly become the norm and the preferred recordkeeping medium rather than paper; communications between and among members, their associated persons and customers commonly take place through email, video or some other electronic means; and customer funds and securities are frequently and increasingly transmitted electronically rather than in physical form. In addition, firms have centralized many aspects of their supervisory, surveillance, compliance, and other control functions that facilitate ongoing, real-time monitoring and supervision of activities of dispersed offices and locations. Changes in business practices and work habits have evolved, but the pandemic experience has accelerated reliance on technological advances in surveillance and monitoring capabilities, and spurred significant changes in lifestyles and work habits, including the growing expectation for workplace flexibility. With these environmental changes, FINRA believes that there is an opportunity to create a regulatory framework in which member firms can capably continue to carry out their obligation to effectively inspect the supervisory activities taking place at an office or location, subject to the proposed controls, on a regular periodic schedule without diminishing investor protection.

vii. FINRA Rule 3110 and Current Requirements To Register and Inspect Offices

Rule 3110 requires a member firm, regardless of size or type, to have a supervisory system for the activities of its associated persons that is reasonably designed to achieve compliance with applicable securities laws and regulations, and FINRA rules. The rule sets forth the minimum requirements of a member firm's supervisory system that includes registering a location as an OSJ or branch office that meets the definitions under Rule 3110(f) and inspecting all offices and locations in accordance with Rule 3110(c). The rule categorizes offices or locations as an OSJ or supervisory branch office, a non-supervisory branch office, or a non-branch location.[51] The requirements to register, inspect and have a principal on-site vary based on the categorization. Specifically, the rule requires the registration and designation as an OSJ or branch office of each location, including the main office, that meets their respective definition under paragraphs (f)(1) and (f)(2) of Rule 3110, as described in more detail below.[52]

An OSJ is a type of branch office. Rule 3110(f)(2) defines a ''branch office'' as ''any location where one or more associated persons of a member firm regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security, or is held out as such[.]'' [53] In addition, any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is a branch office (*i.e.,* a supervisory branch office).[54] A location registered as a branch office must have one or more appropriately registered representatives or principals in each office, and is subject to an inspection at least every three years, unless it is a supervisory branch office in which case it is subject to at least an annual inspection.[55]

Depending upon the functions occurring at a branch office, it may be further classified as an OSJ, which Rule 3110(f)(1) defines as a member's business location at which any one or more of the following functions take place: (1) order execution or market making; (2) structuring of public offerings or private placements; (3) maintaining custody of customers' funds or securities; (4) final acceptance (approval) of new accounts on behalf of the member; (5) review and endorsement of customer orders, pursuant to Rule 3110(b)(2); [56] (6) final

[46] *See* note 19, *supra,* and accompanying text for the then existing OSJ definition.

[47] *See Notice* 88–84.

[48] *See Notice* 88–84.

[49] *See Notice to Members* 98–38 (May 1998) (''*Notice* 98–38'') and *Notice* 99–45.

[50] Paper-based documents included, for example, customer account opening documents; correspondence with customers; marketing materials; communications from registered persons to the firm; order tickets; checks received and forwarded; and fund transmittal records.

[51] *See* FINRA Rule 3110(c).

[52] *See* FINRA Rules 3110(a)(3) and 3110.01. Currently, firms are required to register each branch office and indicate, among other things, whether it is an OSJ, by filing Form BR. *See* Section 2 of Form BR, requiring the applicant to indicate whether an office is a ''FINRA OSJ'' or ''non-OSJ branch,'' *https://www.finra.org/sites/default/files/AppSupportDoc/p465944.pdf.*

[53] *See* FINRA Rule 3110(f)(2)(A).

[54] *See* FINRA Rule 3110(f)(2)(B).

[55] *See* FINRA Rule 3110(a)(4), and FINRA Rule 3110(c)(1)(A) and (B).

[56] FINRA Rule 3110(b)(2) pertains to the review of a member's investment banking and securities business and provides that ''[t]he supervisory procedures required by [Rule 3110(b) (Written Procedures)] shall include procedures for the review by a registered principal, evidenced in

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approval of retail communications for use by persons associated with the member, pursuant to Rule 2210(b)(1), except for an office that solely conducts final approval of research reports;[57] or (7) responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member. An office designated as an OSJ must have an appropriately registered principal on-site at the location, and must be inspected at least annually.[58]

However, subject to specified conditions, an office or location may be deemed a ''non-branch location,'' and excluded from registration as a branch office. Currently, Rule 3110(f)(2)(A) sets forth seven exclusions—often referred to as unregistered offices or non-branch locations—of which two pertain to residential locations.[59] One such exclusion appears under Rule 3110(f)(2)(A)(ii) and exempts from registration as a branch office an associated person's primary residence subject to the following express conditions: (1) only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location; (2) the location is not held out to the public as an office and the associated person does not meet with customers at the location; (3) neither customer funds nor securities are handled at that location; (4) the associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications and other communications to the public by such associated person; (5) the associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with the Rule; (6) electronic communications (*e.g.,* email) are made through the member's electronic system; (7) all orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office; (8) written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and (9) a list of the residence locations is maintained by the member (''primary residence exclusion'').[60] The second exclusion that pertains to a residential location appears under Rule 3110(f)(2)(A)(iii) and is any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided that the member complies with the conditions described in (1) through (8) above (''non-primary residence exclusion''). In general, the non-primary residence exclusion typically refers to a vacation or second home.[61] A non-branch location must be inspected on a periodic schedule, presumed to be at least every three years.[62]

Notwithstanding either of these two residential exclusions or the other exclusions listed under Rule 3110(f)(2)(A),[63] a primary or non-primary residence location that is responsible for either the supervisory activities set forth in the OSJ definition or for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered an OSJ or (supervisory) branch office, respectively.[64] Consequently, such residential supervisory offices are subject to registration, an annual inspection and, in some cases, additional licensing requirements.[65]

As noted above, the branch office definition and its exclusions, including the conditions for the primary residence and non-primary residence exclusions, is a uniform definition FINRA developed in coordination with the NYSE and other self-regulatory organizations (''SROs''), and state securities regulators, and it has been in place since 2005 (collectively, the ''uniform branch office definition'').[66] The codification of the seven exclusions from registration in the uniform branch office definition recognized both practical situations and advances in technology used to conduct and monitor business, the evolving nature of business models, and changing lifestyle and work practices while also preserving investor protection through specified safeguards and limitations such as those appearing in the primary residence exclusion.[67] In the approval order for the uniform branch office definition, the Commission noted that the limitations for the primary residence exclusion ''closely track the limitations on the use of a private residence in the Books and Records Rules.''[68] The Commission also stated that the seven exclusions ''recognize current business, lifestyle, and surveillance practices and provide associated persons with additional flexibility. For instance, because associated persons may have to work from home due to illness, or to provide childcare or eldercare for certain family members, the Commission believes it is appropriate to except primary residences from the definition of branch office while providing certain safeguards and limitations to protect investors.''[69] Further, the Commission stated that ''[g]iven the continued advances in technology used to conduct and monitor businesses and changes in the structure of broker-dealers and in the lifestyles and work habits of the workforce, the Commission believes it is reasonable and appropriate for [FINRA] to reexamine how it determines whether business locations need to be registered as branch offices of broker-dealer

writing, of all transactions relating to the investment banking or securities business of the member.''

[57] In general, with some exceptions, paragraph (b)(1) of Rule 2210 (Communications with the Public) requires that an appropriately qualified registered principal approve each retail communication prior to use or filing with FINRA.

[58] *See* FINRA Rules 3110(a)(4) and 3110(c)(1)(A).

[59] *See generally* FINRA Rule 3110(f)(2)(A) which, in addition to the primary residence and the non-primary residence exclusions that are further described, excludes the following from the definition of ''branch office'': (1) any location that is established solely for customer service or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office; (2) any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; (3) any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year; provided that any retail communication identifying such location also sets forth the address and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised; (4) the Floor of a registered national securities exchange where a member conducts a direct access business with public customers; or (5) a temporary location established in response to the implementation of a business continuity plan.

[60] *See* FINRA Rule 3110(f)(2)(ii)a. through i.

[61] *See Notice to Members* 06–12 (March 2006) (''*Notice* 06–12'').

[62] *See* note 3, *supra.*

[63] *See* note 59, *supra.*

[64] *See* FINRA Rule 3110(f)(1)(D) through (G) and FINRA Rule 3110(f)(2)(B).

[65] *See* note 58, *supra.*

[66] *See* note 40, *supra.*

[67] *See generally Notice to Members* 05–67 (October 2005).

[68] *See* Uniform Definition of Branch Office, *supra* note 40, 70 FR 54782, 54783 (citation omitted).

[69] *See* Uniform Definition of Branch Office, *supra* note 40, 70 FR 54782, 54787. *See also* Securities Exchange Act Release No. 52402 (September 9, 2005), 70 FR 54788, 54795 (September 16, 2005) (Order Approving File No. SR–NYSE–2002–34) (stating, ''the Commission believes that the seven proposed exceptions to registering as a branch office constitute a reasonable approach to recognize current business, lifestyle, and surveillance practices and provide associated persons with flexibility with respect to where they perform their jobs. For instance, because associated persons may have to work from home due to illness, or to provide childcare or eldercare for certain family members, the Commission believes it is appropriate to except primary residences from the definition of branch office.'').

members.'' [70] Finally, the Commission expressed the view that the uniform branch office definition ''strikes the right balance between providing flexibility to broker-dealer firms to accommodate the needs of their associated persons, while at the same time setting forth parameters that should ensure that all locations, including home offices, are appropriately supervised.'' [71] FINRA believes that the Commission's statements about advances in technology and evolving workplace conventions, and the safeguards and limitations of the primary residence exclusion are apt for this proposed rule change as well.

viii. Impact of Technology on Supervision and New Workplace Conventions

In response to the public health crisis, FINRA requested comment regarding pandemic-related issues and questions, including the comment process in connection with the temporary amendments to Rule 3110,[72] and discussions with FINRA's advisory committees and other industry representatives. Firms responded that they relied extensively on technology to support their effective transition to the remote work environment and enhance the supervision of geographically dispersed associated persons, many of whom have been working from home since early 2020 and may continue to do so in some manner in the current environment.[73] These technological tools facilitating their supervisory practices include surveillance systems, electronic tracking programs or applications, and electronic communications, including video conferencing tools.[74] Commenters that responded to the 2022 RSL Rule Filing conveyed the general view that technology has facilitated remote supervision, with some commenters describing the technology used to effectively supervise associated persons.[75] The examples cited included the use of information barriers to safeguard and restrict the flow of confidential and material, non-public information; technology barriers to restrict and control employee access to systems and databases; internal email blocks; internet and social media reviews for evidence of outside business activities or private securities transactions; programs or operating systems to enable firms to conduct computer desktop reviews from another location; web-based communication platforms to communicate with registered persons; video conferencing technology; a centralized repository to retain electronic communications; and software (*e.g.,* DocuSign) to enable customers to digitally sign contracts and other documents such as client attestations and new account documents.[76] In addition, some firms have further noted that the flexibility hybrid work offers has made a positive impact in attracting more diverse talent, and retaining existing talent.[77] These views are consistent with those expressed by several commenters in response to the 2022 RSL Rule Filing.[78]

Similar to the changed environment underlying the Commission's approval order of the uniform branch office definition that codified the existing seven exclusions, FINRA believes that the structural and lifestyle changes for member firms and their workforce catalyzed by the pandemic—along with advances in technology—merit reevaluation of some aspects of the branch office registration and inspection requirements. Specifically, FINRA believes the regulatory benefit of requiring firms to designate a private residence, at which supervisory functions occur, as an OSJ or branch office (*i.e.,* supervisory branch office), subject to an annual inspection schedule, should now be reconsidered where the risk profile of these offices can be effectively controlled through practically based safeguards and limitations.

FINRA is therefore proposing to adopt new Supplementary Material .19 under Rule 3110 to establish a Residential Supervisory Location as a non-branch location, subject to specified safeguards and limitations. This proposed new non-branch location would target the subset of residential locations that have many of the attributes contained in the primary residence exclusion, but must be registered as an OSJ or branch office because of the supervisory functions taking place there.

b. Proposed Residential Supervisory Location as a Non-Branch Location

The proposed definition of an RSL would be based largely on several existing aspects of Rule 3110(f). In particular, FINRA is proposing to incorporate the existing supervisory functions appearing in the OSJ definition (Rule 3110(f)(1)) and branch office definition (Rule 3110(f)(2)(B)) with the existing residential exclusions set forth in the branch office definition to classify a Residential Supervisory Location as a non-branch location. Currently, a private residence at which these supervisory functions occur must be registered and designated as a branch office or OSJ under Rule 3110(a)(3), and inspected at least annually under Rule 3110(c)(1)(A). By treating such location as a non-branch location, the private residence would become subject to inspections on a regular periodic schedule under Rule 3110(c)(1)(C), presumed to be every three years.[79]

Proposed Rule 3110.19 would incorporate some existing safeguards and limitations firms must already satisfy to rely on the primary residence exclusion [80] as FINRA believes that several of these conditions are also appropriate for the proposed Residential Supervisory Location. FINRA intends for the terms underlying the proposed Residential Supervisory Location to be interpreted consistently with their meaning in Rule 3110(f) and existing related guidance.[81] In addition, FINRA is proposing to further augment the conditions for RSL designation and the criteria that would make a firm ineligible to rely on proposed Rule 3110.19 if unmet.

i. Conditions for Designation as a Residential Supervisory Location (Proposed Rule 3110.19(a))

As described above, FINRA is proposing to adopt Rule 3110.19 to establish a Residential Supervisory Location as a new non-branch location, but subject to specified conditions, most of which are derived from those

[70] *See* Uniform Definition of Branch Office, *supra* note 40, 70 FR 54782, 54787.

[71] *See* note 69, *supra.*

[72] *See, e.g.,* Submitted Comments to Securities Exchange Act Release No. 94018 (January 20, 2022), 87 FR 4072 (January 26, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2022–001), *https://www.sec.gov/comments/sr-finra-2022-001/srfinra2022001.htm;* and Submitted Comments to Securities Exchange Act Release No. 89188 (June 30, 2020), 85 FR 40713 (July 7, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–019), *https://www.sec.gov/comments/sr-finra-2020-019/srfinra2020019.htm.*

[73] *See generally Regulatory Notice* 21–44 (December 2021).

[74] *See generally Regulatory Notice* 20–16 (May 2020); *see also* FINRA White Paper, Technology Based Innovations for Regulatory Compliance (''RegTech'') in the Securities Industry (September 2018) (reporting, among other things, that as financial services firms seek to keep pace with regulatory compliance requirements, they are turning to new and innovative regulatory tools to assist them in meeting their obligations in an effective and efficient manner), *https://www.finra.org/sites/default/files/2018_RegTech_Report.pdf.*

[75] *See* Exhibit 2b.

[76] *See* Exhibit 2b.

[77] *See generally* note 12, *supra.*

[78] *See* Exhibit 2b.

[79] *See* note 3, *supra.*

[80] *See* Rule 3110(f)(2)(A)(ii)a., b., c., d., e., f, and i.

[81] *See, e.g., Notice* 06–12.

currently required for the primary residence and non-primary residence exclusions. While many of the proposed conditions are similar to those FINRA had proposed in the 2022 RSL Rule Filing, this proposed rule change adjusts the conditions for RSL designation in two key areas. Specifically, this proposed rule change would add conditions pertaining to (1) books and records to include, among other things, clarifying language about a firm's recordkeeping system and (2) a firm's surveillance and technology tools to provide, among other things, that the tools are appropriate to supervise the risks presented by each RSL.

A. Conditions Derived Largely From Rule 3110 To Remain Substantively Unchanged From the 2022 RSL Rule Filing

In the 2022 RSL Rule Filing, FINRA has proposed several conditions for RSL designation that were based on those used for the existing residential exclusions to the branch office definition. Through this proposed rule change, FINRA is proposing to retain those terms subject to some technical adjustments that would align the proposed rule text more closely to the rule text appearing in Rule 3110(f)(2)(A)(ii).

Under proposed Rule 3110.19(a), any such location would be considered a non-branch location (and thus excluded from branch office registration), provided that: (1) only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location (proposed Rule 3110.19(a)(1)); [82] (2) the location is not held out to the public as an office (proposed Rule 3110.19(a)(2)); [83] (3) the associated person does not meet with customers or prospective customers at the location (proposed Rule 3110.19(a)(3)); [84] (4) no sales activity takes place at the location other than as permitted and subject to the conditions set forth under Rule 3110(f)(2)(A)(ii) or (iii) (proposed Rule 3110.19(a)(4)); [85] (5) neither customer funds nor securities are handled at that location (proposed Rule 3110.19(a)(5)); [86] (6) the associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications and other communications to the public by such associated person (proposed Rule 3110.19(a)(6)); [87] (7) the associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with Rule 3110 (proposed Rule 3110.19(a)(7)); [88] and (8) the associated person's electronic communications (*e.g.,* email) are made through the member's electronic system (proposed Rule 3110.19(a)(8)).[89]

B. Conditions Adjusted From the 2022 RSL Rule Filing

1. Books and Records (Proposed Rule 3110.19(a)(9))

In the 2022 RSL Rule Filing, FINRA had proposed requiring that all books or records required to be made and preserved by the member under the federal securities laws or FINRA rules are maintained by the member other than at the location. FINRA is proposing a clarifying adjustment to the language to provide that: (1) the member must have a recordkeeping system to make and keep current, and preserve records required to be made, and kept current, and preserved under applicable securities laws and regulations, FINRA rules, and the member's own written supervisory procedures under Rule 3110; (2) such records are not physically or electronically maintained and preserved at the location; and (3) the member has prompt access to such records.

2. Surveillance and Technology Tools (Proposed Rule 3110.19(a)(10)

To further enhance the proposed conditions for RSL designation, FINRA is proposing to include the requirement that a firm must determine that its surveillance and technology tools are appropriate to supervise its RSLs. FINRA believes that specifying baseline expectations with respect to the surveillance and technology tools a firm must have in order to supervise its RSLs would promote investor protection.

FINRA believes that these proposed 10 conditions would strengthen a firm's ability to monitor the supervisory activities occurring at a Residential Supervisory Location and act to lower the overall risks associated with such location because, for example, the books and records required to be made and preserved by the member under the federal securities laws or FINRA rules cannot be physically or electronically maintained and preserved at the location. Moreover, FINRA notes that sales activities would be permissible at a Residential Supervisory Location to the same extent sales activities are permitted currently under such exclusions. As previously noted, the conditions for the current primary and non-primary residence exclusions, which align with the SEC's Books and Records Rules, were developed in coordination with other SROs and state securities regulators and such exclusions have been in place since 2005.[90] As such, firms have developed experience with monitoring and supervising these conditions, and FINRA believes member firms will be able to rely on such experience to reasonably supervise similar conditions for proposed Residential Supervisory Locations. As with any non-branch location, a Residential Supervisory Location would be subject to an inspection on a periodic schedule, presumed to be at least every three years.[91]

iv. Member Firm Ineligibility Criteria (Proposed Rule 3110.19(b))

FINRA is further proposing several criteria a member firm must meet before it would be eligible to designate an office or location as a Residential Supervisory Location in accordance with proposed Rule 3110.19. As described further below, the proposed seven ineligibility criteria reflect attributes of a member firm that FINRA believes are more likely to raise investor protection concerns based on FINRA rules. Consistent with the 2022 RSL Rule Filing, proposed Rule 3110.19(b) would provide that a location would be ineligible for designation as a Residential Supervisory Location in accordance with Rule 3110.19 if: (1) the member is currently designated as a ''Restricted Firm'' under Rule 4111 (Restricted Firm Obligations) [92]

[82] *See* Rule 3110(f)(2)(A)(ii)a. (''Only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location[.]'').

[83] *See* Rule 3110(f)(2)(A)(ii)b. (''The location is not held out to the public as an office and the associated persons does not meet with customers at the location[.]'').

[84] *See* note 83, *supra.*

[85] An associated person's private residence, other than a primary residence, remains subject to the less than 30-business-day in any calendar year limitation on use for securities business.

[86] *See* Rule 3110(f)(2)(A)(ii)c. (''Neither customer funds nor securities are handled at the location[.]'').

[87] *See* Rule 3110(f)(2)(A)(ii)d. (''The associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications and other communications to the public by such associated person[.]'').

[88] *See* Rule 3110(f)(2)(A)(ii)e. (''The associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with this Rule[.]'').

[89] *See* Rule 3110(f)(2)(A)(ii)f. (''Electronic communications (*e.g.,* email) are made through the member's electronic system[.]'').

[90] 17 CFR 240.17a–4(l); *see also* note 40, *supra.*

[91] *See* note 3, *supra.*

[92] In general, Rule 4111 requires member firms that are identified as ''Restricted Firms'' to deposit

(proposed Rule 3110.19(b)(1)); (2) the member is currently designated as a ''Taping Firm'' under Rule 3170 (Tape Recording of Registered Persons by Certain Firms) [93] (proposed Rule 3110.19(b)(2)); or (3) the member is currently undergoing, or is required to undergo, a review under Rule 1017(a)(7) as a result of one or more associated persons at such location [94] (proposed Rule 3110.19(b)(3)).[95] Through this proposed rule change, FINRA is proposing to supplement these criteria to include a member firm: (1) that receives a notice from FINRA pursuant to Rule 9557 (Procedures for Regulating Activities under Rule 4110 (Capital Compliance), Rule 4120 (Regulatory Notification and Business Curtailment) or Rule 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties)), unless FINRA has otherwise permitted activities in writing pursuant to such rule (proposed Rule 3110.19(b)(4)); (2) is or becomes suspended by FINRA (proposed Rule 3110.19(b)(5)); (3) based on the date in CRD, had its FINRA membership become effective within the prior 12 months (proposed Rule 3110.19(b)(6)); or (4) is or has been found within the past three years by the SEC or FINRA to have violated Rule 3110(c) (proposed Rule 3110.19(b)(7)).

FINRA believes that a member firm that is experiencing issues complying with its capital requirements or that has been suspended by FINRA is more likely to face significant operational challenges that may negatively impact the firm's overall supervision of its associated persons. FINRA further believes that a firm that has been a FINRA member for less than 12 months is often still implementing its business plan and developing a supervisory system appropriate tailored to the firm's specific attributes and structure. With respect to a firm that is or has been found within the past three years by the SEC or FINRA to have violated Rule 3110(c), FINRA believes such a firm has demonstrated challenges in developing or maintaining a robust inspection program. As such, FINRA believes that these proposed ineligibility criteria appropriately account for firms that pose higher risks, and for that reason, would be ineligible to rely on proposed Rule 3110.19.

v. Location Ineligibility Criteria (Proposed Rule 3110.19(c))

In the 2022 RSL Rule Filing, FINRA had proposed several criteria applicable to an associated person that if unmet, would make the location of the associated person ineligible for RSL designation. All but one of the terms of proposed Rule 3110.19(c) remain substantively unchanged from those FINRA had proposed in the 2022 RSL Rule Filing. As described below, FINRA is proposing to make a clarifying adjustment to a criterion applicable to a firm's associated persons.

Under proposed Rule 3110.19(c), a location would be ineligible for designation as a Residential Supervisory Location where: (1) one or more associated persons at such location is a designated supervisor who has less than one year of direct supervisory experience with the member (proposed Rule 3110.19(c)(1)); (2) one or more associated persons at such location is functioning as a principal for a limited period in accordance with Rule 1210.04 [96] (proposed Rule 3110.19(c)(2)); (3) one or more associated persons at such location is subject to a mandatory heightened supervisory plan under the rules of the SEC, FINRA or state regulatory agency (proposed Rule 3110.19(c)(3)); (4) one or more associated persons at such location is statutorily disqualified, unless such disqualified person has been approved (or is otherwise permitted pursuant to FINRA rules and the federal securities laws) to associate with a member and is not subject to a mandatory heightened supervisory plan under paragraph (c)(3) of this proposed Supplementary Material or otherwise as a condition to approval or permission for such association (proposed Rule 3110.19(c)(4)); (5) one or more associated persons at such location has an event in the prior three years that required a ''yes'' response to any item in Questions 14A(1)(a) and 2(a), 14B(1)(a) and 2(a), 14C, 14D and 14E on Form U4 [97] (proposed Rule 3110.19(c)(5)). These proposed criteria remain substantively unchanged from the 2022 RSL Rule Filing.

In addition to the proposed criteria above, an office or location would be ineligible for designation as a Residential Supervisory Location at which one or more associated persons at such location is currently subject to, or has been notified in writing that it will be subject to, any investigation, proceeding, complaint or other action by the member, the SEC, an SRO, including FINRA, or state securities commission (or agency or office performing like functions) alleging they have failed reasonably to supervise another person subject to their supervision, with a view to preventing the violation of any provision of the Securities Act, the Exchange Act, the Investment Advisers Act, the Investment Company Act, the Commodity Exchange Act, any state law pertaining to the regulation of securities or any rule or regulation under any of such Acts or laws, or any of the rules of the Municipal Securities Rulemaking Board or FINRA (proposed Rule 3110.19(c)(6)).[98] This proposed criterion, which is similar to the one FINRA had proposed in the 2022 RSL Rule Filing, is a product of integrating aspects of several ''Regulatory Action Disclosure'' questions from Form U4

cash or qualified securities in a segregated, restricted account; adhere to specified conditions or restrictions; or comply with a combination of such obligations. *See generally Regulatory Notice* 21–34 (September 2021) (announcing FINRA's adoption of rules to address firms with a significant history of misconduct).

[93] In general, Rule 3170 requires a member firm to establish, enforce and maintain special written procedures supervising the telemarketing activities of all of its registered persons, including the tape recording of conversations, if the firm has hired more than a specified percentage of registered persons from firms that meet FINRA Rule 3170's definition of ''disciplined firm.'' *See generally Regulatory Notice* 14–10 (March 2014) (announcing FINRA's adoption of consolidated rules governing supervision).

[94] Rule 1017(a)(7) requires a member firm to file an application for continuing membership when a natural person seeking to become an owner, control person, principal or registered person of the member firm has, in the prior five years, one or more defined ''final criminal matters'' or two or more ''specified risk events'' unless the member firm has submitted a written request to FINRA seeking a materiality consultation for the contemplated activity. Rule 1017(a)(7) applies whether the person is seeking to become an owner, control person, principal or registered person at the person's current member firm or at a new member firm. *See generally Regulatory Notice* 21–09 (March 2021) (announcing FINRA's adoption of rules to address brokers with a significant history of misconduct).

[95] In the 2022 RSL Rule Filing, FINRA had categorized these criteria as ''ineligible locations,'' but through this proposed rule change, FINRA is proposing to categorize these terms as ''member firm ineligibility criteria.'' *See* proposed Rule 3110.19(c).

[96] In general, Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) imposes an experience requirement (18 months of experience within the preceding five-year period) on those registered representatives who are designated by their firms to function in a principal capacity for a fixed 120-day period before having passed an appropriate principal qualification examination. *See generally Regulatory Notice* 17–30 (October 2017) (announcing FINRA's adoption of consolidated rules governing qualification and registration).

[97] Form U4's Questions 14A(1)(a) and 2(a), 14B(1)(a) and 2(a) elicit reporting of criminal convictions, and Questions 14C, 14D, and 14E pertain to regulatory action disclosures.

[98] *See* Form U4, Questions 14C(6)–(8) and 14E(5)–(7) (referencing the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, and the rules of the Municipal Securities Rulemaking Board).

into a single provision.[99] In addition, as adjusted, this proposed criterion is responsive to NASAA's comment to the 2022 RSL Filing, which recommended broadening the scope of the criterion to include any state laws pertaining to securities regulation, noting that ''state regulators investigate and bring actions for violations of state securities laws[,]'' [100] and further noted that ''state securities actions typically allege violations of state securities laws and regulations, even if the same conduct could also be a violation of federal securities laws or SRO rules.'' [101] FINRA had declined to include the reference to state securities laws in order to remain aligned with the provisions listed in Form U4.[102] But after further consideration, FINRA is proposing to incorporate NASAA's recommendation to include a reference to ''any state law pertaining to the regulation of securities'' within the list of provisions under proposed Rule 3110.19(c)(6) to account for state regulators. FINRA is also proposing to add a reference to FINRA rules. While this proposed adjustment would address NASAA's recommendation, FINRA notes that Form U4 does not have a specific question that elicits information regarding notice of an investigation or other action for a failure to supervise under state laws or FINRA rules and as such, proposed Rule 3110.19(c)(6) would require further information to monitor. A firm would need to be prepared to provide regulators information related to this proposed criterion upon request.

FINRA believes that these proposed six ineligibility criteria applicable to a firm's associated persons reflect the appropriate limitations on the private residences that can be designated as a Residential Supervisory Location. In particular, FINRA believes that an associated person designated at such location should have more than one year of supervisory experience with the member and have passed the appropriate principal level qualification examination before the associated person's private residence can be treated as a non-branch location under proposed Rule 3110.19(a). While it is possible that an associated person may have prior supervisory experience from another firm, a new supervisor at the current member firm may need time to become knowledgeable about that firm's systems, people, products, and overall compliance culture. In addition, FINRA believes that the specified disclosures on Form U4 pertaining to criminal convictions and final regulatory action and the imposition of a mandatory heightened supervisory plan are indicia of increased risk to investors at some firms and locations such that they should not be treated as a non-branch location under the proposed supplementary material.[103]

vi. Obligation To Provide List of RSLs to FINRA (Proposed Rule 3110.19(d))

In the 2022 RSL Rule Filing, FINRA had proposed requiring a firm to maintain a list of residence locations in similar fashion as the existing requirement under Rule 3110(f)(2)(A)(ii)i.[104] Two commenters to the 2022 RSL Rule Filing shared their views on this proposed condition.[105] In general, their views pertained to the reliability or completeness of such a list, and the creation of a more formal categorization or appropriate system change so firms can identify and track RSLs in the Central Registration Depository (''CRD®'').[106] In further consideration of the comments, FINRA is proposing to require the member to provide FINRA with a list of the residence locations by the 15th day of the month following the calendar quarter through an electronic process or such other process as FINRA may prescribe. FINRA notes that CRD currently provides regulators with information regarding the offices and locations (registered and unregistered) to which associated persons required to be registered are assigned,[107] but requiring member firms to affirmatively provide this information to FINRA through a scheduled process would make this information more readily accessible to regulators.[108]

Proposed Rule 3110.19 would not be available to a member firm or private residence that meets any of the ineligibility criteria in proposed paragraphs (b) or (c), respectively, under Rule 3110.19 even with the safeguards and limitations listed in proposed Rule 3110.19(a). A member firm would be required to designate such private residence as an OSJ or branch office, as applicable, unless the location otherwise meets a branch office exclusion under Rule 3110(f)(2)(A). FINRA believes the proposed ineligibility criteria are appropriately derived from existing rule-based criteria that already have a process to identify firms that may pose greater concern (*e.g.,* Rules 4111 and 3170) or to identify associated persons that may pose greater concerns as supervisors due to the nature of disclosures of regulatory or disciplinary events on the uniform registration forms or where the firm has not yet had the opportunity to gauge such person's effectiveness as a supervisor due to their limited supervisory experience with the member firm. FINRA believes that these objective categorical restrictions strike the correct balance and are sensible and consistent with a reasonably designed supervisory system while still preserving investor protections.

FINRA acknowledges the shift towards a permanent blended or hybrid

[99] *See* note 97, *supra; see also* Form U4 Question 14G, which provides: ''Have you been notified, in writing, that you are now the subject of any: (1) regulatory complaint or proceeding that could result in a ''yes'' answer to any part of 14C, D or E? (If ''yes'', complete the Regulatory Action Disclosure Reporting Page.); (2) investigation that could result in a ''yes'' answer to any part of 14A, B, C, D or E? (If ''yes'', complete the Investigation Disclosure Reporting Page.)''

[100] *See* Letter from Melanie Senter Lubin, President, NASAA, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated August 23, 2022 (''NASAA I''), *https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20137298-307861.pdf.*

[101] *See* Letter from Andrew Hartnett, President, NASAA, to J. Lynn Taylor, Assistant Secretary, SEC, dated November 25, 2022 (''NASAA II''), *https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20151667-320142.pdf.*

[102] *See* note 98, *supra.*

[103] In response to the 2022 RSL Rule Filing, one commenter recommended that a location should be precluded from being designated as an RSL where a firm has implemented its own heightened supervisory plan, suggesting that this additional layer of supervision upon an associated person would warrant an automatic exclusion of such person's private residence as an RSL. In its second letter responding to comments directed to the 2022 RSL Rule Filing, FINRA indicated that a firm's routine evaluation of its supervisory system to ensure it is appropriately tailored to the firm's business may prompt a firm, out of an abundance of caution and independent of specific regulatory requirements or mandates, to undertake additional supervisory measures, including voluntarily imposing a heightened supervisory plan. *See* Exhibit 2c. FINRA further notes that a ''voluntary heightened supervisory plan'' is undefined and thus, a firm's view of ''heightened supervision'' could differ from that of a regulator. For example, a firm could voluntarily implement ''heightened supervision'' to review with more frequency the trade blotters of a registered person because the blotters relate to a new product of the firm.

[104] *See* Rule 3110(f)(2)(A)(ii)i. (''A list of the residence locations is maintained by the member[.]'').

[105] *See* Exhibits 2a and 2b.

[106] CRD is the central licensing and registration system that FINRA operates for the benefit of FINRA, the SEC, other SROs, state securities regulators and broker-dealer firms. The information maintained in the CRD system is reported by registered broker-dealer firms, associated persons and regulatory authorities in response to questions on specified uniform registration forms. *See generally* Rule 8312 (FINRA BrokerCheck Disclosure).

[107] FINRA notes that firms are under a continuing obligation to promptly update, among other things, their uniform forms whenever the information becomes inaccurate or incomplete. Amendments must be filed electronically (unless the filer is an approved paper filer) by promptly updating the appropriate section of such forms. *See, e.g.,* general instructions to Form U4 and Form BR.

[108] FINRA is exploring ways to provide this information to state regulators in a practical format.

workforce model and therefore believes under the current environment, private residences responsible for the supervisory activities and subject to the safeguards and conditions, and the ineligibility criteria described above should not require registration as branch offices, and calibrating the proposed Residential Supervisory Location to a regular periodic inspection schedule is appropriately tailored to the lower risk profile. FINRA notes that as part of efforts between FINRA and the NYSE to align the interpretations of the uniform branch office definition, FINRA made a definitional change to the OSJ definition to exclude from OSJ designation and treat as a non-branch location an office or location at which final approval of research reports occurred,[109] noting that ''the limited nature of such activity [did] not necessitate supervision of such a location as an OSJ[.]'' [110]

The proposed RSL designation is intended to reflect a pragmatic balance between the hybrid workforce model and the parameters that should ensure that all locations, including residential locations, are appropriately supervised. Separate and apart from the classification of the office or location and the attendant inspection obligations, firms will continue to have an ongoing obligation to supervise the activities of each associated person in a manner reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. FINRA emphasizes that member firms have a statutory duty to supervise their associated persons, regardless of their location, compensation or employment arrangement, or registration status, in accordance with the FINRA By-Laws and rules.[111]

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice.*

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[112] 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. In recognition of the ongoing advances in compliance technology and evolving lifestyle and work practices, FINRA believes that the proposed rule change will reasonably account for evolving work models by excluding from branch office registration a Residential Supervisory Location at which lower risk activities occur, while retaining important investor protections with a set of safeguards and limitations derived largely from the primary residence exclusion. The proposed new non-branch location is intended to provide a practical and balanced way for firms to continue to effectively meet the core regulatory obligation to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules that directly serve investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

1. Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

a. Regulatory Need

As discussed above, in the wake of the pandemic, many member firms are developing hybrid workforce models for their employees. In these new ways of working, some employees may work permanently in an alternative location such as a private residence, other employees may spend some time in alternative locations and some time on-site in a conventional office setting, and some may work on-site full time.[113] Absent the proposed rule change, when the temporary relief from the requirement to submit branch office applications on Form BR for new office locations ends, many member firms would need to either curtail activities at residential locations or register large numbers of residential locations as OSJs or supervisory branch offices. Either type of adjustment would create potentially significant costs. The proposed rule change would reduce, but not eliminate, the need for such adjustments since the activities conducted at some new residential locations would likely not meet the requirements of the proposed rule change.

b. Economic Baseline

The economic baseline includes both current and foreseeable workforce arrangements and business practices, including those that were first developed during the pandemic and have been modified since in light of reduced health and safety concerns. In particular, the economic baseline includes the innovations, and investments in communication and surveillance technology, that have supported and continue to support supervision in the remote work environment.[114] These innovations and investments have depended in part on the temporary suspension of the requirement to submit branch office applications on Form BR for new office locations, provided in *Notice* 20–08. However, in order to provide a full accounting of the likely effects of the proposed rule change, the analysis considers the impact of the proposed rule change under the assumption that, going forward, the temporary suspension of the above requirement is no longer in effect. The current supervisory requirements of Rule 3110 will then apply, including the provisions of Rule 3110 that categorize an OSJ, branch office and non-branch location and that establish the supervisory and registration requirements of each office or location.

[109] *See* Rule 3110(f)(1)(F).

[110] *See* Securities Exchange Act Release No. 56585 (October 1, 2007), 72 FR 57081, 57082 (October 5, 2007) (Notice of Filing of File No. SR–FINRA–2007–008).

[111] *See* Exchange Act Section 15(b)(4)(E), 15 U.S.C. 78*o*(b)(4)(E), and Exchange Act Section 15(b)(6)(A), 15 U.S.C. 78*o*(b)(6)(A).

[112] 15 U.S.C. 78*o*–3(b)(6).

[113] According to the Survey of Working Arrangements and Attitudes (SWAA), post-COVID, many employers are planning to allow employees to work from home about 2.2 days per week on average. *See* Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, SWAA February 2023 (Updates February 12, 2023), *https://wfhresearch.com/wp-content/uploads/2023/02/WFHResearch_updates_February2023.pdf.* The SWAA is a monthly survey with respondents that are working-age persons in the United States that had earnings of at least $10,000 in 2019. Further details about this survey can be found at *https://wfhresearch.com.*

[114] The pandemic propelled increased reliance on technology solutions in the remote work environment. A McKinsey survey in late 2020 found that, overall, firms had accelerated their adoption of technology, with large accelerations in the implementation of changes to increase remote working and collaboration, as well the use of advanced technologies in operations. *See* McKinsey & Company, How COVID–19 has pushed companies over the technology tipping point—and transformed business forever, October 5, 2020, *https://mck.co/3nlK8b2.*

As discussed above, a location registered as a branch office must have one or more appropriately registered representatives or principals in each office, and is subject to an inspection at least every three years, unless it is a supervisory branch office in which case it is subject to at least an annual inspection.

As of December 31, 2022, FINRA's membership included 3,381 firms [115] with 150,495 registered branch offices. Of these branch offices, 18,564 (12%) are OSJs, with 2,451 of them identified as private residences.[116] There are 21,510 principal level registered persons serving as OSJ supervisors, with 2,165 (12%) working at OSJs identified as private residences.[117] Data on the number of residential locations at which supervisors are currently working full or part time may be incomplete, due to the temporary suspension of the Form BR requirement for new offices included in *Notice* 20–08. However, large member firms (500 or more registered persons) account for about 69% of OSJs. By type of business, diversified and retail firms account for 81% of OSJs. To the extent that these member firms account for most supervisory staff, they are potentially currently making broad use of hybrid workforce arrangements involving residential locations.

c. Economic Impacts

Absent the proposed rule change, if the temporary relief on registering new branches with Form BR, provided during the pandemic, ends, many member firms would likely need to either curtail activities at residential locations or register large numbers of residential locations as OSJs or supervisory branch offices. This potential increase in office count would impact inspection obligations and in some cases, licensing requirements associated with individual locations. These additional requirements would hold even for office locations that bear lower risk characteristics and from which lower risk supervisory functions are conducted. The economic impacts of these changes would be mitigated by the proposed rule change.

Changes in the number of different types of offices and locations since the start of the pandemic, along with current data, can provide a rough indication of the potential impact of the proposed rule change on firms. As Table 1 below shows, the number of offices and locations has fallen except for non-branch locations. Residential non-branch locations have increased by 17,603 (75%). Some of these new residential non-branch locations would have needed to register as OSJs if not for the temporary suspension of the Form BR requirement and will need to register as OSJs unless the proposed rule change is adopted. Further, some of the 2,451 private residences that are currently registered as OSJs, described above, might be able to become Residential Supervisory Locations if the proposed rule change is adopted. The numbers suggest that the number of offices and locations that may benefit from the proposed rule change is in the thousands. While Form U4 and Form BR can be used to count numbers of work locations and identify high-level activities at registered branch offices, the number of residential locations that would meet the conditions of proposed Rule 3110.19(a) alone would depend on specific information about the activities at residential locations that these forms do not provide.[118]

TABLE 1—NUMBERS OF OFFICES AND LOCATIONS, PRE-PANDEMIC AND CURRENT

	December 31, 2019	December 31, 2022
Registered branch locations	152,682	150,495
OSJs	19,123	18,564
Non-OSJs	134,559	131,931
Non-branch locations	43,678	59,830
Residential non-branch locations	23,475	41,078

i. Anticipated Benefits

The proposed rule change would allow some of the work arrangements adopted during the pandemic to continue with only small additional compliance costs. Specifically, as long as the location is a private residence and is not otherwise ineligible under the rule, associated persons could continue to conduct work that meets the requirements of the proposed rule change. Not all new residential locations would qualify as Residential Supervisory Locations, so some would need to register as some type of branch location—and face higher compliance costs—or otherwise meet a branch office exclusion under Rule 3110(f)(2) or stop operating as a work location.

The proposed rule change also creates an opportunity for continued innovation in workforce arrangements. The proposed rule change may lead to centralizing tasks in specific OSJs and restructuring of job functions to enable the use of a Residential Supervisory Location on a full or part time basis, and possibly an increase in the number of supervisors. Some current OSJs might qualify as Residential Supervisory Locations with no further adjustments, allowing members to reduce expenses on compliance. Firms would make use of these opportunities if they are beneficial to their operations, and not otherwise.

The proposed rule change would also support the competitiveness of the broker-dealer industry for educated individuals who seek professional

[115] This count excludes firms with membership pending approval, and withdrawn or terminated from membership.

[116] The number of branch offices and OSJs is derived from Form BR, a uniform form that a member firm uses to register with FINRA and as required by the relevant state jurisdictions or other SROs, the firm's location as a branch office. Form BR's Section 1 (General Information) provides a place for a firm to indicate whether the branch office is a private residence by checking a ''Private Residence Checkbox.'' The number of OSJs is derived from Form BR's Section 2 (Registration/Notice Filing/Type of Office/Activities), which requires a firm to indicate whether the branch office is an OSJ. Some OSJs have more than one supervisor, and some principals serve as supervisors for more than one OSJ. FINRA's records from Form U4 show that, altogether, there are about 137,777 registered persons with principal registration categories (including those in OSJ supervisory roles).

[117] In addition, FINRA member firms with a single branch account for 1,698 of these OSJs and 2,064 of the supervisors. Sixty-eight FINRA member firms did not have any branches registered at the end of year 2022; these firms are all small member firms.

[118] Non-branch locations do not have to be registered with FINRA. The estimates for non-branch locations are obtained by reviewing Form U4. There may be some double counting of non-branch locations if members record the address differently on more than one Form U4. For the numbers of non-branch locations in Table 1, FINRA counted, by firm, unique addresses based on the first seven characters of the Form U4 ''Street 1'' field, city and state. Addresses that matched the address of the main office or of an existing registered branch were excluded.

positions.[119] The expectation of workplace flexibility and remote work by such individuals may lead them away from the broker-dealer industry if other segments of financial services or professional occupations offer more flexible workforce arrangements.

As noted above, the pandemic caused firms throughout the financial services sector to accelerate the adoption of technological solutions.[120] Technology has been used not only to make remote work possible but also to conduct a range of compliance and regulatory risk management activities. By facilitating hybrid work arrangements, the proposed rule change would support continued adoption and innovation in technological solutions and reductions in the cost of these solutions.[121]

Finally, the proposed rule change would relieve member firms from paying FINRA branch office registration fees for locations that would be branch offices under the baseline but qualify as Residential Supervisory Locations. Member firms may also find that some existing branch locations become unnecessary given the proposed rule change and could reduce expenses attendant to those locations, including such fees. However, member firms would still need to pay branch office registration fees generally for new residential locations that meet the definition of a ''branch office,'' and are not covered by the proposed Residential Supervisory Location designation or do not meet a branch office exclusion under Rule 3110(f)(2).

ii. Anticipated Costs

The proposed rule change provides firms with a new designation for work locations without removing any designations that are available under the baseline. Firms will therefore use the new Residential Supervisory Location designation only if doing so is beneficial to their operations relative to using one of the existing designations. The cost of complying with the requirements of the new designation for work locations is obviously a factor in this decision. Firms may incur a number of new one-time costs, such as adjusting staffing and activities at existing locations, to initially meet the requirements of proposed Rule 3110.19. Firms may also need to develop new written supervisory procedures and new trainings for staff at Residential Supervisory Locations, and deploy these trainings, so staff are aware of the compliance requirements. Firms may incur new ongoing costs to monitor for compliance and for adjusting staffing and designations if a Residential Supervisory Location becomes ineligible for this designation because an associated person incurs events or actions described in proposed Rule 3110.19(b).

Classifying residential locations that would otherwise need to register as OSJs or branch offices as Residential Supervisory Locations will remove certain compliance requirements. Depending on the type of branch, the reduction in compliance requirements may include no longer having to have one or more appropriately registered representatives or principals in each office or to conduct inspections annually or every three years. These reductions in compliance requirements may create risks to member firms and investors.

To mitigate these risks, the proposal excludes locations on the basis of inexperience or prior harmful conduct by individuals working at those locations, and limits the activities that can be performed at those locations. The designation of certain locations as ineligible provides minimum standards for staff that are eligible to work in such locations. FINRA expects that most firms would go beyond these minimum standards in selecting staff who would perform supervisory and other sensitive work at Residential Supervisory Locations, and in monitoring their conduct.

d. Alternatives Considered

FINRA is proposing to provide certain regulatory accommodations for the innovations in business organization and operations that occurred during the pandemic by modeling the Residential Supervisory Locations after the existing primary residence and non-primary residence exclusions, which have been in effect since 2005. FINRA considered adopting a proposed rule with just those exclusions and without the designation of certain locations as ineligible. More locations would qualify as Residential Supervisory Locations without the additional requirements. FINRA expects, however, that the proposed rule change provides a better balance of the potential benefits and the risks that could impose costs on members and investors.

In addition, FINRA considered the merits of adapting other requirements similar to those FINRA had proposed in File No. SR–FINRA–2022–021, a proposal to establish a voluntary three-year remote inspections pilot program.[122] In particular, the 2022 Remote Inspections Pilot Program Rule Filing includes the requirement for a firm to conduct and document a risk assessment considering several factors referenced in Rule 3110 and others, for each office or location where a firm determines to conduct a remote inspection. FINRA believes that adding the requirement for a firm to conduct and document a risk assessment for designating an office or location as a Residential Supervisory Location would be largely redundant given other requirements applicable to designating an office or location as an RSL. A firm continues to have a fundamental obligation under Rule 3110(a) to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. This supervisory system would, at least in effect, require the assessment and mitigation of the risk that the activities of associated persons working at Residential Supervisory Locations would not comply with the securities laws. The supervisory system thereby reduces the benefit of a separately conducted and documented risk assessment. Similarly, under Rule 3110(b), a firm is required to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve

[119] *See* note 113, *supra. See also* Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, Why Working from Home Will Stick (NBER Working Paper 28731, April 2021), *https://wfhresearch.com/wp-content/uploads/2021/04/w28731-3-May-2021.pdf,* who point to a lasting effect of the pandemic on work arrangements, in particular for those with higher education and earnings; and Alexander Bick, Adam Blandin & Karel Mertens, Work from Home Before and After the COVID–19 Outbreak, (Working Paper, October 2022), *https://karelmertenscom.files.wordpress.com/2022/11/wfh_oct_15_paper.pdf,* who find consistent results, with a higher adoption rate of work from home jobs in Finance and Insurance, relative to other industries, reflected in Figure 10. Both papers, based on different surveys and, in Bick et al, with added results from a model, conclude that around 22% of full workdays will be provided from home in the long run.

[120] *See* note 114, *supra.*

[121] *See* Ben Charoenwong, Zachary T. Kowaleski, Alan Kwan, & Andrew Sutherland, RegTech, MIT Sloan Research Paper 6563–22 (September 16, 2022), Available at SSRN: *https://ssrn.com/abstract=4000016.* The authors show that broker-dealers that made required compliance technology investments were able to make complementary technology investments in communications and customer relationship management software that resulted in a reduced number of complaints and less employee misconduct.

[122] *See* Securities Exchange Act Release No. 96520 (December 16, 2022), 87 FR 78737 (December 22, 2022) (Notice of Partial Amendment No. 1 to File No. SR–FINRA–2022–021) (''2022 Remote Inspections Pilot Program Rule Filing'').

compliance with applicable securities laws and regulations, and with applicable FINRA rules. These supervisory procedures would, at least in effect, require the assessment and mitigation of risks of non-compliance posed by the types of business conducted at Residential Supervisory Locations. FINRA determined that requiring a firm to conduct and document a risk assessment for designating an office or location as an RSL would not provide an additional benefit to members or investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The SEC published the 2022 RSL Rule Filing for comment and as of the end of the comment period on August 23, 2022, the SEC had received 20 unique comment letters, then subsequently received six more comment letters.[123] On October 31, 2022, FINRA responded to the comments and did not propose changing the terms of the 2022 RSL Rule Filing in response to the comments.[124] On the same day, the Commission instituted proceedings to determine whether to approve or disapprove the 2022 RSL Rule Filing (''Order''),[125] and the SEC received five comments letters in response to the Order.[126] On December 9, 2022, FINRA responded to those comments and did not propose changing the 2022 RSL Rule Filing in response to them.[127] Since then, the SEC has received one supplemental comment letter.[128] March 30, 2023 was the date by which the SEC was required to either approve or disapprove the 2022 RSL Rule Filing. But on March 29, 2023, FINRA withdrew the 2022 RSL Rule Filing from the SEC to consider whether modifications and clarifications to the filing would be appropriate in response to concerns raised by commenters. While the proposed rule change retains many of the terms of the 2022 RSL Rule Filing, the proposed rule change makes some adjustments, which are discussed in detail above under Item II.A.1.b.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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–FINRA–2023–006 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–2023–006. 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 a.m. and 3 p.m. Copies of the 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–2023–006 and should be submitted on or before April 27, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[129]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07145 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

[123] *See* note 9, *supra.*

[124] *See* note 9, *supra; see also* Exhibit 2b.

[125] *See* Securities Exchange Act Release No. 96191 (October 31, 2022), 87 FR 66767 (November 4, 2022) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove File No. SR–FINRA–2022–019).

[126] *See* note 9, *supra.*

[127] *See* note 9, *supra; see also* Exhibit 2c.

[128] *See* Letter from Bernard V. Canepa, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, to Vanessa A. Countryman, Secretary, SEC, dated December 20, 2022, *https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20153234-320719.pdf.*

[129] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97232; File No. SR–Phlx–2023–09]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change To Permit the Listing and Trading of Options on the Nasdaq-100 ESG Index

March 31, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 28, 2023, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to permit the listing and trading of options on the Nasdaq-100 ESG Index.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to permit the listing and trading of options on the Nasdaq-100 ESG Index or ''NDXESG''.[3] The Nasdaq-100 ESG Index is a broad based, modified ESG Risk Rating Score-adjusted market-capitalization-weighted index that is designed to measure the performance of the companies in the Nasdaq-100 Index (''NDX'') that meet specific environmental, social and governance (''ESG'') criteria.[4] The Nasdaq-100 ESG Index at all times consists of a selection of securities in NDX.[5] In order to be selected for the Nasdaq-100 ESG Index, a Nasdaq-100 Index company must: (1) not be involved in specific business activities, as defined in the methodology[6] and determined by Sustainalytics;[7] (2) not be deemed non-compliant with the principles of the United Nations Global Compact, as determined by Sustainalytics; (3) not have a controversy level higher than four (4), as defined by Sustainalytics; and (4) have a Sustainalytics ESG Risk Rating Score lower than 40. There are various stages in the constituent weighting process which are outlined in the methodology.[8]

Initial and Maintenance Listing Criteria

The Nasdaq-100 ESG Index meets the definition of a broad-based index as set forth in Options 4A, Section 2(a)(13)[9] (*i.e.,* an index designed to be representative of a stock market as a whole or of a range of companies in unrelated industries). Additionally, the Nasdaq-100 ESG Index satisfies the initial listing criteria of a broad-based index, as set forth in Options 4A, Section 3(d):

(1) The index is broad-based, as defined in Options 4A, Section 2(a)(13);

(2) Options on the index are designated as A.M.-settled index options;

(3) The index is capitalization-weighted, price-weighted, modified capitalization-weighted or equal dollar-weighted;

(4) The index consists of 50 or more component securities;

(5) Component securities that account for at least ninety-five percent (95%) of the weight of the index have a market capitalization of at least $ 75 million, except that component securities that account for at least sixty-five percent (65%) of the weight of the index have a market capitalization of at least $ 100 million;

(6) Component securities that account for at least eighty percent (80%) of the weight of the index satisfy the requirements of Options 4, Section 3 applicable to individual underlying securities;

(7) Each component security that accounts for at least one percent (1%) of the weight of the index has an average daily trading volume of at least 90,000 shares during the last six month period;

(8) No single component security accounts for more than ten percent (10%) of the weight of the index, and the five highest weighted component securities in the index do not, in the aggregate, account for more than thirty-three percent (33%) of the weight of the index;

(9) Each component security must be an ''NMS Stock'' as defined in rule 600 of Regulation NMS under the Exchange Act;

(10) Non-U.S. component securities (stocks or ADRs) that are not subject to comprehensive surveillance agreements do not, in the aggregate, represent more than twenty percent (20%) of the weight of the index;

(11) The current index value is widely disseminated at least once every fifteen (15) seconds by one or more major market data vendors during the time options on the index are traded on the Exchange;

(12) The Exchange reasonably believes it has adequate System capacity to support the trading of options on the index, based on a calculation of the Exchange's current Independent System Capacity Advisor (ISCA) allocation and the number of new messages per second expected to be generated by options on such index;

(13) An equal dollar-weighted index is rebalanced at least once every calendar quarter;

(14) If an index is maintained by a broker-dealer, the index is calculated by a third-party who is not a broker-dealer, and the broker-dealer has erected an informational barrier around its personnel who have access to information concerning changes in, and adjustments to, the index;

(15) The Exchange has written surveillance procedures in place with respect to surveillance of trading of options on the index.

The Nasdaq-100 ESG Index will also be subject to the maintenance listing standards set forth in Options 4A, Section 3(e):

(1) The conditions set forth in subparagraphs (d)(1), (2), (3), (9), (10), (11), (12), (13), (14) and (15) must continue to be satisfied. The conditions set forth in subparagraphs (d)(5), (6), (7) and (8) must be satisfied only as of the first day of January and July in each year;

(2) The total number of component securities in the index may not increase or decrease by more than ten percent (10%) from the number of component securities in the index at the time of its initial listing.[10]

Expiration Months, Settlement, and Exercise Style

Consistent with existing rules for certain index options, the Exchange will allow up to twelve near-term expiration months for the Nasdaq-100 ESG Index options (''NDXESG options'')[11] as well as LEAPS.[12] Options on NDX may list up to twelve near-term expiration months pursuant to Phlx Options 4A, Section 12(a)(4). The Nasdaq-100 ESG Index consists of components that are also included in NDX, as discussed above. Because of the relationship between the Nasdaq-100 ESG Index and NDX, which will likely result in market participants' investment and hedging strategies consisting of options over both, the Exchange believes it is appropriate to permit the same number of monthly expirations for the Nasdaq-100 ESG Index and NDX. Strike price intervals would be at no less than $2.50 intervals.[13]

The NDXESG options will be a.m.-settled[14] and cash-settled contracts with European-style exercise.[15] A.M.-

[3] These options would trade under the symbol ''EXGN.''

[4] Companies are evaluated and weighted on the basis of their business activities, controversies and ESG Risk Ratings.

[5] *See https://indexes.nasdaqomx.com/docs/methodology_NDXESG.pdf.*

[6] *See supra* note 5.

[7] Sustainalytics is a company that rates the sustainability of listed companies based on their ESG performance.

[8] *See supra* note 5.

[9] The Exchange proposes to amend Options 4A, Section 3(d)(1) to correct a citation to the definition of a broad-based index from Section 2(a)(11) to Section 2(a)(13).

[10] As is the case with other index options authorized for listing and trading on Phlx, in the event the Nasdaq-100 ESG Index fails to satisfy the maintenance listing standards, the Exchange will not open for trading any additional series of options of that class unless such failure is determined by the Exchange not to be significant and the Commission concurs in that determination, or unless the continued listing of that class of index options has been approved by the Commission under Section 19(b)(2) of the Act.

[11] *See* Phlx Options 4A, Section 12(a)(4).

[12] *See* Phlx Options 4A, Section 12(b)(2).

[13] *See* proposed Phlx Options 4A, Section 12(a)(2).

[14] *See* proposed Phlx Options 4A, Section 12(e)(II).

[15] *See* proposed Phlx Options 4A, Section 12(a)(5).

settlement is consistent with the generic listing criteria for broad-based indexes,[16] and thus it is common for index options to be a.m.-settled. The Exchange proposes to amend Phlx Options 4A, Section 12(e)(II) to add the Nasdaq-100 ESG Index options to the list of other a.m.-settled options. European-style exercise is consistent with many index options, as set forth in Options 4A, Section 12(a)(5). The Exchange proposes to amend Options 4A, Section 12(a)(5) to add the NDXESG options to the list of European-style index options. Standard third-Friday NDX options are a.m.-settled with European-style exercise. Because of the relationship between the Nasdaq-100 ESG Index and the NDX, which will likely result in market participants' investment and hedging strategies consisting of options over both, the Exchange believes it is appropriate to list the NDXESG options with the same settlement and exercise style as the other NDX options.

Minimum Trading Increment

The Exchange proposes the minimum trading increment for NDXESG options would be $0.05 for options trading below $3.00 and $0.10 for all other options.[17]

Reporting Authority

The Nasdaq Stock Market LLC would be the Reporting Authority for the Nasdaq-100 ESG Index.[18]

Position Limit and Exercise Limits

The position limits for options on the Nasdaq-100 ESG Index would be 25,000 contracts on the same side of the market in accordance with Phlx Options 4A, Section 6(a). The exercise limits for options on the Nasdaq-100 ESG Index shall be equivalent to the position limits pursuant to Options 4A, Section 10. Each member or member organization that maintains a position on the same side of the market in excess of 100,000 contracts for its own account or for the account of a customer in NDXESG options must file a report with the Exchange pursuant to proposed Phlx Options 4A, Section 6(c).[19] The Exchange also proposes to make a technical correction to Phlx Options 4A, Section 6(c) to add an ''or'' within that paragraph.

Likewise, the position and exercise limits for FLEX options on the Nasdaq-100 ESG Index would be 25,000 contracts on the same side of the market. In amending Phlx Options 8, Section 34(e), regarding position limits for FLEX options, the Exchange proposes to align the position limits for FLEX options within Phlx Options 8, Section 34, with the position limits for standard options within Phlx Options 4A, Section 6, which are specifically related to index options. Today, FLEX index options are subject to the same position limits governing standard index options as provided for within Options 4A, Section 6, unless otherwise noted within Options 8, Section 34. At this time, Phlx proposes to amend Options 8, Section 34(e) to add a sentence that provides that the position limits are the same for FLEX index options as with standard index options, unless otherwise noted. This amendment is intended to be non-substantive and would not change any position limits. Rather, the amendment would simply cross-reference the position limits in Options 4A, Section 6 as opposed to restating each position limit.[20] Today, the position limits for standard index options are identical to the FLEX index options on the same index. With this proposal those position limits would continue to be identical.

Trading Hours

NDXESG options will be available for trading during the Exchange's standard trading hours for index options, *i.e.,* from 9:30 a.m. to 4:15 p.m. New York time.[21]

Margin and Sales Practice

The margin requirements for NDXESG options would be subject to Phlx Options 6C, Section 3, Proper and Adequate Margin. Phlx General 9, Section 10, Recommendations to Customers (Suitability), and Phlx Options 10, Section 8, Suitability, would also apply to NDXESG options.

Surveillance and Capacity

Finally, the Exchange represents that it has sufficient capacity to handle additional quotations and message traffic associated with the proposed listing and trading of NDXESG options. Further, the Exchange has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any additional traffic associated with the listing of NDXESG options.

Index options are integrated into the Exchange's existing surveillance system architecture and are thus subject to the relevant surveillance processes. The Exchange represents that it has adequate surveillance procedures to monitor trading in NDXESG options thereby aiding in the maintenance of a fair and orderly market.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[22] in general, and furthers the objectives of Section 6(b)(5) of the Act,[23] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange. The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act[24] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the introduction of NDXESG options will attract order flow to the Exchange, increase the variety of listed options to investors, and provide a valuable hedge tool to investors.

In particular, the Exchange believes that the proposal to list and trade options on the Nasdaq-100 ESG Index will remove impediments to and perfect the mechanism of a free and open market and a national market system, because the Exchange believes that the proposed rule change will further the Exchange's goal of introducing new and innovative products to the marketplace. Additionally, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, as the

[16] *See* Phlx Options 4A, Section 3(d).

[17] *See* Phlx Options 3, Section 3.

[18] *See* proposed Phlx Supplementary Material .02 to Options 4A, Section 2.

[19] The report would include, but would not be limited to, data related to the option positions, whether such positions are hedged and if applicable, a description of the hedge and information concerning collateral used to carry the positions. Market Makers are exempt from this reporting requirement. *See* proposed Phlx Options 4A, Section 6(c).

[20] In light of this proposal, the Exchange proposes to remove the remainder of the rule text related to index options within Options 8, Section 34(e).

[21] *See* proposed Phlx Supplementary .01 to Options 4A, Section 12.

[22] 15 U.S.C. 78f(b)

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78(f)(b)(8).

Exchange believes there is unmet market demand for exchange-listed security options listed on this new ESG index. NDXESG options are designed to provide different and additional opportunities for investors who have a desire to invest in companies that meet certain environmental, social and governance criteria to hedge on the market risk associated with this index by listing an option directly on this index. Further, the Exchange believes that this new product will provide market participant with an additional investment opportunity.

The Exchange believes that the introduction of the Nasdaq-100 ESG Index will likely result in market participants' investment and hedging strategies consisting of options over both the Nasdaq-100 ESG Index and NDX. The Exchange notes that the Nasdaq-100 ESG Index consists of companies within NDX that meet specific ESG criteria. Because of this relationship between the Nasdaq-100 ESG Index and NDX, the Exchange believes the proposed rule change will benefit investors, as it will provide market participants with additional investment and hedging strategies consisting of options over each of these indexes.

The Exchange believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, as well as protect investors and the public interest, because the proposed rule change is consistent with current rules already applicable to the listing and trading of options on Phlx, which were previously filed with and approved as consistent with the Act by the Commission. Particularly, the NDXESG options satisfy the initial listing standards for a broad-based index in Phlx's rules, which the Commission previously deemed consistent with the Act.[25]

With this proposal NDXESG options would be permitted to list up to twelve near-term expiration months and LEAPS. The Exchange believes that its proposal is consistent with the Act and promotes just and equitable principles of trade because the listings of these options is consistent with existing rules for certain index options, including options on NDX which may list up to twelve near-term expiration months pursuant to Phlx Options 4A, Section 12(a)(4), as well as LEAPs pursuant to Options 4A, Section 12(b)(2). As noted herein, the Nasdaq-100 ESG Index consists of components that are also included in NDX, as discussed above. Because of the relationship between the Nasdaq-100 ESG Index and NDX, the Exchange believes it is appropriate to permit the same number of monthly expirations for the Nasdaq-100 ESG Index and NDX. Further, the Exchange's proposal for strike price intervals to be at no less than $2.50 intervals is consistent with the Act and promotes just and equitable principles of trade because the proposed strike prices align with NDX options strike price intervals.[26]

The NDXESG options will be a.m.-settled[27] and cash-settled contracts with European-style exercise.[28] The Exchange believes that it is consistent with the Act for NDXESG options to be a.m.-settled as this is consistent with the generic listing criteria for broad-based indexes,[29] and thus it is common for index options to be a.m.-settled. Additionally, standard third-Friday NDX options are a.m.-settled. Further, the Exchange believes that it is consistent with the Act for NDXESG options to be European-style as standard third-Friday NDX options have European-style exercises. Further, European-style exercise is consistent with many index options, as set forth in Options 4A, Section 12(a)(5) including NDX options. Because of the relationship between the Nasdaq-100 ESG Index and the NDX, which will likely result in market participants' investment and hedging strategies consisting of options over both, the Exchange believes it is appropriate to list the NDXESG options with the same settlement and exercise style as the other NDX options. Additionally, the Reporting Authority shall be the same for NDXESG as it is for NDX.

The Exchange's proposal to utilize $0.05 for options trading below $3.00 and $0.10 for all other options for the minimum trading increment for NDXESG options is consistent with the Act as this is consistent with the minimum trading increments for a majority of index options including NDX options.

Setting position and exercise limits for options on the Nasdaq-100 ESG Index at 25,000 contracts on the same side of the market for both standard and FLEX options will promote just and equitable principles of trade and protect investors and the public interest because these position limits should serve to reduce potential manipulative schemes and adverse market impacts surrounding the use of options, such as disrupting the market in the security underlying the options.

The amendments to Phlx Options 8, Section 34(e) to include a cross-cite to the standard options within Phlx Options 4A, Section 6 is consistent with the Act because this amendment will reflect that the position limits for standard index options are identical to the FLEX index options on the same index. This amendment is non-substantive.

Proposing standard trading hours for NDXESG options is consistent with the Act and serves to remove impediments to and perfects the mechanism of a free and open market because these trading hours align with trading hours in other index options including NDX options.

Subjecting NDXESG options to the same margin and suitability rules that apply to other index options serves to remove impediments to and perfects the mechanism of a free and open market.

Finally, the Exchange represents that it has the necessary systems capacity to support the new option series given these proposed specifications. The Exchange believes that its existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior which might arise from listing and trading options on the Nasdaq-100 ESG Index. The Exchange further notes that current Exchange rules that apply to the trading of other index options traded on the Exchange, such as options on the NDX, would also apply to the trading of options on the Nasdaq-100 ESG Index, such as, for example, Exchange Rules governing customer accounts, margin requirements and trading halt procedures.

Finally, this proposal is not novel as Cboe Exchange, Inc. (''Cboe'') lists options on the S&P 500 ESG Index.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. Any member or member organization may transact NDXESG options. Further, the Nasdaq-100 ESG Index satisfies initial listing standards set forth in the rules, and the proposed number of expirations, settlement, and exercise style are consistent with current rules applicable to index options, including standard

[25] *See* Securities Exchange Act Release No. 54158 (July 17, 2006), 71 FR 41853 (July 24, 2006) (SR–Phlx–2006–17) (Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Listing Standards for Broad-Based Index Options).

[26] *See* Phlx Options 4A, Section 12(a)(2).

[27] *See* proposed Phlx Options 4A, Section 12(e)(II).

[28] *See* proposed Phlx Options 4A, Section 12(a)(5).

[29] *See* Phlx Options 4A, Section 3(d).

third-Friday NDX options. Because of the relationship between the Nasdaq-100 ESG Index and the NDX, which will likely result in market participants' investment and hedging strategies consisting of options over each of these indexes, the Exchange believes it is appropriate to have the same number of expirations, settlement, and exercise style for options on each index. The NDXESG options will provide investors with different and additional opportunities to hedge or speculate on the market associated with this index.

This proposed rule change does not impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because this proposal will facilitate the listing and trading of a new option product that will enhance competition among market participants, to the benefit of investors and the marketplace. Today, Cboe lists options on the S&P 500 ESG Index. Also, other options exchanges may develop similar products.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2023–09 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–Phlx–2023–09. 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 (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2023–09 and should be submitted on or before April 27, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07141 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–409, OMB Control No. 3235–0467]

Submission for OMB Review; Comment Request; Extension: Rule 102

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 (''PRA'') (44 U.S.C. 3501 *et seq.*), 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 102 of Regulation M (17 CFR 242.102), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 102 prohibits distribution participants, issuers, and selling security holders from purchasing activities at specified times during a distribution of securities. Persons otherwise covered by this rule may seek to use several applicable exceptions such as an exclusion for actively traded reference securities and the maintenance of policies regarding information barriers between their affiliates.

There are approximately 1,361 respondents per year that require an aggregate total of 2,261 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes on average approximately 1.661 hours to complete. Thus, the total hour burden per year is approximately 2,261 hours. The total internal compliance cost for all respondents is approximately $183,141.00, resulting in an internal cost of compliance per respondent of approximately $134.56 (*i.e.,* $183,141.00/1,361 respondents).

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 May 8, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* 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: April 3, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07225 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–411, OMB Control No. 3235–0465]

Submission for OMB Review; Comment Request; Extension: Rule 104

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 (''PRA'') (44 U.S.C. 3501 *et seq.*), 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 104 of Regulation M (17 CFR 242.104), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 104 permits stabilizing by a distribution participant during a distribution so long as the distribution participant discloses information to the market and investors. This rule requires disclosure in offering materials of the potential stabilizing transactions and that the distribution participant inform the market when a stabilizing bid is made. It also requires the distribution participants (*i.e.,* the syndicate manager) to maintain information regarding syndicate covering transactions and penalty bids and disclose such information to the Self-Regulatory Organization. There are approximately 1,211 respondents per year that require an aggregate total of approximately 242 hours per year to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 0.20 hours (12 minutes) to complete. Thus, the total hour burden per year is approximately 242 hours. The total internal labor cost of compliance for the respondents is approximately $19,618.20 per year, resulting in an internal cost of compliance per respondent of approximately $16.20 (*i.e.,* $19,618.20/1,211 respondents).

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 May 8, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* 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: April 3, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07224 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97231; File No. SR–NYSEAMER–2023–22]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Make a Clarifying Change to the Term Settlement Style Applicable to Flexible Exchange Options

March 31, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on March 22, 2023, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .01 under Rule 903G to make a clarifying change to the flex term settlement style applicable to Flexible Exchange (''FLEX'') Options. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Commentary .01 under Rule 903G to make a clarifying change to the flex term settlement style applicable to FLEX Options.

FLEX Options are customized equity or index contracts that allow investors to tailor contract terms for exchange-listed equity and index options. Commentary .01 under Rule 903G currently states that, provided the options on an underlying security or index are otherwise eligible for FLEX trading, FLEX Options will be permitted in puts and calls that do not have the same exercise style, same settlement style, same expiration date and same exercise price as Non-FLEX Options that are already available for trading on the same underlying security or index.[4] The rule also provides that FLEX Options are permitted before the options are listed for trading as Non-FLEX Options. Once and if an option series is listed for trading as a Non-FLEX Option series, (i) all existing open positions established under the FLEX trading procedures shall be fully fungible with transactions in the respective Non-FLEX Options series, and (ii) any further trading in the series would be as Non-FLEX Options subject to the Non-FLEX trading procedures and rules, however, in the event a Non-FLEX series is added intra-day, the holder of a position established under FLEX Trading Procedures would be permitted to close such position using FLEX trading procedures against another closing only FLEX position for

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Rule 903G, Commentary .01.

the balance of the trading day on which the series is added.[5]

Commentary .01 to Rule 903G is designed to prevent the trading of a FLEX Option that has the exact same terms (underlying security, exercise style, settlement style, expiration date and exercise price) as a non-FLEX Option. In other words, as long as just one term of the FLEX Option is different from an existing ''regular'' or ''non-FLEX'' option it may be traded as a FLEX Option.

Under Exchange rules, certain FLEX Equity Options where the underlying security is an Exchange-Traded Fund are permitted to be settled by delivery in cash if the underlying security meets prescribed criteria.[6] The purpose of this proposed rule change is to amend Commentary .01 under Rule 903G to clarify that the reference to ''same settlement style'' in the rule applies to FLEX Index Options and not to the FLEX ETF Options permitted for listing and trading pursuant to Rule 903G(c)(3)(ii).[7] As proposed, the first sentence in Commentary .01 under Rule 903G would be modified to state that ''provided the options on an underlying security or index are otherwise eligible for FLEX trading, FLEX Options shall be permitted in puts and calls that do not have the same exercise style, same settlement style (with respect to FLEX index options only), same expiration date and same exercise price as Non-FLEX Options that are already available for trading on the same underlying security or index.'' As a result of this change, for FLEX ETF Options, at least one of the following terms—exercise style, expiration date and exercise price—must differ from options in the non-FLEX market. The Exchange believes the proposed rule change will add clarity and certainty regarding the flex term settlement style applicable for FLEX Options listed and traded on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that clarity regarding the flex term settlement style applicable for FLEX Options will promote fair and orderly markets by eliminating potential confusion and would allow ATP Holders and investors with additional opportunities to trade customized options in an exchange environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to more clearly describe the current operation of an existing rule without changing its substance and, therefore, the Exchange believes that the proposed change will not impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)[12] of the Act and Rule 19b–4(f)(6)(iii) thereunder.[13]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act 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–NYSEAMER–2023–22 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–NYSEAMER–2023–22. 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

[5] *Id.*

[6] Rule 903G(c)(3)(ii) provides that the exercise settlement for a FLEX ETF Option may be by physical delivery of the underlying security or by delivery in cash if the underlying security, measured over a six-month period, has an average daily notional value of $500 Million or more and a national average daily volume (ADV) of at least 4,680,000 shares. *See also* Securities Exchange Act Release No. 88131 (February 5, 2020), 85 FR 7806 (February 11, 2020) (SR–NYSEAmerican–2019–38) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Allow Certain Flexible Equity Options To Be Cash Settled).

[7] *See* Securities Exchange Act Release No. 79125 (October 19, 2016), 81 FR 73452 (October 25, 2016) (SR–NYSEMKT–2016–48) (Adding 2 new settlement styles for FLEX Index Options—Asian and Cliquet—and adding a reference to settlement style in Commentary .01 under Rule 903G).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A)(iii).

[11] 17 CFR 240.19b–4(f)(6).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description of the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 15 U.S.C. 78s(b)(2)(B).

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2023–22 and should be submitted on or before April 27, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07140 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97234; File No. SR–NYSEARCA–2023–28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the NYSE Arca Options Fee Schedule

March 31, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 24, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (''Fee Schedule'') regarding (1) credits for Qualified Contingent Cross (''QCC'') transactions, (2) fees applicable to routed orders, and (3) certain Market Maker incentives. The Exchange proposes to implement the fee changes effective March 24, 2023.[4] The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Fee Schedule to (1) provide for additional credits to qualifying Submitting Brokers for QCC transactions[5] and clarify the cap applicable to QCC credits and Floor Broker rebates earned through the Manual Billable Rebate Program (''FB Rebates''), (2) modify the Routing Fees applicable to routed orders, and (3) eliminate the Market Maker Incentive For Penny Issues and the Market Maker Incentive For Non-Penny Issues (collectively, the ''Market Maker Incentives''). The Exchange proposes to implement the rule change on March 24, 2023.

[4] The Exchange originally filed to amend the Fee Schedule on March 1, 2023 (SR–NYSEARCA–2023–22), then withdrew such filing and amended the Fee Schedule on March 15, 2023 (SR–NYSEARCA–2023–25), which latter filing the Exchange withdrew on March 24, 2023.

[5] A QCC Order is defined as an originating order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade coupled with a contra-side order or orders totaling an equal number of contracts. *See* Rule 6.62P–O(g)(1)(A).

QCC Transaction Credits

Currently, the Exchange offers Submitting Brokers a credit of ($0.22) per contract for Non-Customer vs. Non-Customer QCC transactions or ($0.16) per contract for Customer vs. Non-Customer QCC transactions.[6] QCC executions in which a Customer is on both sides of the QCC trade are not eligible for a credit.[7]

The Exchange proposes to offer additional credits on QCC transactions to Submitting Brokers that meet certain monthly volume thresholds. Submitting Brokers who achieve 1.5 million QCC contracts in a month will receive an additional ($0.01) credit on Customer vs. Non-Customer QCC transactions, and an additional ($0.03) credit on Non-Customer vs. Non-Customer QCC transactions. Submitting Brokers who achieve 3 million QCC contracts in a month will receive an additional ($0.02) credit on Customer vs. Non-Customer QCC transactions, and an additional ($0.06) credit on Non-Customer vs. Non-Customer QCC transactions. The proposed additional credits would be applicable back to the first QCC contract executed by a Submitting Broker in a month, but would not be cumulative across tiers (*e.g.,* a Submitting Broker who transacts 3.1 million QCC contracts in a month would be eligible for an additional ($0.02) credit on Customer vs. Non-Customer QCC transactions or an additional ($0.06) credit on Non-Customer vs. Non-Customer QCC transactions, but would not also earn the additional credits offered to Submitting Brokers that achieve 1.5 million QCC contracts in a month). Although the Exchange cannot predict with certainty whether the proposed change would encourage Submitting Brokers to increase their QCC volume, the proposed change is intended to continue to incentivize additional QCC executions by Submitting Brokers by increasing the credits available on such orders.

Endnote 13 of the Fee Schedule currently provides that QCC executions in which a Customer is on both sides of the QCC trade will not be eligible for the Submitting Broker credit and that there is a $375,000 maximum monthly credit per firm on QCC transactions by a Submitting Broker.[8] The Exchange recently modified the Fee Schedule to

[6] *See* Fee Schedule, QUALIFIED CONTINGENT CROSS (''QCC'') TRANSACTION FEES AND CREDITS.

[7] *See id.*

[8] *See* Fee Schedule, Endnote 13.

provide that Submitting Broker QCC credits and Floor Broker rebates earned through the Manual Billable Rebate Program may not combine to exceed $2,000,000 per month per firm (the ''Monthly Credit and Rebate Cap'').[9] To improve the clarity of the Fee Schedule and obviate potential confusion regarding the applicability of the Monthly Credit and Rebate Cap, the Exchange proposes to delete the second sentence of Endnote 13 (which describes the $375,000 maximum monthly credit on QCC transactions by a Submitting Broker), add new Endnote 17, and modify the table setting forth Submitting Broker QCC credits to reference Endnote 17. Endnote 17 would contain the same text already reflected in the Fee Schedule describing the Monthly Credit and Rebate Cap.[10] The Exchange believes that Endnote 17 would add clarity to the Fee Schedule regarding the maximum amount that a firm could earn per month from Submitting Broker QCC credits and FB Rebates combined.

Routing Fees

The Exchange currently charges an $0.11 per contract fee on orders routed and executed on another exchange, plus (i) any transaction fees assessed by the away exchange (calculated on an order-by-order basis since different away exchanges charge different amounts) or (ii) if the actual transaction fees assessed by the away exchange(s) cannot be determined prior to the execution, the highest per contract charge assessed by the away exchange(s) for the relevant option class and type of market participant (*e.g.,* Customer, Firm, Broker/Dealer, Professional Customer or Market Maker).[11] The Exchange applies the Routing Fees in addition to any customary execution fees applicable to the order.

The Exchange now proposes to modify the Routing Fees to be based on whether the routed order is in a Penny or non-Penny issue and to establish a single fee that would be applicable to all routed orders in Penny issues, and a single fee for routed orders in non-Penny issues. Specifically, the Exchange proposes that the fee for routed orders would be set at a fixed amount intended to counterbalance the internal resources required to support the handling of orders routed away from the Exchange. The Exchange proposes to implement a flat fee structure for routing fees, which the Exchange believes would streamline the process of calculating fees applied to orders routed away from the Exchange because it would, among other things, reduce the administrative burden of recalibrating routing fees each time an away exchange modifies its relevant transaction fees. Accordingly, the Exchange proposes a Routing Fee of $0.61 in Penny issues, and $1.21 in non-Penny issues. The Exchange believes that having a single published rate for all routed orders in Penny issues and single published rate for all routed orders in non-Penny issues would also reduce potential confusion relating to the amount of the Routing Fee for a given order (particularly in light of the variability in transaction fees across other options markets) and would permit market participants to determine execution costs at the time of order entry, thereby promoting clarity and transparency in the Fee Schedule. The Exchange believes the proposed routing fee structure is not novel, as at least one other options exchange similarly applies fixed routing fees based on whether the routed order is in a Penny or non-Penny issue, and that the proposed amounts of the fees are within the range of fees applied by other markets to routed orders.[12]

Market Maker Incentives

The Exchange currently offers a Market Maker Incentive For Penny Issues, which provides an enhanced posting credit of $0.41 applied to electronic executions of Market Maker posted interest in Penny issues to Market Makers that achieve the volume requirement of at least 0.75% TCADV from Customer posted interest in all issues and an ADV from Market Maker posted interest in all issues other than SPY equal to 0.40% of TCADV.

The Exchange also offers a similar Market Maker Incentive For Non-Penny Issues. Market Makers that meet the volume requirement of either (1) at least 0.55% of TCADV from Market Maker posted interest in all issues, or (2) at least 1.60% of TCADV from all interest in all issues, all account types, with at least 0.15% of TCADV from Market Maker posted interest in all issues qualify for a $0.55 credit applied to electronic executions of Market Maker posted interest in non-Penny issues.

The Exchange now proposes to eliminate the Market Maker Incentives because they have not been as effective in encouraging Market Maker posted interest as other similar incentive programs. Market Makers are entitled to the highest credit on posted interest they achieve, and because the Market Maker Incentives have similar qualifying criteria but offer lower credit amounts than other volume incentive programs available to Market Makers (such as the Market Maker Penny and SPY Posting Credit Tiers or the Non-Customer, Non-Penny Posting Credit Tiers),[13] Market Makers have availed themselves of the Market Maker Incentives less frequently. Accordingly, the Exchange believes that Market Markers would not be significantly impacted by the elimination of the Market Maker Incentives, as the programs generally provided benefits that were superseded by the incentives available through other, more utilized volume incentive programs (which would continue to be available to Market Makers).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[15] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized

[9] *See* Fee Schedule, FLOOR BROKER FIXED COST PREPAYMENT INCENTIVE PROGRAM (the ''FB Prepay Program'').

[10] The Exchange also proposes a conforming change to delete the text describing the Monthly Credit and Rebate Cap in the section of the Fee Schedule setting forth the Floor Broker Fixed Cost Prepayment Incentive Program and add a reference to Endnote 17, as proposed.

[11] *See* Fee Schedule, ROUTING FEES.

[12] *See, e.g.,* BOX Options Exchange Fee Schedule, *available at: https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-March-6-2023.pdf* (providing for fixed routing fees of $0.60 per contract fee for customer orders in Penny classes and $0.85 per contract fee for customer orders in non-Penny class); Cboe Exchange, Inc. Options Fee Schedule, *available at: https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing, for example, Customer routing fees of $0.75 for orders in Penny issues or $1.25 for orders in non-Penny issues routed to certain away markets and Non-Customer routing fees of $1.17 for all orders in Penny issues or $1.45 for all orders in non-Penny issues routed away).

[13] *See* Fee Schedule, MARKET MAKER PENNY AND SPY POSTING CREDIT TIERS & NON–CUSTOMER, NON–PENNY POSTING CREDIT TIERS.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4) and (5).

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.'' [16]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[17] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in January 2023, the Exchange had less than 13% market share of executed volume of multiply-listed equity and ETF options trades.[18]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, modifications to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes that the proposed additional QCC credits are reasonable because they are designed to incent OTP Holders to increase the number of QCC transactions sent to the Exchange by offering increased credits on QCC transactions for Submitting Brokers that meet the qualifying volume thresholds. In addition, the Exchange believes it is reasonable to offer a higher additional credit on Non-Customer vs. Non-Customer QCC transactions than on Customer vs. Non-Customer QCC transactions because Non-Customer vs. Non-Customer QCC transactions are billable on both sides, whereas Customer vs. Non-Customer QCC transactions are billable on one side only. The Exchange also believes that modifying the Fee Schedule regarding the Monthly Credit and Rebate Cap is reasonable because it would add clarity to the Fee Schedule regarding the maximum monthly amount that firms may earn from Submitting Broker QCC credits and FB Rebates combined. To the extent that the proposed change attracts more volume to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system. The Exchange notes that all market participants stand to benefit from any increase in volume entered by Submitting Brokers, which could promote market depth, facilitate tighter spreads and enhance price discovery, to the extent the proposed change encourages OTP Holders to utilize the Exchange as a primary trading venue, and may lead to a corresponding increase in order flow from other market participants. In addition, any increased liquidity on the Exchange would result in enhanced market quality for all participants.

The Exchange believes the proposed change to Routing Fees is reasonable because it would establish a single fee that would be applicable to all routed orders in Penny issues and a single fee that would be applicable to all routed orders in non-Penny issues, and such fees would be applicable to all market participants equally. In addition, the Exchange believes the proposed change is reasonable because it would provide for routing fees that would counterbalance the internal resources required to support the handling of orders routed away from the Exchange and would streamline the process of calculating routing fees by obviating the need to recalibrate fees based on individual away market fees (which are variable and subject to frequent change) and eliminating any potential confusion as to routing fees applicable to a given order. The Exchange also notes that a fixed fee structure for routing fees is not novel and that the amounts of the proposed Routing Fees are within the range of routing fees currently charged by other options exchanges.[19]

The Exchange believes that eliminating the Market Maker Incentives is reasonable because the programs have been underutilized in favor of incentive programs offering higher credits on posted interest, and the Exchange will continue to offer alternative incentives for Market Makers with similar qualifying bases and credits (including the Market Maker Penny and SPY Posting Credit Tiers or the Non-Customer, Non-Penny Posting Credit Tiers). Accordingly, although Market Makers would no longer be able to qualify for credits through the Market Maker Incentives, they would still benefit from the availability of other similar incentive programs that have, to date, more successfully incentivized Market Maker posted interest.

Finally, to the extent the proposed change continues to attract greater volume and liquidity, the Exchange believes the proposed change would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors. The Exchange's fees are constrained by intermarket competition, as OTP Holders may direct their order flow to any of the 16 options exchanges, including those offering rebates on QCC transactions.[20] Thus, OTP Holders have a choice of where they direct their order flow, including their QCC transactions. The proposed rule change is designed to continue to incent OTP Holders to direct liquidity and, in particular, QCC transactions to the Exchange. In addition, to the extent OTP Holders are incentivized to aggregate their trading activity at the Exchange, that increased liquidity could promote market depth, price discovery and improvement, and enhanced order execution opportunities for market participants.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposed QCC credits are based on the amount and type of business transacted on the

[16] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[17] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: *https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.*

[18] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of equity-based ETF options, *see id.,* the Exchange's market share in equity-based options decreased from 13.06% for the month of January 2022 to 12.58% for the month of January 2023.

[19] *See* note 12, *supra.*

[20] *See, e.g.,* EDGX Options Exchange Fee Schedule, QCC Initiator/Solicitation Rebate Tiers (applying ($0.14) per contract rebate up to 999,999 contracts for QCC transactions when only one side of the transaction is a non-customer or ($0.22) per contract rebate up to 999,999 contracts for QCC transactions with non-customers on both sides); BOX Options Fee Schedule at Section IV.D.1. (QCC Rebate) (providing for ($0.14) per contract rebate up to 1,499,999 contracts for QCC transactions when only one side of the QCC transaction is a broker-dealer or market maker or ($0.22) per contract rebate up to 1,499,999 contracts for QCC transactions when both parties are a broker-dealer or market maker); Nasdaq ISE, Options 7, Section 6.B. (QCC Rebate) (offering rebates on QCC transactions of ($0.14) per contract when only one side of the QCC transaction is a non-customer or ($0.22) per contract when both sides of the QCC transaction are non-customers).

Exchange, and Submitting Brokers can attempt to submit QCC transactions to earn the credits or not. In addition, the proposed credits are equally available to all qualifying Submitting Brokers. The Exchange also believes the proposed changes regarding the Monthly Credit and Rebate Cap are equitable because they would add clarity and transparency to the Fee Schedule regarding the current maximum monthly amount that a firm could earn from combined Submitting Broker QCC credits and FB Rebates, thereby obviating potential confusion regarding the applicability of the Monthly Credit and Rebate Cap. To the extent the proposed changes continue to incent Submitting Brokers to direct increased liquidity to the Exchange, all market participants would benefit from enhanced opportunities for price improvement and order execution. Moreover, the proposed credits are designed to incent Submitting Brokers to encourage OTP Holders to aggregate their executions—including QCC transactions—at the Exchange as a primary execution venue. To the extent that the proposed change achieves its purpose in attracting more volume to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery.

The Exchange also believes the proposed change to the Routing Fees is equitable because the proposed single fee for all routed orders in Penny issues and single fee for all routed orders in non-Penny issues would apply to all market participants equally and the proposed amounts are designed to offset internal resources necessary to support the handling of orders routed away from the Exchange. The proposed change would also streamline the process of calculating routing fees for all market participants and provide increased clarity regarding execution costs at the time of order entry.

The Exchange believes that the elimination of the Market Maker Incentives is equitable because these incentives, which did not achieve their intended purpose of encouraging Market Maker posted interest, would no longer be available to any Market Makers, and, moreover, the Exchange offers Market Makers alternative methods to achieve credits of an equal or higher amount.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes the proposed change is not unfairly discriminatory because the proposed credits on QCC transactions would be available to all qualifying Submitting Brokers on an equal and non-discriminatory basis. The proposed change is based on the amount and type of business transacted on the Exchange, and Submitting Brokers are not obligated to execute QCC transactions. Rather, the proposal is designed to encourage Submitting Brokers to increase QCC volume sent to the Exchange and to utilize the Exchange as a primary trading venue for all transactions (if they have not done so previously). To the extent that the proposed change attracts more QCC transactions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest.

The Exchange also believes that the proposed change to eliminate the Market Maker Incentives is also not unfairly discriminatory because the incentives, which were underutilized by Market Makers, would be eliminated in their entirety and would no longer be available to any Market Makers. In addition, Market Makers would continue to be eligible for alternative incentives currently available to them with similar credits and qualifying criteria. The Exchange also believes that the proposed changes to the Routing Fees are not unfairly discriminatory because the proposed fees are intended to assess streamlined routing fees in amounts that would appropriately account for the internal resources necessary to support orders routed away from the Exchange and would apply equally to all market participants' routed orders, based on whether such order is in a Penny or non-Penny issue. The proposed change would simplify the calculation of routing fees for all market participants and add clarity and transparency to the Fee Schedule regarding the fees applicable to routed orders.

Thus, the Exchange believes that, to the extent the proposed rule change would continue to improve market quality for all market participants on the Exchange by promoting clarity and transparency in the Fee Schedule and attract more order flow to the Exchange, thereby improving market-wide quality and price discovery, the resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [21]

Intramarket Competition. The proposed change with respect to QCC credits is designed to attract additional order flow to the Exchange (particularly in QCC transactions), which could increase the volumes of contracts traded on the Exchange. Greater liquidity benefits all market participants on the Exchange, and increased QCC transactions could increase opportunities for execution of other trading interest. The proposed credit would be available to all similarly-situated Submitting Brokers that execute

[21] *See* Reg NMS Adopting Release, *supra* note 16, at 37499.

QCC trades and achieve the volume thresholds for the additional credits. The Exchange does not believe that the proposed changes regarding Routing Fees or the Monthly Credit and Rebate Cap would impose any burden on competition that is not necessary or appropriate, as they are intended to add clarity and transparency to the Fee Schedule with respect to fees for orders routed away from the Exchange and the monthly cap on combined Submitting Broker QCC credits and FB Rebates earned by a firm. The Exchange also does not believe that the proposed changes to the Market Maker Incentives would impose any burden on intramarket competition that is not necessary or appropriate because the incentives would be eliminated for all Market Makers.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[22] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in January 2023, the Exchange had less than 13% market share of executed volume of multiply-listed equity and ETF options trades.[23]

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to continue to incent OTP Holders to direct trading interest (particularly QCC transactions) to the Exchange, to provide liquidity and to attract order flow. To the extent that Submitting Brokers are incentivized to utilize the Exchange as a primary trading venue for all transactions, all of the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange does not believe that the proposed changes regarding Routing Fees or the Monthly Credit and Rebate Cap would impose any burden on competition that is not necessary or appropriate, as they are intended to improve the clarity and transparency of the Fee Schedule with respect to fees for orders routed away from the Exchange and the maximum monthly amount that a firm could earn from Submitting Broker QCC credits and FB Rebates combined. The Exchange also does not believe that the proposed elimination of the Market Maker Incentives would impose any burden on competition that is not necessary or appropriate because the incentives would no longer be available to any Market Makers, and the Exchange would continue to offer Market Makers similar, alternative incentives.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment. The Exchange further believes that the proposed changes could promote competition between the Exchange and other execution venues, including those that currently offer similarly structured routing charges or that currently offer credits on QCC transactions, by encouraging additional orders (and, in particular, QCC transactions) to be sent to the Exchange for execution.[24]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[25] of the Act and subparagraph (f)(2) of Rule 19b–4[26] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[27] of the Act 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2023–28 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2023–28. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://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

[22] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: *https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.*

[23] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of equity-based ETF options, *see id.,* the Exchange's market share in equity-based options decreased from 13.06% for the month of January 2022 to 12.58% for the month of January 2023.

[24] *See* notes 12 & 20, *supra.*

[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f)(2).

[27] 15 U.S.C. 78s(b)(2)(B).

10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2023–28, and should be submitted on or before April 27, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07142 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34873]

Deregistration Under Section 8(f) of the Investment Company Act of 1940

March 31, 2023.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'')

ACTION: Notice of applications for deregistration under Section 8(f) of the Investment Company Act of 1940.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of March 2023. A copy of each application may be obtained via the Commission's website by searching for the applicable file number listed below, 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 *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the relevant applicant 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 SEC by 5:30 p.m. on April 25, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.*

FOR FURTHER INFORMATION CONTACT: Shawn Davis, Assistant Director, at (202) 551–6413 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE, Washington, DC 20549–8010.

Destra Targeted Income Unit Investment Trust [File No. 811–22757]

Summary: Applicant, a unit investment trust, seeks an order declaring that it has ceased to be an investment company. On December 31, 2015, and April 15, 2022, applicant made liquidating distributions to its shareholders, based on net asset value. Expenses of $75,000.00 incurred in connection with the liquidation were paid by the applicant. Applicant also has retained $75,000 for the purpose of paying outstanding liabilities.

Filing Date: The application was filed on February 21, 2023.

Applicant's Address: 901 Warrenville Road, Suite 15, Lisle, Illinois 60532.

FEG Absolute Access Fund I LLC [File No. 811–22527]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 31, 2020, February 28, 2021, September 1, 2021, and January 3, 2023, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $3,000 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on March 7, 2023.

Applicant's Address: Joshua.deringer@faegredrinker.com.

FEG Absolute Access Fund LLC [File No. 811–22454]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant currently has fewer than 100 beneficial owners, is not presently making an offering of securities and does not propose to make any offering of securities. Applicant will continue to operate as a private investment fund in reliance on Section 3(c)(1) of the Act.

Filing Date: The application was filed on March 7, 2023.

Applicant's Address: Joshua.deringer@faegredrinker.com.

Lord Asset Management Trust [File No. 811–08348]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 15, 2022, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of $115,463.67 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on March 10, 2023.

Applicant's Address: 425 South Financial Place, Suite 3900, Chicago, Illinois 60605.

Transamerica Asset Allocation Variable Funds [File No. 811–07717]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On October 28, 2022, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of $58,697.01 incurred in connection with the liquidation were paid by the issuer and depositor of the applicant.

Filing Dates: The application was filed on December 16, 2022, and amended on March 17, 2023.

Applicant's Address: 1801 California Street, Suite 5200, Denver, Colorado 80202.

UBS Relationship Funds [File No. 811–09036]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Expenses of $5,500 incurred in connection with the liquidation were paid by the applicant.

Filing Dates: March 10, 2023.

Applicant's Address: c/o UBS Asset Management (Americas) Inc., One North Wacker Drive, Chicago, Illinois 60606.

Zell Capital [File No. 811–23563]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant currently has fewer than 100 beneficial owners, is not presently making an offering of securities and does not propose to make any offering of securities. Applicant will continue to operate as a private investment fund in reliance on Section 3(c)(1) of the Act.

Filing Dates: The application was filed on February 24, 2023.

Applicant's Address: 175 South Third, Suite 200, Columbus, Ohio 43215.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07156 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97230; File No. SR–ICEEU–2023–007]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments of the ICE Clear Europe Delivery Procedures

March 31, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 20, 2023, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II and III below, which Items have been primarily prepared by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(4)(ii) thereunder,[4] such that the proposed rule change was immediately effective upon filing with the Commission. On March 27, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 (hereafter the ''proposed rule change''),[5] from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') proposes to amend its Delivery Procedures (''Delivery Procedures'' or ''Procedures'') to add a new Part N2 thereto (''Part N2''), which will apply to certain ICE Futures Europe Deliverable Carbon Credit Contracts (together the ''Contracts''), for which delivery will be made through a registry account of the Clearing House.[6]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe is proposing to add a new Part N2 to the Delivery Procedures. Part N2 would apply to the Contracts, which are to be traded on ICE Futures Europe and cleared at ICE Clear Europe, and would address settlement that will occur through a Registry Account of the Clearing House. The proposed Delivery Procedures are intended to become operative on March 28, 2023, subject to regulatory approval. ICE Clear Europe will announce by Circular the specific Contracts to which Part N2 of the Delivery Procedures will apply. ICE Clear Europe currently expects that Part N2 will apply to all ICE Futures Europe physically deliverable carbon credit contracts.

Pursuant to Part N2, delivery under the Contracts, in the case of the Seller, would be effected upon the transfer of the relevant Carbon Credits from the Registry Account of the Seller into the Registry Account of the Clearing House and acceptance of the Carbon Credits by the Clearing House. In the case of the Buyer, delivery would be effected upon transfer of the relevant Carbon Credits from the relevant Registry Account of the Clearing House to the relevant Registry Account of the Buyer, and there would not be a prerequisite for the Buyer to accept the Carbon Credits. Part N2 would set out the Clearing House's ability not to accept a transfer from the Seller in the event the transferred carbon credits are not in accordance with the contract specifications. Delivery would take place during the Delivery Period for the relevant Contracts in accordance with the contract specifications, and neither delivery by Seller nor receipt by Buyer would require performance by the other to occur simultaneously. Consistent with the foregoing, the amendments would also state that both the Buyer and Seller would deal directly with the Clearing House in the settlement.

The amendments would set out relevant definitions related to delivery under the contract, including as to the underlying deliverable Carbon Credits. The amendments provide that the Carbon Credits must conform to the specification described in the Contract and the specifications of the Registry to and from which delivery may be made under the relevant Contract. In cases where the Seller effected the transfer of carbon credits that are not in accordance with the relevant Contract specifications, the Clearing House would reserve the right to reject the transfer and return the respective carbon credits. In such scenario the Seller would remain under an obligation to deliver the Carbon Credits of the specified quantity along with the Contract within the appropriate timeline. The amendments would further specify certain details of the delivery process for the Contracts including quantity, settlement price, and timing of cessation of trading.

The amendments would state that the Contracts would be based on Open Contract Positions after expiration of the relevant Contract Set and the delivery process would occur over a three consecutive Business Day period. In addition, the amendments would include delivery timetables with detailed timeframes and descriptions of the processes for delivery under Contracts. Such timetables would set out, among other processes, the time for cessation of trading, submission of delivery intentions, confirmation reports, confirmations of delivery position/expiry, payment by the Buyer, payment and return of delivery margin, Seller's delivery to the Clearing House, payment to Seller, and Clearing House delivery to the Buyer.

The amendments would also address the responsibilities of the Clearing House and relevant parties for delivery under Contracts, as well as certain limitations of liability for the Clearing House. Specifically, the Clearing House would not be responsible for the performance or non-performance of, or any delay or error in performance by any Registry or Registry Operator; the compliance or lack of compliance of any Seller or Buyer or their respective

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

[5] Amendment No. 1 amended and restated in its entirety the Form 19b–4 and Exhibit 1A in order to correct the narrative description of the proposed rule change.

[6] Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

Transferors or Transferees with any rules of the relevant Registry or any laws applicable to it; any errors in the Registry Account details entered into the relevant Registry systems or provided to the Clearing House by a Seller, Transferor, Buyer or Transferee in respect of a delivery; closure of any Registry Accounts; or the compliance with the contractual obligations owed to the Registry in respect of any Clearing House Registry Accounts, among other matters. Additionally, neither the Buyer or Seller would have any claim against the Clearing House for any loss, cost, damage or expense incurred or suffered as a result of the condition or operation of any Registry Operator or the performance or non-performance of any Registry Operator. The amendments would state that the section on liability would be without prejudice to the generality of and subject to the provisions of the Rules relating to liability and would be in addition to the general requirements of the Delivery Procedures. Furthermore, the Clearing House would not make any representation regarding the authenticity, validity or accuracy of any delivery tender notice, description of a Registry, market tracking system or any other Registry instructions, confirmations of transfer or any other notice, document, file, record or instrument used or delivered pursuant to the Contract Terms or pursuant to the procedures of any Registry.

The amendments would provide details related to delivery contract security, which is the delivery margin to be provided by Buyer and Seller, and which would take into account the Finance Procedures. The Clearing House would retain the Seller's security until the full contract value is released to the Seller following the delivery timetables.

The amendments would outline the use of the relevant Registry. Clearing Members would have to ensure their Transferors/Transferees have established the appropriate Registry Accounts at the relevant Registry for the Contracts in question and provide necessary instructions or confirmations to the Registry. Furthermore, Clearing Members making or taking delivery of the Contracts for their own account would be required to have established Registry Accounts in the relevant Registry for the Contract in question. In addition, it would be the responsibility of the Clearing Members to comply, and ensure their Transferors/Transferees also comply, with the rules, regulations and laws applicable to the Registry. The Clearing Members would also have to provide, and ensure their respective Transferors/Transferees also provide, correct Registry account details at all times.

The amendments would also provide for the use of an Alternative Delivery Procedure (''ADP'') in the event of a failure to transfer carbon credits in the manner and on the terms specified in the Contract. In such case, a Clearing Member may request agreement of the Clearing House to enter into an ADP to provide for delivery outside the terms of the Contract. In such case, settlement of the Contract would be dealt with in the manner specified in the ADP, and the affected parties and the Clearing House would be released from their rights and obligations in respect of the existing Contract. If the existing Contract would be liquidated under the ADP Agreement, it would be on the basis of the Exchange Delivery Settlement Price. A new Contract or Contracts would then be formed for purposes of the Rules, and delivery under an ADP Agreement would be subject to the specified requirements of the Delivery Procedures, the same Contract Terms as the Contracts replaced by the ADP Agreement (subject to the terms agreed in the ADP), the directions by the Clearing House that it may issue under its discretion, and the terms of the ADP Agreement. Any Clearing Member that enters into an ADP agreement would be deemed to have agreed to indemnify the Clearing House in respect of all and any of the Clearing House's costs, losses, charges and expenses incurred by the Clearing House in connection with the ADP. If a Clearing Member and the Clearing House are unable to enter into an ADP Agreement or effect delivery under an ADP within a reasonable time period after the failed delivery, the Clearing House may refer the matter to ICE Futures Europe and it will consider in its discretion what other reasonable next steps it should take, if any, under applicable exchange rules.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Delivery Procedures are consistent with the requirements of Section 17A of the Act [7] and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act [8] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The proposed changes to the Delivery Procedures are designed to establish delivery procedures relating to ICE Futures Europe Deliverable Carbon Credit Contracts under which delivery will be made through a Registry Account of the Clearing House. The amendments would set out the role, responsibilities and liabilities of the Clearing House, Clearing Members and designated transferors and transferees in the delivery process, in line with Delivery Procedures for other types of carbon credit futures contracts. Contracts providing for delivery under Part N2 will be cleared by the Clearing House in the substantially same manner as other types of deliverable carbon credit contracts that have been settled bilaterally rather than through a Clearing House Registry Account, and will be supported by ICE Clear Europe's existing F&O financial resources, risk management, systems and operational arrangements. Accordingly, ICE Clear Europe believes that its financial resources, risk management, systems and operational arrangements are sufficient to support clearing of such contracts and to manage the risks associated with such contracts. As a result, in ICE Clear Europe's view, the amendments would be consistent with the prompt and accurate clearance and settlement of the contracts, and the protection of investors and the public interest consistent with the requirements of Section 17A(b)(3)(F) of the Act.[9] (In ICE Clear Europe's view, the amendments would not affect the safeguarding of funds or securities in the custody or control of the clearing agency or for which it is responsible, within the meaning of Section 17A(b)(3)(F).[10])

In addition, Rule 17Ad–22(e)(10) [11] provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable [. . .] establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor and manage the risks associated with such physical deliveries.'' As discussed above, the amendments would establish a new set of procedures applicable to the delivery and settlement of ICE Futures Europe Deliverable Carbon Credit Contracts that are to be settled by

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] 17 CFR 240.17Ad–22(e)(10).

delivery through the Clearing House's Registry Account. The procedures would address, among other matters, delivery specifications for such contracts, the obligations and roles of Clearing Members and the Clearing House, certain limitations of liability for the Clearing House, and certain other documentation and timing matters. Clearance of the Contracts would otherwise be supported by ICE Clear Europe's existing financial resources, risk management, systems and operational arrangements. The amendments thus appropriately clarify the role and responsibilities of the Clearing House and Clearing Members with respect to physical delivery. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad–22(e)(10).[12]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments to the Delivery Procedures are intended to establish a new set of procedures applicable to the delivery and settlement of ICE Futures Europe Deliverable Carbon Credit Contracts under which delivery will be made through a Registry Account of the Clearing House. In ICE Clear Europe's view, the amendments will thus enhance the settlement process, and would not otherwise materially affect the terms of the contract. ICE Clear Europe does not believe the amendments would adversely affect competition among Clearing Members, materially affect the cost of clearing, adversely affect access to clearing for Clearing Members or their customers, or otherwise adversely affect competition in clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendment have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments received with respect to the proposed rule change.

[12] 17 CFR 240.17Ad–22(e)(10).

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 [13] and paragraph (f) of Rule 19b–4 [14] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2023–007 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–ICEEU–2023–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.*

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–ICEEU–2023–007 and should be submitted on or before April 27, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07139 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97236; File No. SR–PEARL–2023–15]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rules 2617 and 2626 Regarding Retail Orders Routed Pursuant to the Route to Primary Auction Routing Option

March 31, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 28, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rules 2617(b)(5) and 2626(f) related to Retail Orders [3] routed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 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

Continued

pursuant to the Route to Primary (''PAC'') routing option when trading equity securities on the Exchange's equity trading platform (referred to herein as ''MIAX Pearl Equities'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Exchange Rule 2617(b)(5) related to Retail Orders routed pursuant to the PAC routing option when trading equity securities on MIAX Pearl Equities. Exchange Rule 2626 defines Retail Orders and sets forth the requirements [4] that Equity Members [5] must complete prior to sending Retail Orders to the Exchange. Equity Members that seek to become a Retail Member Organization (''RMO'') [6] must complete an attestation in a form required by the Exchange that substantially all orders submitted as Retail Orders will qualify as such under Exchange Rule 2626. Such Equity Members must then be approved by the Exchange as a RMO and then may designate a Retail Order to be identified as Retail on the Exchange's proprietary data feeds on an order-by-order or port-by-port basis pursuant to Exchange Rule 2626(f). As proposed, those same Equity Members that are approved as RMOs would then be able to also identify Retail Orders as Retail when routed to the primary listing market's opening, re-opening, or closing process pursuant to the PAC routing option,[7] described in more detail below.

The Exchange offers its Equity Members optional routing functionality that allows them to use the Exchange to access liquidity on other Trading Centers.[8] The functionality includes routing algorithms that determine the destination or pattern of routing. Exchange Rule 2617(b)(5) sets forth that there is a particular pattern of routing to other Trading Centers, known as the ''System routing table'', as well as sets forth the Exchange's available routing options. All routing is designed to be conducted in a manner consistent with Regulation NMS.

The Exchange recently launched the PAC routing option,[9] which enables an Equity Member to designate that their order be routed to participate in the primary listing market's opening, re-opening, or closing process. In sum, Exchange Rule 2617(b)(5)(B) describes PAC as a routing option for Market Orders [10] and displayed Limit Orders [11] with a time-in-force of Regular Hours Only (''RHO'') [12] that the entering firm wishes to designate for participation in the opening, re-opening (following a regulatory halt, suspension, or pause), or closing process of a primary listing market (Cboe BZX Exchange, Inc. (''BZX''), the New York Stock Exchange LLC (''NYSE''), The Nasdaq Stock Market LLC (''Nasdaq''), NYSE American LLC (''NYSE American''), or NYSE Arca, Inc. (''NYSE Arca'')) if received before the opening, re-opening, or closing process of such market.

Exchange Rule 2617(b)(5)(B)(1)(i) describes how orders are routed to participate in the primary listing market's opening or re-opening process pursuant to the PAC routing option and provides, in sum, that displayed Limit Orders and Market Orders with a time-in-force of RHO received before the security has opened on the primary listing market will be routed to participate in the primary listing market's opening process prior to the primary listing market's order entry cut-off time. Exchange Rule 2617(b)(5)(B)(1)(i) further provides that if a displayed Limit Order or Market Order designated as RHO is received at or after the time the Exchange begins to route existing orders to participate in the primary listing exchange's opening process, but before market open, the Exchange will route such orders to participate in the primary listing market's opening process upon receipt.

Exchange Rule 2617(b)(5)(B)(1)(ii) describes how orders are routed to participate in the primary listing market's closing process pursuant to the PAC routing option. Exchange Rule 2617(b)(5)(B)(1)(ii)(a) covers Limit Orders and provides, in sum, that a Limit Order designated as RHO will be routed to participate in the primary listing market's closing process prior to the primary listing market's order entry cut-off time. If a Limit Order designated as RHO is received at or after the time the Exchange begins to route existing orders to participate in the primary listing market's closing process, but before market close, the Exchange will check the System for available shares and then route the remaining shares to participate in the primary listing market's closing process. Exchange Rule 2617(b)(5)(B)(1)(ii)(b) covers Market Orders and provides, in sum, that a Market Order designated as RHO is not eligible to be routed to participate in the primary listing market's closing process,

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. *See* Exchange Rule 2626(a)(2).

[4] Members must submit a signed written attestation, in a form prescribed by the Exchange, that they have implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the Member as a ''Retail Order'' comply with the above requirements. *See* Exchange Rule 2626(b).

[5] The term ''Equity Member'' is a Member authorized by the Exchange to transact business on MIAX Pearl Equities. *See* Exchange Rule 1901.

[6] A ''Retail Member Organization'' or ''RMO'' is an Equity Member (or a division thereof) that has been approved by the Exchange under Exchange Rule 2626 to submit Retail Orders. *See* Exchange Rule 2626(a)(1).

[7] *See* Exchange Rule 2617(b)(5).

[8] 17 CFR 242.600(b)(95) (defining ''Trading Center'' as ''a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent'').

[9] *See* Securities Exchange Act Release No. 94301 (February 23, 2022), 87 FR 11739 (March 2, 2022) (SR–PEARL–2022–06). *See also MIAX Pearl Equities—Expansion of Functionality Through New Route to Primary Auction (PAC) Strategy—Rollout Postponed until June 27, 2022,* dated June 8, 2022, *available at https://www.miaxoptions.com/alerts/2022/06/08/miax-pearl-equities-expansion-functionality-through-new-route-primary-auction-pac* (last visited June 28, 2022).

[10] *See* Exchange Rule 2614(a)(2).

[11] *See* Exchange Rule 2614(a)(1).

[12] Exchange Rule 2614(b)(2) defines ''Regular Hours Only'' or ''RHO'' as ''[a]n order that is designated for execution only during Regular Trading Hours, which includes the Opening Process for equity securities. An order with a time-in-force of RHO entered into the System before the opening of business on the Exchange as determined pursuant to Exchange Rule 2600 will be accepted but not eligible for execution until the start of Regular Trading Hours.'' To ensure that orders coupled with the PAC routing option are eligible to participate in the primary listing market's opening, re-opening, or closing process, the Exchange routes Market Orders and displayed Limit Orders designated as RHO upon entry with a time-in-force accepted or required by the primary listing market. *See* Exchange Rule 26174(b)(5)(B). As such, the Exchange converts an order's time-in-force to a time-in-force accepted or required by the primary listing market when necessary only for purposes of routing that order to an away market.

unless such Market Order is: (i) entered at or after 3:50 p.m. Eastern Time, but before market close, (ii) the primary listing market has declared a regulatory halt; and (iii) the primary listing market is to conduct its closing process according to their applicable rules.[13] All other Market Orders designated as RHO received at or after the time the Exchange begins to route existing orders to participate in the primary listing market's closing process, but before market close, will be cancelled.[14]

Going forward, the Exchange proposes that Retail Orders that a RMO has designated as Retail pursuant to Exchange Rule 2626(f) would also be identified as Retail when routed to the primary listing market's opening, re-opening, or closing process pursuant to the PAC routing option,[15] so that such order may receive preferred pricing available to Retail Orders offered by the primary listing market.[16] The Exchange notes that the proposal will primarily benefit displayed Limit Orders identified as Retail that are routed to participate in the primary listing market's closing process because, unlike before the opening or re-opening process, continuous trading is in effect prior to the closing process during which such routed Retail Orders may be executed and eligible to receive preferred pricing.[17]

The Exchange routes orders in equity securities via one or more routing brokers that are not affiliated with the Exchange.[18] Those routing broker-dealers are required to complete the required attestation to qualify as RMOs on the Exchange pursuant to Exchange Rule 2626, described above. Those routing broker dealers would likewise be required to complete any requirements by the primary listing market to enter Retail Orders on that market and to qualify for any enhanced pricing. To the extent the Exchange routes a Retail Order identified as Retail via a routing broker-dealer to a primary listing market, it will ensure that it does so in compliance with that market's rules governing its retail orders, including that the order satisfies that market's definition of ''Retail Order.''[19]

As discussed above, RMOs may designate a Retail Order to be identified as Retail on the Exchange's proprietary data feeds on an order-by-order or port-by-port basis pursuant to Exchange Rule 2626(f). Those same Retail Orders that are to be identified as Retail pursuant to Exchange Rule 2626(f) would also be identified as Retail when routed pursuant to the PAC routing option. The identification of a Retail Order as Retail on the Exchange's proprietary data feed and when being routed pursuant to the PAC routing option would implicate orders entered during continuous trading that are to be routed to participate in the primary listing market's closing process pursuant to the PAC routing option. Such Retail Orders that are to be identified as Retail when routed pursuant to the PAC routing option entered before market open that are to be routed to participate in the primary listing market's opening process or entered when a security is halted that are to be routed to participate in the primary listing market's re-opening process are entered during times when continuous trading is not in effect on the Exchange[20] and would, therefore, only be identified as Retail when being routed pursuant to the PAC routing option. The Exchange will not identify a Retail Order as Retail when routed pursuant to the PAC routing option unless instructed by the RMO to do so pursuant to Exchange Rule 2626, either on an order-by-order or port-by-port basis. This behavior would be codified under new subparagraph (iii) under Exchange Rule 2617(b)(5)(B), which would state that, a RMO (as defined in Rule 2626(a)(1)) may designate a Retail Order (as defined in Rule 2626(a)(2)) to be identified as Retail on an order-by-order basis or instruct the Exchange to identify all of its Retail Orders as Retail on a port-by-port basis. Proposed Exchange Rule 2617(b)(5)(B)(iii) would also provide that if so designated, a Retail Order will be identified as Retail when routed pursuant to Exchange Rule 2617(b)(5)(B)(1)(i) and (ii), as well as on the Exchange's proprietary data feeds pursuant to Rule 2626(f). Proposed Exchange Rule 2617(b)(5)(B)(iii) would further provide that a RMO that instructs the Exchange to identify all its Retail Orders as Retail on a particular port will be able to override such setting and designate any individual Retail Order from that port to not be identified as Retail when routed to the primary listing market pursuant to Exchange Rule 2617(b)(5)(B)(1)(i) and (ii).[21] As stated above, RMOs may designate their orders as Retail in accordance with Exchange Rule 2626(f) for purposes of order attribution on the MIAX Pearl Equities proprietary data feeds. A RMO may designate a Retail Order to be identified as Retail when routed pursuant to the PAC routing option on an order-by-order basis or port-by-port basis,[22] which is the same manner as

[13] The Exchange notes that this functionality was implemented on March 28, 2023. *See MIAX Pearl Equities—Enhancement for Market Orders with a Primary Auction (PAC) Routing Strategy will be Activated on Tuesday, March 28, 2023, available at https://www.miaxoptions.com/alerts/2023/03/22/miax-pearl-equities-enhancement-market-orders-primary-auction-pac-routing. See also* Securities Exchange Act Release No. 95298 (July 15, 2022), 87 FR 43579 (July 21, 2022) (SR–PEARL–2022–29).

[14] *Id.*

[15] The Exchange currently designates all routable orders, other than those routed pursuant to the PAC routing option, as IOC when routing such order to an away market, regardless of the time-in-force included with the order upon entry. Exchange Rule 2617(b)(4) describes this functionality and currently provides that the System will designate Market Orders and marketable Limit Orders that are fully or partially routed to an away Trading Center as IOC. The Exchange does not propose to identify as Retail a Retail Order that is being routed as IOC and not pursuant to the PAC routing option because such orders would remove liquidity on entry or be cancelled and, therefore, not be eligible to receive preferred pricing available to liquidity adding orders by primary listing markets, which primarily employ maker/taker fee structures. *See infra* note 16. Orders routed pursuant to the PAC routing option include a time-in-force of RHO when entered on the Exchange and, therefore, may provide liquidity (and receive a preferred rebate) on the primary listing market prior to participating in the primary listing market's closing process if the time-in-force employed by the primary listing market allows the order to provide liquidity. The Exchange notes that it would convert an order's time-in-force to a time-in-force accepted or required by the primary listing market when necessary only for purposes of routing that order to an away market.

[16] *See, e.g.,* Cboe BZX fee schedule *available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/* (providing an enhanced rebate of $0.0032 to Retail Orders that add liquidity); *and* NYSE fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf* (providing an enhanced rebate of $0.0032 to Retail Orders that add liquidity).

[17] While the proposal may benefit Market Orders, the Exchange notes that it would be an edge case because of the limited scenario where the Exchange would route Market Orders to the primary listing market's closing process, namely, when the security is halted and continuous trading is not in effect. *See* Exchange Rule 2617(b)(5)(B)(1)(ii)(b).

[18] This routing process is described under Exchange Rule 2617(b)(1).

[19] Any portion of a routed Retail Order that is not executed on the primary listing market that is returned the Exchange will continue to be treated as a Retail Order.

[20] The Exchange does not disseminate quote and trade data on its proprietary data feeds when it is not engaged in continuous trading.

[21] In such case, the Retail Order would also not be identified as retail on the Exchange's proprietary data feeds pursuant to Exchange Rule 2626(f).

[22] A RMO may designate a Retail Order to be identified as Retail when routed pursuant to the PAC routing option on an order-by-order basis via standard order entry protocols. A RMO may designate that all Retail Orders be identified as Retail when routed pursuant to the PAC routing option on a particular port by instructing the Exchange's Trading Operations personnel to designate that port as Retail or the RMO may designate a port as on their own via the Exchange's online portal. The Exchange provides an internet-facing portal via its website that Equity Members, including RMOs, access using unique login credentials. The online portal provides self-service functions to Equity Members. *See* Member Firm Portal User Manual, *available at https://www.miaxoptions.com/sites/default/files/knowledge-center/2022-06/MIAX_*

Continued

when as order is to be identified as Retail on the Exchange's proprietary data feeds pursuant to Exchange Rule 2626(f).[23] Proposed Exchange Rule 2617(b)(5)(B)(iii) is based on current Exchange Rule 2626(f).

Implementation

Due to the technological changes associated with this proposed change, the Exchange will issue a trading alert publicly announcing the implementation date of the proposed rule change. The Exchange anticipates that the implementation date will be in the second or third quarter of 2023.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[24] in general, and furthers the objectives of Section 6(b)(5),[25] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposal promotes just and equitable principles of trade because it enables RMOs to instruct the Exchange to identify a Retail Order as Retail when routed pursuant to the PAC routing option and potentially receive preferred pricing available to Retail Orders offered by the primary listing market, which primarily employ maker/taker fee structures. In addition, the proposal promotes just and equitable principles of trade because Retail Orders that a RMO has designated as Retail on an order-by-order or port-by-port-basis pursuant to Exchange Rule 2626(f) would also be identified as Retail when routed pursuant to the PAC routing option and this order-by-order or port-by-port optionality provides RMOs flexibility to identify their Retail Orders as Retail based upon how they manage their order flow. The proposal removes impediments to and perfects the mechanism of a free and open market and a national market system because it would enable the Exchange to better compete for Retail Order flow with another exchange that offers similar functionality.[26] The proposal would also promote just and equitable principles of trade because the potential to receive preferred pricing on the primary listing market should incentivize RMOs to enter additional Retail Order flow on the Exchange. This additional order flow would come in the form of displayed Limit Orders designated as RHO entered during continuous trading that may first check the System for available shares and then be posted to the MIAX Pearl Equities Book prior to being routed pursuant to the PAC routing option.[27] This may, in turn, deepen the available liquidity on the Exchange and attract additional order flow, benefiting all Exchange participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposal would enhance competition for retail order flow among exchanges by allowing the Exchange to provide Retail Orders with increased opportunities to receive preferred pricing provided to Retail Orders by the primary listing market when being routed pursuant to the PAC routing option. The proposal would not impede the national market system because it would not disrupt the ability of the primary listing market to conduct their opening, re-opening, and closing processes. The Exchange would continue to route orders in a form and manner currently accepted by the primary listing markets, which the Exchange understands currently includes accepting orders with a Retail identifier. The proposal would also enhance intermarket competition because it would enable the Exchange to better compete with other exchanges that offer similar functionality.[28] The proposal may further enhance intermarket competition by attracting additional Retail Order flow to the Exchange since a displayed Limit Order designated as RHO that is entered during continuous trading may first check the System for available shares and may be posted to the MIAX Pearl Equities Book prior to being routed pursuant to the PAC routing option.[29] This may, in turn, deepen the available liquidity on the Exchange and attract additional order flow, benefiting all Exchange participants, and improving competition between exchange markets. The proposal would also enhance intramarket competition because the proposed functionality would be available to all Equity Members that may qualify as a RMO and elect to have their Retail Orders identified as Retail when routed pursuant to the PAC routing option.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act[30] and Rule 19b–4(f)(6)[31] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule

Exchanges_Member_Firm_Portal_User_Manual_05262022.pdf. A RMO that instructs the Exchange to identify all its Retail Orders as Retail on a particular port will be able to override such setting and designate any individual Retail Order from that port to not be identified as Retail via standard order entry protocols when submitting that particular order to the Exchange.

[23] The Exchange proposes to make a related change to Exchange Rule 2626(f) to, likewise, specify that a Retail Order to be identified as Retail pursuant to Exchange Rule 2626(f) will also be identified as Retail when being routed pursuant to the PAC routing option under Rule 2617(b)(5)(B)(1)(iii).

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(5).

[26] *See* Cboe EDGX Exchange, Inc. (''Cboe EDGX'') Rule 11.21(e). *See also* Securities Exchange Act Release No. 75824 (September 3, 2015), 80 FR 54638 (September 10, 2015) (SR–EDGX–2015–40).

[27] *See* Exchange Rules 2617(b)(5)(B)(1)(ii)(a) and (b)(5)(B)(2)(i).

[28] *See* Cboe EDGX Rule 11.21(e). *See also* Securities Exchange Act Release No. 75824 (September 3, 2015), 80 FR 54638 (September 10, 2015) (SR–EDGX–2015–40).

[29] *See* Exchange Rules 2617(b)(5)(B)(1)(ii)(a) and (b)(5)(B)(2)(i).

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2023–15 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2023–15. 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 (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2023–15 and should be submitted on or before April 27, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–07144 Filed 4–5–23; 8:45 am]

BILLING CODE 8011–01–P

[32] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 12038]

30-Day Notice of Proposed Information Collection: Office of Language Services Contractor Application Form

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to May 8, 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: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Wanda Lyles Howell who may be reached on 202–631–9374 or at *lyleswm2@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Office of Language Services Contractor Application Form.
- *OMB Control Number:* 1405–0191.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Bureau of Administration, A/OPR/LS.
- *Form Number:* DS–7651.
- *Respondents:* General public applying for translator and/or interpreter contract positions.
- *Estimated Number of Respondents:* 1000.
- *Estimated Number of Responses:* 1000.
- *Average Time per Response:* 30 minutes.
- *Total Estimated Burden Time:* 500 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The information collected is needed to ascertain whether respondents are valid interpreting and/or translating candidates, based on their work history and legal work status in the United States. If candidates successfully become contractors for the U.S. Department of State, Office of Language Services, the information collected is used to initiate security clearance background checks and for processing payment vouchers. Respondents are typically members of the general public with varying degrees of experience in the fields of interpreting and/or translating.

Methodology

The Office of Language Services makes the ''Office of Language Services Contractor Application Form'' (DS–7651) available on the Department of State forms site, *https://eforms.state.gov.* Respondents can submit the form via email.

Elissa G. Pitterle,

Executive Director, Bureau of Administration, Department of State.

[FR Doc. 2023–07254 Filed 4–5–23; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice: 12037]

Notice of Determinations; Culturally Significant Object Being Imported for Exhibition—Determinations: Exhibition of ''Armor for the German Joust of Peace, Made for Philip I of Castile''

SUMMARY: Notice is hereby given of the following determinations: I hereby

determine that a certain object being imported from abroad pursuant to an agreement with its foreign owner or custodian for temporary exhibition or display in the Arms and Armor Department of The Metropolitan Museum of Art, New York, New York, and at possible additional exhibitions or venues yet to be determined, is of cultural significance, and, further, that its temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Scott Weinhold,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–07253 Filed 4–5–23; 8:45 am]

BILLING CODE 4710–05–P

STATE JUSTICE INSTITUTE

SJI Board of Directors Meeting, Notice

AGENCY: State Justice Institute.

ACTION: Notice of meeting.

SUMMARY: The purpose of this meeting is to consider grant applications for the 2nd quarter of FY 2023, and other business.

DATES: The SJI Board of Directors will be meeting on Monday, April 17, 2023 at 10:00 a.m. ET.

ADDRESSES: SJI Headquarters, 12700 Fair Lakes Circle, Suite 340, Fairfax, Virginia.

FOR FURTHER INFORMATION CONTACT: Jonathan Mattiello, Executive Director, State Justice Institute, 12700 Fair Lakes Circle, Suite 340, Fairfax, VA 22033, 703–660–4979, *contact@sji.gov.*

(Authority: 42 U.S.C. 10702(f))

Jonathan D. Mattiello,

Executive Director.

[FR Doc. 2023–07169 Filed 4–5–23; 8:45 am]

BILLING CODE 6820–SC–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 526 (Sub-No. 17)]

Notice of Railroad-Shipper Transportation Advisory Council Vacancies

AGENCY: Surface Transportation Board (Board).

ACTION: Notice of vacancies on the Railroad-Shipper Transportation Advisory Council (RSTAC) and solicitation of nominations.

SUMMARY: The Board hereby gives notice of vacancies on RSTAC for a small railroad representative and a large railroad representative. The Board seeks nominations for candidates to fill these vacancies.

DATES: Nominations are due on May 8, 2023.

ADDRESSES: Nominations may be submitted via e-filing on the Board's website at *www.stb.gov.* Submissions will be posted to the Board's website under Docket No. EP 526 (Sub-No. 17).

FOR FURTHER INFORMATION CONTACT: Gabriel Meyer at (202) 245–0150. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: The Board, created in 1996 to take over many of the functions previously performed by the Interstate Commerce Commission, exercises broad authority over transportation by rail carriers, including regulation of railroad rates and service (49 U.S.C. 10701–47, 11101–24), the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. 10901–07), as well as railroad line sales, consolidations, mergers, and common control arrangements (49 U.S.C. 10902, 11323–27).

The ICC Termination Act of 1995 (ICCTA), enacted on December 29, 1995, established RSTAC to advise the Board's Chair; the Secretary of Transportation; the Committee on Commerce, Science, and Transportation of the Senate; and the Committee on Transportation and Infrastructure of the House of Representatives with respect to rail transportation policy issues RSTAC considers significant. RSTAC focuses on issues of importance to small shippers and small railroads, including car supply, rates, competition, and procedures for addressing claims. ICCTA instructs RSTAC to endeavor to develop private sector mechanisms to prevent, or identify and address, obstacles to the most effective and efficient transportation system practicable. The members of RSTAC also prepare an annual report concerning RSTAC's activities. RSTAC is not subject to the Federal Advisory Committee Act.

RSTAC's 15 appointed members consist of representatives of small and large shippers, and small and large railroads. These members are appointed by the Chair. In addition, members of the Board and the Secretary of Transportation serve as ex officio members. Of the 15 appointed members, nine are voting members and are appointed from senior executive officers of organizations engaged in the railroad and rail shipping industries. At least four of the voting members must be representatives of small shippers as determined by the Chair, and at least four of the voting members must be representatives of Class II or III railroads. The remaining six members to be appointed—three representing Class I railroads and three representing large shipper organizations—serve in a nonvoting, advisory capacity, but may participate in RSTAC deliberations.

Meetings of RSTAC are required by statute to be held at least semi-annually. RSTAC typically holds meetings quarterly at the Board's headquarters in Washington DC, although some meetings are held virtually or in other locations.

The members of RSTAC receive no compensation for their services and are required to provide for the expenses incidental to their service, including travel expenses. Currently, RSTAC members have elected to submit annual dues to pay for RSTAC expenses.

RSTAC members must be citizens of the United States and represent as broadly as practicable the various segments of the railroad and rail shipper industries. They may not be full-time employees of the United States Federal Government. According to revised guidance issued by the Office of Management and Budget, it is permissible for federally registered lobbyists to serve on advisory committees, such as RSTAC, as long as they do so in a representative capacity, rather than an individual capacity. *See Revised Guidance on Appointment of Lobbyists to Fed. Advisory Comms., Bds., & Comm'ns,* 79 FR 47,482 (Aug. 13, 2014). Members of RSTAC are appointed to serve in a representative capacity.

Each RSTAC member is appointed for a term of three years. No member will be eligible to serve in excess of two consecutive terms. However, a member may serve after the expiration of his or her term until a successor has taken office.

Due to the resignation of a small railroad representative and a large railroad representative, the Board is seeking to fill these RSTAC positions. Nominations for candidates to fill the vacancies should be submitted in letter form, identifying the names of the candidates, providing a summary of why the candidates are qualified to serve on RSTAC, and containing representations that the candidates are willing to serve as RSTAC members effective immediately upon appointment. Candidates may nominate themselves. The Chair is committed to having a committee reflecting diverse communities and viewpoints and strongly encourages the nomination of candidates from diverse backgrounds. RSTAC candidate nominations should be filed with the Board by May 8, 2023. Members selected to serve on RSTAC are chosen at the discretion of the Board Chair. Please note that submissions will be posted on the Board's website under Docket No. EP 526 (Sub-No. 17) and can also be obtained by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at *RCPA@stb.gov* or (202) 245–0238.

Authority: 49 U.S.C. 1325.

Decided: March 31, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Brendetta Jones,

Clearance Clerk.

[FR Doc. 2023–07235 Filed 4–5–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36677]

Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company

Union Pacific Railroad Company (UP), a Class I railroad, has filed a verified notice of exemption under 49 CFR 1180.2(d)(8) for the acquisition of temporary overhead trackage rights over an approximately 51.7-mile rail line of BNSF Railway Company (BNSF) between milepost 579.3 on BNSF's Creek Subdivision near Mill Creek, Okla., and milepost 631.0 on BNSF's Madill Subdivision near Joe Junction, Tex., pursuant to the terms of a written temporary trackage rights agreement dated December 31, 2022 (Agreement).[1]

UP states that the sole purpose of the temporary trackage rights is to allow UP to move loaded and empty unit ballast trains, which will be used solely for UP maintenance-of-way projects. UP states that the temporary trackage rights will expire on December 31, 2023.

The transaction may be consummated on or after April 20, 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 temporary 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), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

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 April 13, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36677, 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 UP's representative, Whitney C. Larkin, Union Pacific Railroad Company, 1400 Douglas Street, MS 1580, Omaha, NE 68179.

According to UP, 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 30, 2023.

[1] A copy of the Agreement was attached as an exhibit to the verified notice.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2023–07120 Filed 4–5–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Compatibility Program for Lihue Airport, Lihue, Kauai, Hawaii

AGENCY: Federal Aviation Administration, Department of Transportation (DOT).

ACTION: Notice of acceptance of noise exposure maps.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the Hawaii Department of Transportation for Lihue Airport are in compliance with applicable statutory and regulatory requirements.

DATES: The effective date of the FAA's determination on the noise exposure maps is March 31, 2023.

FOR FURTHER INFORMATION CONTACT: Kevin Nishimura, Environmental Protection Specialist, 300 Ala Moana Boulevard, Honolulu, Hawaii 96850, Telephone: 808–312–6038.

SUPPLEMENTARY INFORMATION: In accordance with title 49, United States Code (U.S.C.) section 47503 of the Aviation Safety and Noise Abatement Act, an airport operator may submit to the FAA, noise exposure maps (NEMs) depicting non-compatible uses and other information as of the date the map was submitted. 49 U.S.C. 47503 also requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport. In accordance with 49 U.S.C. 47504, an airport operator that submits an NEM that the FAA determined complied with statutory and regulatory requirements, may submit for FAA approval, a noise compatibility program (NCP) identifying measures the airport operator has taken or proposes to take to reduce existing non-compatible land uses and prevents the introduction of additional non-compatible uses.

On February 10, 2023, Hawaii Department of Transportation submitted NEMs, descriptions and other supporting documentation for Lihue Airport for FAA's review and acceptance. An NEM must include a description of estimated aircraft

operations during a forecast period that is at least five years in the future and how those operations will affect the map and other information. The specific documentation determined to constitute the NEMs includes Exhibit NEM–1, ''2019 Existing Condition Noise Exposure Map'' and Exhibit NEM–2 and ''2027 Forecast Noise Exposure Map'', which addressed the current and forecast NEM graphics requirements and all other narrative, graphic or tabular representations of the data required by appendix A in 14 CFR part 150 and 49 U.S.C. 47503 and 47506.

The FAA completed its review of the NEMs and supporting documentation and determined the NEMs comply with the applicable statutory and regulatory requirements. This determination is effective on March 31, 2023. FAA's determinations for this NEM submitted by Hawaii Department of Transportation is limited to a finding that the maps were developed in accordance with 49 U.S.C. 47503 and the procedures in appendix A of 14 CFR part 150. FAA's determination does not constitute approval of the Hawaii Department of Transportation data, information or plans, or constitute a commitment to approve a noise compatibility program or to fund the implementation of that program. If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on an NEM it should be noted the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the NEMs to resolve questions concerning, for example, which properties should be covered by the provisions of 49 U.S.C. 47506. These functions are inseparable from the land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under 14 CFR part 150 or through FAA's review of NEMs. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the Hawaii Department of Transportation data that submitted the NEMs or with those public agencies and planning agencies with which consultation is required. The FAA relied on the certification by the Hawaii Department of Transportation this required consultation has been accomplished per 14 CFR 150.21 and 49 U.S.C. 47503.

Copies of the full noise exposure map documentation and of the FAA's evaluation of the maps are available for examination at the following locations:

Federal Aviation Administration, Honolulu Airports District Office, 300 Ala Moana Boulevard, Room 7–128, Honolulu, Hawaii, 96850.

The Hawaii Department of Transportation has also made a hard copy of the document available for review at:

Mr. Herman Tuiolosega, Planner, Hawaii Department of Transportation—Airports Engineering Branch, 400 Rodgers Boulevard, 7th Floor, Honolulu, Hawaii 96819

Mr. Craig Davis, Airport Manager, Lihue Airport, 3901 Mokulele Loop, Lihue, Hawaii 96766

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in El Segundo, California, on March 31, 2023.

Mark A. McClardy,

Director, Airports Division, Western-Pacific Region, AWP–600.

[FR Doc. 2023–07171 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advanced Aviation Advisory Committee (AAAC); Notice of Public Meeting

AGENCY: Federal Aviation Administration, Department of Transportation.

ACTION: Notice of Advanced Aviation Advisory Committee (AAAC) meeting.

SUMMARY: This notice announces a meeting of the AAAC.

DATES: The meeting will be held on April 26, 2023, between the hours of 1:30 p.m. and 5:00 p.m. Eastern Time.

Requests for accommodations for a disability must be received by April 19, 2023. Requests to submit written materials to be reviewed during the meeting must be received no later than April 19, 2023.

ADDRESSES: The meeting will be held at the FAA Headquarters, 800 Independence Avenue SW, Washington DC 20591. In-person attendance is limited to Advanced Aviation Advisory Committee members and selected FAA support staff. Members of the public who wish to observe the meeting through virtual means can access the livestream on the following FAA social media platforms on the day of the event, *https://www.facebook.com/FAA* or *https://www.youtube.com/FAAnews.* For copies of meeting minutes along with all other information please visit the AAAC internet website at *https://www.faa.gov/uas/programs_partnerships/advanced_aviation_advisory_committee/.*

FOR FURTHER INFORMATION CONTACT: Gary Kolb, Advanced Aviation Advisory Committee Manager, Federal Aviation Administration, U.S. Department of Transportation, at *gary.kolb@faa.gov* or 202–267–4441. Any committee related request or reasonable accommodation request should be sent to the person listed in this section.

SUPPLEMENTAL INFORMATION:

I. Background

The AAAC was created under the Federal Advisory Committee Act (FACA), in accordance with title 5 of the United States Code (5 U.S.C. app. 2) to provide the FAA with advice on key drone and advanced air mobility (AAM) integration issues by helping to identify challenges and prioritize improvements.

II. Agenda

At the meeting, the agenda will cover the following topics:

- Official Statement of the Designated Federal Officer
- Approval of the Agenda and Minutes
- Opening Remarks
- FAA Update
- Industry-Led Technical Topics
- New Business/Agenda Topics
- Closing Remarks
- Adjourn

Additional details will be posted on the AAAC internet website address listed in the **ADDRESSES** section at least 5 days in advance of the meeting.

III. Public Participation

The meeting will be open to the public via a livestream. Members of the public who wish to observe the virtual meeting can access the livestream on the following FAA social media platforms on the day of the event, *https://www.facebook.com/FAA* or *https://www.youtube.com/FAAnews.* The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

The FAA is not accepting oral presentations at this meeting due to time constraints. Written statements submitted by the deadline will be provided to the AAAC members before the meeting. Any member of the public may submit a written statement to the committee at any time.

Issued in Washington, DC.

Jeffrey U. Vincent,

Executive Director, UAS Integration Office, Federal Aviation Administration.

[FR Doc. 2023–07226 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0031]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of denials.

SUMMARY: FMCSA announces its decision to deny applications from 132 individuals who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a commercial motor vehicle (CMV) from operating CMVs in interstate commerce.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing material in the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2023–0031) in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, 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.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. 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 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

FMCSA received applications from 132 individuals who requested an exemption from the FMCSRs prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a CMV from operating CMVs in interstate commerce.

FMCSA has evaluated the eligibility of these applicants and concluded that granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8).

III. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification. The Agency's decision regarding these exemption applications is based on the eligibility criteria, the terms and conditions for Federal exemptions, and an individualized assessment of each applicant's medical information provided by the applicant.

IV. Conclusion

The Agency has determined that these applicants do not satisfy the eligibility criteria or meet the terms and conditions of the Federal exemption and granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8). Therefore, the 132 applicants in this notice have been denied exemptions from the physical qualification standards in § 391.41(b)(8).

Each applicant has, prior to this notice, received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final action by the Agency. This notice summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denial.

The following 132 applicants do not meet the minimum time requirement for being seizure-free, either on or off of anti-seizure medication:

Gary Abels (MN)
Zachary Adams (MS)
William Allen (MI)
Evan Bailey (CA)
Sherman Ballard (FL)
Eduardo Barboza (CA)
Michael Bartelt (WI)
Mark Bartlebaugh (TN)
Austin Baze (CA)
Duncan Bennett (TN)
Blake Bloddington (KS)
Gary Bohl (WY)
Alber Brown (GA)
Kenneth Brown (IN)
Dwight Bryson (VA)
Steven Bucklin (IL)
Rashawn Buggs (OH)
Walter Burks (MS)
Todd Burrey (OH)
Galen Butcher (WA)
Lydia Capelle (WY)
Pietro Capobianco (NJ)
Robert Carels (PA)
William Carol III (MD)
Perry Chase (VT)
Michael Curtin (NY)
Charles Curtis (NC)
Wade Davis (NC)
Jean Daza (NJ)
Aristedes Debarros (RI)
Michael Di Leonard (NY)
Joseph S. Drion (MO)
Gregory Durmaz (WA)
Kenneth Eife (NJ)
John Engle (IN)
Natalia Ericson (CA)
Marie Evans (TX)
Tray Freeman (NC)
Logan Fry (WA)
Drew Gettel (CO)
Timothy Gilroy (IA)
Chandler Gneiting (ID)
Dakota Graham (ID)
Anthony Gray (GA)
Charlotte Greek (CA)
Denise Gristi (CA)
Mario Gutierrez (CO)
Elton Hardin (IN)

Zachary Harkcom (PA)
Eric Harmon (MD)
Victor Haugen (NC)
Alexander Heckler (GA)
Christopher Hensel (MN)
Patricia Herman (CT)
Zachary Hewitt (PA)
Michael Holden (FL)
Barry Huan (TN)
Christine Jacks (AL)
Shaheed Jackson (GA)
Raymond Jackson (IL)
Richard Jeromchek (WA)
Preston Keim (IN)
Leonard King (NC)
Brandon Koole (MI)
Scotty Kuester (GA)
Jeffery Kueter (IA)
Bradley Kurtz (VA)
Sara Lockhart (MO)
Shane Lore (NJ)
Demon Lowe (NC)
Gabriella Lugtu (CA)
Blake Mallet (MA)
Douglas Mallon (NH)
Cole Martin (NC)
Matthew May (CT)
Taylor McBride (VA)
Nakia McCormick (NY)
Joseph Miller (IA)
Justin Moeller (IA)
Daniel Motisi (CO)
Brandon Muarry (IN)
Cole Neard (MT)
Glen Nelle (AR)
James Nicklasson (NE)
Sarah Ogle (IN)
Louis Orenstein (CO)
David Overhoff (NY)
Todd Paiano (NJ)
Richard Parsons (KS)
Tony Pearl (TN)
Robert Pinkston (NC)
Laci Poffenberger (MR)
Blake Quilia (VT)
Anthony Raasch (MI)
Donald Richard (VT)
Kevin Riggenbach (OH)
Clinton Rogers (MA)
Jay Rohde (MN)
Eric Rosello (DE)
Bryson Rowley (UT)
Ernest Sang (NC)
William Saucier (MN)
William Schaap (NJ)
Jason Shaw (IN)
Michael Shea (NJ)
Chad Shelhart (AZ)
Daryl Shupp (PA)
Michael Sifford (ID)
Paritpal Singh (CA)
Randall Slavik (MO)
Zachary Smith (IL)
Wesley Smith (UT)
Jeffrey Smith Jr. (FL)
Tammy Snyder (NC)
Lucas Sorey (NC)
Timothy Stassel (MO)
Christopher Strawbridge (WI)
Joshua Thomason (SC)
Sean Treacy (PA)
Darby Tyler (WA)
Dimitra Tzortzis (GA)
Glenn Utter (AZ)
Paul Warren (ME)
Ryan Welder (PA)
Michael Weymouth (NH)
Cade Whitaker (ID)
George Wihoit (PA)
Steven Willett (MA)
Garrett Williams (CA)
James Wilson (TN)
Richard Wisor (PA)
Christian Yesbeck (VA)

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–07191 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0041]

Qualification of Drivers; Exemption Applications; Implantable Cardioverter Defibrillator (ICD)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of denials.

SUMMARY: FMCSA announces its decision to deny the applications from four individuals treated with an Implantable Cardioverter Defibrillator (ICD) who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting operation of a commercial motor vehicle (CMV) in interstate commerce by persons with a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope (transient loss of consciousness), dyspnea (shortness of breath), collapse, or congestive heart failure.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing materials in the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2023–0041) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, 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.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. 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 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

On February 13, 2023, FMCSA published a notice announcing receipt of applications from four individuals treated with ICDs and requested comments from the public (88 FR 9318). The individuals requested an exemption from 49 CFR 391.41(b)(4) which prohibits operation of a CMV in interstate commerce by persons with a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive heart failure. The public comment period ended on March 15, 2023, and one comment was received.

FMCSA has evaluated the eligibility of the applicants and concluded that granting an exemption would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(4). A summary of each applicant's medical history related to their ICD exemption request was discussed in the February 13, 2023, **Federal Register** notice (88 FR 9318), and will not be repeated here.

The Agency's decision regarding this exemption application is based on information from the Cardiovascular Medical Advisory Criteria, an April 2007 evidence report titled ''Cardiovascular Disease and Commercial Motor Vehicle Driver Safety,'' [1] and a December 2014 focused research report titled ''Implantable Cardioverter Defibrillators and the Impact of a Shock in a Patient When Deployed.'' Copies of these reports are included in the docket.

FMCSA has published advisory criteria to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.[2] The advisory criteria for § 391.41(b)(4) indicates that coronary artery bypass surgery and pacemaker implantation are remedial procedures and thus, not medically disqualifying. ICDs are disqualifying due to risk of syncope.

III. Discussion of Comments

FMCSA received one comment in this proceeding. The comment was from a cardiovascular specialty nurse. The commenter indicated that a review of the applicant's ''clinical presentation and health status'' is more important to consider rather than just the physical presence of an ICD, suggesting that a decision on whether to grant an exemption should be made on an individualized basis considering those factors.

As stated in this notice in the section below, FMCSA evaluates each exemption application on an individualized basis considering all medical information to include what is provided by the applicant, available medical and scientific data concerning ICDs, and any relevant public comments received. Not only does FMCSA consider the physical presence of an ICD, but also the underlying condition for which the ICD was implanted that places the individual at high risk for loss of ability to operate a CMV.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

The Agency's decision regarding these exemption applications is based on an individualized assessment of the applicants' medical information, available medical and scientific data concerning ICDs, and any relevant public comments received.

In the case of persons with ICDs, the underlying condition for which the ICD was implanted places the individual at high risk for syncope or other unpredictable events known to result in gradual or sudden incapacitation. ICDs may discharge, which could result in loss of ability to safely control a CMV. The December 2014 focused research report referenced previously upholds the findings of the April 2007 report and indicates that the available scientific data on persons with ICDs and CMV driving does not support that persons with ICDs who operate CMVs are able to meet an equal or greater level of safety.

V. Conclusion

The Agency has determined that the available medical and scientific literature and research provides insufficient data to enable the Agency to conclude that granting these exemptions would achieve a level of safety equivalent to, or greater than, the level of safety maintained without the exemption. Therefore, the following applicants have been denied an exemption from the physical qualification standards in § 391.41(b)(4):

Kevin Coughlin (MA)

Charles Halepakis (MA)

Antonio Maceroni (MI)

Michael Wilson (FL)

The applicants have, prior to this notice, received a letter of final disposition regarding their exemption request. The decision letter fully outlined the basis for the denial and constitute final action by the Agency. The names of these individuals published today summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–07192 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–EX–P

[1] The report is available on the internet at *https://rosap.ntl.bts.gov/view/dot/16462.*

[2] These criteria may be found in 49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section D. *Cardiovascular: § 391.41(b)(4),* paragraph 4, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2010–0032]

Metro-North Railroad's Request To Amend Its Positive Train Control System

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 March 3 and 15, 2023, Metro-North Railroad (MNR) submitted a request for amendment (RFA) to its FRA-certified positive train control (PTC) system, the Advanced Civil Speed Enforcement System II (ACSES II), in order to support the construction of a new interlocking at Control Point 243 and associated adjacent signal system changes on MNR's New Haven Line in the vicinity of Norwalk, CT. The RFA proposes to establish an ACSES II Construction Zone (CZ) through the installation of transponders during the interlocking construction. This RFA does not propose any changes to safety critical elements of the ACSES II PTC system.

DATES: FRA will consider comments received by April 26, 2023. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to 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 host railroad is Docket No. FRA–2010–0032. For convenience, all active PTC dockets are hyperlinked on FRA's website at *https://railroads.dot.gov/train-control/ptc/ptc-annual-and-quarterly-reports.* 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 general, Title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify

that a host railroad's PTC system complies with Title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTCSP, a host railroad must submit, and obtain FRA's approval of, an RFA to its PTC system or PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification or discontinuance of a signal and train control system. Accordingly, this notice informs the public that, on March 15, 2023, MNR submitted an RFA to its Advanced Civil Speed Enforcement System II (ACSES II), which seeks FRA's approval to discontinue its PTC system temporarily for three months from September 1, 2023, to December 1, 2023, while it installs a new interlocking and makes certain signal system changes. That RFA is available in Docket No. FRA–2010–0032.

Interested parties are invited to comment on MNR's RFA to its PTC system by submitting written comments or data. During FRA's review of this railroad's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). Under 49 CFR 236.1021, FRA maintains the authority to approve, approve with conditions, or deny a railroad's RFA to its PTC system at FRA's 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. 2023–07124 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. DOT–NHTSA–2023–0015]

Agency Information Collection Activities; Notice and Request for Comment; Automated Vehicle Transparency and Engagement for Safe Testing (AV TEST) Initiative

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a request for approval for extension with modification of a currently approved information collection.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) invites public comments about our intention to request approval from the Office of Management and Budget (OMB) for an extension of a currently approved information collection. Before a Federal agency can collect certain information from the public, it must receive approval from OMB. Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information. This document describes an existing collection of information for NHTSA's Automated Vehicle Transparency and Engagement for Safe Testing (AV TEST) Initiative for which NHTSA intends to seek renewed OMB approval. The AV TEST Initiative involves the voluntary collection of information from entities testing vehicles equipped with automated driving systems (ADS) and from States and local authorities involved in the regulation of ADS testing. The purpose of this collection is to provide information to the public about ADS testing operations in the U.S. and applicable State and local laws, regulations, and guidelines.

DATES: Comments must be submitted on or before June 5, 2023.

ADDRESSES: You may submit comments identified by the Docket No. DOT–NHTSA–2023–0015 through any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except on Federal holidays.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9322 before coming.
- *Instructions:* All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.
- *Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets 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 (65 FR 19477–78) or you may visit *https://www.transportation.gov/privacy.*
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. To be sure someone is there to help you, please call (202) 366–9322 before coming. Follow the online instructions for accessing the dockets via internet.

FOR FURTHER INFORMATION CONTACT: For additional information or access to background documents, contact Chris Wiacek, Office of Data Acquisition, (NSA–100), Room W53–478, 1200 New Jersey Avenue SE, Washington, DC 20590. Mr. Wiacek's telephone number is (202) 366–4801.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the

public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following: (i) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) how to enhance the quality, utility, and clarity of the information to be collected; (iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information:

Title: Automated Vehicle Transparency and Engagement for Safe Testing (''AV TEST'') Initiative.

OMB Control Number: 2127–0748.

Type of Request: Request for approval of an existing information collection.

Type of Review Requested: Regular.

Affected Public: There are two information collection components to this request. The first affects entities engaged in testing of ADS vehicles, including original manufacturers of ADS vehicles and ADS vehicle equipment, and operators of ADS vehicles. The second affects local authorities regulating testing of ADS vehicles within their jurisdictions, including States, cities, counties, and other municipalities.

Request Expiration Date of Approval: Three years from date of approval.

Summary of the Collection of Information: The U.S. Department of Transportation (DOT), National Highway Traffic Safety Administration (NHTSA) was established by Congress to save lives, prevent injuries, and reduce economic costs due to motor vehicle crashes through education, research, safety standards, and enforcement activity. DOT and NHTSA are fully committed to reaching an era of crash-free roadways through the deployment of innovative lifesaving technologies. The prevalence of automotive crashes in the United States underscores the urgency to develop and deploy lifesaving technologies that can dramatically decrease the number of fatalities and injuries on our Nation's roadways. NHTSA believes that Automated Driving System (ADS) technology, including technology contemplating no human driver at all, has the potential to significantly improve roadway safety in the United States. This technology remains substantially in development phases with companies across the United States performing varying levels of development, research, and testing relating to the performance of various aspects of ADS vehicle technologies. While much of these development operations occur in private facilities and closed-course test tracks, many stakeholders have progressed to conducting ADS vehicle testing on public roads or in public demonstrations. Moreover, to regulate such operations in their jurisdictions, many local authorities, such as States and cities, have passed laws governing ADS vehicle testing on public roads. These statutes, regulations, and ordinances vary, ranging from operational requirements to mandating the submission of periodic reports detailing ADS vehicle operation.

Description of the Need for the Information and Use of the Information: The AV TEST Initiative seeks to enhance public education and engagement with public ADS vehicle testing by coalescing information regarding respondents' various testing operations or requirements into a centralized resource. This information collections seeks voluntarily-provided information from entities performing ADS testing about their operations and information from local authorities about requirements or recommendations for such operations. NHTSA maintains a digital platform on its website that collects information from respondents and makes the information about ADS operations and applicable State and local requirements and recommendations available to members of the public.

The program supports two main objectives. The first objective is to provide the public with access to geographic visualizations of testing at the national, State, and local levels. This information is displayed on a graphic of the United States, with projects overlaid on the geographic areas in which the testing project is taking place. By clicking on a testing location, members of the public will be able see additional information about the operation and the ADS operator. Additional information may include basic information about the ADS operator, a brief statement about the entity, specific details of the testing activity, high-level (non-confidential) descriptions of the vehicles and technology, photos of the test vehicles, the dates on which testing occurs, frequency of vehicle operations, the number of vehicles participating in the project, the specific streets or areas comprising the testing routes, information about safety drivers and their training, information about engagement with the community and/or local government, weblinks to the company's websites with brief introductory statements, and a link to the company's Voluntary Safety Self-Assessment.[1]

The second objective is to provide members of the public with information collected from States and local authorities that regulate ADS operations. State and local authorities are asked to provide weblinks for specific ADS-related topics, such as statutes, regulations, or guidelines for ADS operations, privacy-related issues, emergency response policies and training, or other activities that cultivate ADS testing. This program provides a central resource for the aforementioned information concerning ADS testing across the United States.

Estimated Number of Respondents: NHTSA anticipates that the Initiative could expand to include up to 35 State or local government respondents and 40 ADS developer, ADS vehicle manufacturer, or ADS operator respondents per year.

Frequency: Participation is completely voluntary and each participant will choose its respective degree of involvement and the frequency of its submissions. Therefore, the frequency of a participant's response may vary due to a variety of factors, such as the degree of the entity's participation in the initiative or the frequency with which each entity modifies its ADS testing operations or, in the case of local authorities, amends its regulations governing such operations.

Estimated Total Annual Burden Hours: NHTSA estimates that the annual burden of participation will be approximately 48 hours for private industry respondents that include ADS operators, developers, or vehicle manufacturers. This total number of hours represents approximately four hours per month to perform data entry for testing projects (4 hours × 12 months = 48). Therefore, for the estimated 40

[1] Voluntary Self-Assessments are described in Automated Driving Systems 2.0: A Vision for Safety, available at *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf.* VSSAs are covered by the PRA Clearance with OMB Control Number 2127–0723.

ADS operator participants, the total burden is estimated to be 1,920 hours per year (40 respondents × 48 hours).

NHTSA estimates that each State or local authority respondent would spend approximately 10 hours responding to this collection. Therefore, for the estimated 35 State or local authority participants, the total burden is estimated to be 350 hours per year.

The total burden for the entire information collection request is estimated to be 2,270 hours (1,920 hours + 350 hours). The total burden hours have been reduced from the original estimate of 2,520 when the agency first sought approval for this information collection because of the lower estimated participation. However, the agency believes the annual hours per respondent has not changed.

The labor cost associated with this collection of information is derived by (1) applying the appropriate average hourly labor rate published by the Bureau of Labor Statistics, (2) dividing by either 0.705 [2] (70.5%), for private industry workers, or 0.619 (61.9%), for state and local government workers, to obtain the total cost of compensation, and (3) multiplying by the estimated burden hours for each respondent type.

Labor costs associated with original manufacturers of ADS Vehicles or ADS vehicle equipment and operators of ADS vehicles are estimated to be $60.48 per hour for ''Project Management Specialists,'' Occupation Code 13–1082, ($42.64 [3] per hour ÷ 0.705). The labor cost per private industry respondent for each year for development and submission of information is estimated to be $2,903.04 ($60.48 × 48 hours). Therefore, the total annual labor cost for private industry to participate in the AV TEST Initiative is estimated to be $116,121.60 ($2,903.04 × 40 respondents).

Labor costs associated with local and regional authorities, such as states, counties, and cities are estimated to be $66.79 per hour for ''Legal Support Workers,'' Occupation Code 23–2099, ($41.34 [4] per hour ÷ 0.619). The labor cost per regional authority respondent for each year for development and submission of information is estimated to be $667.90 ($66.79 × 10 hours). Therefore, the total annual labor cost for regional authorities to participate in the AV TEST Initiative is estimated to be $23,376.50 ($667.9 × 35 respondents).

The total annual labor costs for all respondents, private industry and regional authorities together, are estimated to be $139,499 ($116,122 + $23.377). See Table 1 below for a summary of estimated burden hours and estimated labor costs.

TABLE 1—SUMMARY OF ESTIMATED BURDEN HOURS AND ESTIMATED LABOR COSTS

Respondent type	Number of respondents	Annual hours per respondent	Labor cost per hour	Annual labor cost per respondent	Total estimated burden hours	Total annual labor costs
Original Manufacturer of ADS Vehicles or ADS Vehicle Equipment and Operators of ADS Vehicles	40	48	$60.48	$2,903.04	1,920	$116,122
State or Local Authority	35	10	66.79	667.900	350	23,377
Total All Respondents	75				2,270	139,499

Estimated Total Annual Burden Costs: NHTSA estimates that there will be no costs to respondents other than costs associated with burden hours.

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 the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (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 the use of automated collection techniques or other forms of information technology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

Chou-Lin Chen,

Associate Administrator, National Center for Statistics and Analysis.

[FR Doc. 2023–07123 Filed 4–5–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–2023–0006]

Minority Depository Institutions Advisory Committee

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The OCC announces a meeting of the Minority Depository Institutions Advisory Committee (MDIAC).

DATES: The OCC MDIAC will hold a public meeting on Tuesday, April 25, 2023, beginning at 8:15 a.m. Eastern Daylight Time (EDT). The meeting will be in person and virtual.

ADDRESSES: The OCC will hold the April 25, 2023 meeting of the MDIAC at the OCC's offices at 400 7th Street SW, Washington, DC 20219 and virtually.

FOR FURTHER INFORMATION CONTACT: André King, Designated Federal Officer and Assistant Deputy Comptroller, (202) 649–5420, Office of the Comptroller of the Currency, 400 Seventh Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services. You may also access prior MDIAC meeting materials on the MDIAC page of OCC's website.[1]

SUPPLEMENTARY INFORMATION: Under the authority of the Federal Advisory Committee Act (the Act), 5 U.S.C. 1001

[2] *See* Table 1. Employer Costs for Employee Compensation by ownership (Sep. 2022), available at *https://www.bls.gov/news.release/ecec.t01.htm* (accessed March 14, 2023).

[3] *See* May 2021 National Industry-Specific Occupational Employment and Wage Estimates. NAICS 336100—Motor Vehicle Manufacturing, available (accessed March 14, 2023).

[4] *See* May 2021 National Occupational Employment and Wage Estimates by ownership. Federal, state, and local government, including government-owned schools and hospitals and the U.S. Postal Service, available at *https://www.bls.gov/oes/current/999001.htm#23-0000* (accessed March 14, 2023).

[1] *https://www.occ.gov/topics/supervision-and-examination/bank-management/minority-depository-institutions/minority-depository-institutions-advisory-committee.html.*

et seq., and the regulations implementing the Act at 41 CFR part 102–3, the OCC is announcing that the MDIAC will convene a meeting at 8:15 a.m. EDT on Tuesday, April 25, 2023. The meeting is open to the public. Agenda items will include current topics of interest to the industry. The purpose of the meeting is for the MDIAC to advise the OCC on steps the agency may be able to take to ensure the continued health and viability of minority depository institutions and other issues of concern to minority depository institutions. Members of the public may submit written statements to the MDIAC by email to: *MDIAC@OCC.treas.gov*.

The OCC must receive written statements no later than 5 p.m. EDT on Thursday, April 20, 2023. Members of the public who plan to attend the meeting should contact the OCC by 5 p.m. EDT on Thursday, April 20, 2023, to inform the OCC of their desire to attend the meeting and whether they will attend in person or virtually, and to obtain information about participating in the meeting. Members of the public may contact the OCC via email at *MDIAC@OCC.treas.gov* or by telephone at (202) 649–5420. Attendees should provide their full name, email address, and organization, if any. Members of the public who are deaf, hard of hearing, or have a speech disability, should dial 7–1–1 to access telecommunications relay services for this meeting.

Michael J. Hsu,

Acting Comptroller of the Currency.

[FR Doc. 2023–07168 Filed 4–5–23; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the recent lifting of pandemic travel restrictions and other unavoidable circumstances, we will not be able to meet the 15-calendar notice threshold. This meeting will be held via teleconference.

DATES: The meeting will be held Thursday, April 13, 2023.

FOR FURTHER INFORMATION CONTACT: Ann Tabat at 1–888–912–1227 or (602) 636–9143.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be held Thursday, April 13, 2023, at 3:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Ann Tabat. For more information, please contact Ann Tabat at 1–888–912–1227 or (602) 636–9143, or write TAP Office, 4041 N Central Ave., Phoenix, AZ 85012 or contact us at the website: *http://www.improveirs.org.* The agenda includes: Welcoming; Roll Call; Agenda Review; Designated Federal Officer Report; National Office Report; Chair Report; Minute Review Approval/Denial; Public Comment; Subcommittee Reports; Outreach Report; Screening Report; Internal Communications Briefing; Action Items; Roundtable; and Closing.

Dated: March 31, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–07155 Filed 4–5–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Special Projects Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the recent lifting of pandemic travel restrictions and other unavoidable circumstances, we will not be able to meet the 15-calendar notice threshold. This meeting will be held via teleconference.

DATES: The meeting will be held Wednesday, April 12, 2023.

FOR FURTHER INFORMATION CONTACT: Antoinette Ross at 1–888–912–1227 or 202–317–4110.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be held Wednesday, April 12, 2023, at 11:00 a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Antoinette Ross. For more information please contact Antoinette Ross at 1–888–912–1227 or 202–317–4110, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.* The agenda includes: Welcoming; Roll Call; Agenda Review; Designated Federal Officer Report; National Office Report; Chair Report; Minute Review Approval/Denial; Public Comment; Subcommittee Reports; Outreach Report; Screening Report; Internal Communications Briefing; Action Items; Roundtable; and Closing.

Dated: March 31, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–07153 Filed 4–5–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the recent lifting of pandemic travel restrictions and other unavoidable circumstances, we will not be able to meet the 15-calendar notice threshold. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, April 11, 2023.

FOR FURTHER INFORMATION CONTACT: Robert Rosalia at 1–888–912–1227 or (718) 834–2203.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be held Tuesday, April 11, 2023, at 11:00 a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Robert Rosalia. For more information, please contact Robert Rosalia at 1–888–912–1227 or (718) 834–2203, or write TAP Office, 2 Metrotech Center, 100 Myrtle Avenue, Brooklyn, NY 11201 or contact us at the website: *http://www.improveirs.org.* The agenda includes: Welcoming; Roll Call; Agenda Review; Designated Federal Officer Report; National Office Report; Chair Report; Minute Review Approval/Denial; Public Comment; Subcommittee Reports; Outreach Report; Screening Report; Internal Communications Briefing; Action Items; Roundtable; and Closing.

Dated: March 31, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–07152 Filed 4–5–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the recent lifting of pandemic travel restrictions and other unavoidable circumstances, we will not be able to meet the 15-calendar notice threshold. This meeting will be held via teleconference.

DATES: The meeting will be held Thursday, April 13, 2023.

FOR FURTHER INFORMATION CONTACT: Rosalind Matherne at 1–888–912–1227 or 202–317–4115.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Toll-Free Phone Lines Project Committee will be held Thursday, April 13, 2023, at 2:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Rosalind Matherne. For more information, please contact Rosalind Matherne at 1–888–912–1227 or 202–317–4115, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.* The agenda includes: Welcoming; Roll Call; Agenda Review; Designated Federal Officer Report; National Office Report; Chair Report; Minute Review Approval/Denial; Public Comment; Subcommittee Reports; Outreach Report; Screening Report; Internal Communications Briefing; Action Items; Roundtable; and Closing.

Dated: March 31, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–07154 Filed 4–5–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Improvements Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the recent lifting of pandemic travel restrictions and other unavoidable circumstances, we will not be able to meet the 15-calendar notice threshold. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, April 11, 2023.

FOR FURTHER INFORMATION CONTACT: Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be held Tuesday, April 11, 2023, at 2:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Matthew O'Sullivan. For more information please contact Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274, or write TAP Office, 1301 Clay Street, Oakland, CA 94612–5217 or contact us at the website: *http://www.improveirs.org.* The agenda includes: Welcoming; Roll Call; Agenda Review; Designated Federal Officer Report; National Office Report; Chair Report; Minute Review Approval/Denial; Public Comment; Subcommittee Reports; Outreach Report; Screening Report; Internal Communications Briefing; Action Items; Roundtable; and Closing.

Dated: March 31, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–07151 Filed 4–5–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the recent lifting of pandemic travel restrictions and other unavoidable circumstances, we will not be able to meet the 15-calendar notice threshold. This meeting will be held via teleconference.

DATES: The meeting will be held Wednesday, April 13, 2023.

FOR FURTHER INFORMATION CONTACT: Conchata Holloway at 1–888–912–1227 or 214–413–6550.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory

Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee will be held Wednesday, April 13, 2023, at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Conchata Holloway. For more information, please contact Conchata Holloway at 1–888–912–1227 or 214–413–6550, or write TAP Office, 1114 Commerce St. MC 1005, Dallas, TX 75242 or contact us at the website: *http://www.improveirs.org.* The agenda includes: Welcoming; Roll Call; Agenda Review; Designated Federal Officer Report; National Office Report; Chair Report; Minute Review Approval/Denial; Public Comment; Subcommittee Reports; Outreach Report; Screening Report; Internal Communications Briefing; Action Items; Roundtable; and Closing.

Dated: March 31, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–07150 Filed 4–5–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0919]

Agency Information Collection Activity: Servicemembers' Group Life Insurance—Traumatic Injury Protection Program (TSGLI) Application for TSGLI and Traumatic Injury Protection Program (TSGLI) Appeal Request Form; Withdrawn

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice; withdrawal.

SUMMARY: On Thursday, March 16, 2023, the Veterans Benefits Administration (VA), published a notice in the **Federal Register** announcing an opportunity for public comment on the proposed collection Servicemembers' Group Life Insurance—Traumatic Injury Protection Program (TSGLI) Application for TSGLI Benefits (SGLV 8600) and Traumatic Injury Protection Program (TSGLI) Appeal Request Form (SGLV 8600a). This notice was published in error; therefore, this document corrects that error by withdrawing this FR notice, document number 2023–05356.

DATES: As of March 31, 2023, the FR notice published at 88 FR 51 on Thursday, March 16, 2023, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.*

SUPPLEMENTARY INFORMATION: FR Doc. 2023–05356, published on Thursday, March 16, 2023, is withdrawn by this notice.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt.), Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–07127 Filed 4–5–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0474]

Agency Information Collection Activity Under OMB Review: Create Payment Request for the VA Funding Fee

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: 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. Refer to ''OMB Control No. 2900–0474''.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0474'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 3729, 38 CFR 36.4232 and 36.4313.

Title: Create Payment Request For The VA Funding Fee (VA Form 26–8986).

OMB Control Number: 2900–0474.

Type of Review: Revision of a currently approved collection.

Abstract: A funding fee must be paid to VA before a loan can be guaranteed and evidence of guaranty issued. The funding fee is payable on all VA-guaranteed loans (*i.e.,* assumptions, manufactured housing, refinances, and real estate purchase and construction loans). Lenders are required to pay the funding fee in an internet-based application, VA Funding Fee Payment System (FFPS), that permits lenders to pay the funding fee online in order to obtain a VA loan guaranty. The application calculates the appropriate fee, including any late fees and interest that may be due. Lenders may also choose to pay the funding fee via batch payment processing by uploading an XML file into FFPS.

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 88 FR 5434 on January 27, 2023, pages 5434 and 5435.

Affected Public: Individuals or Households.

Estimated Annual Burden: 26,400 hours.

Estimated Average Burden per Respondent: 2 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 800,000.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt.), Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–07176 Filed 4–5–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 88 Thursday,

No. 66 April 6, 2023

Part II

Securities and Exchange Commission

17 CFR Parts 240, 248, 270, et al.

Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Customer Information; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 248, 270, and 275

[Release Nos. 34–97141; IA–6262; IC–34854; File No. S7–05–23]

RIN 3235–AN26

Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Customer Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing rule amendments that would require brokers and dealers (or ''broker-dealers''), investment companies, and investment advisers registered with the Commission (''registered investment advisers'') to adopt written policies and procedures for incident response programs to address unauthorized access to or use of customer information, including procedures for providing timely notification to individuals affected by an incident involving sensitive customer information with details about the incident and information designed to help affected individuals respond appropriately. The Commission also is proposing to broaden the scope of information covered by amending requirements for safeguarding customer records and information, and for properly disposing of consumer report information. In addition, the proposed amendments would extend the application of the safeguards provisions to transfer agents. The proposed amendments would also include requirements to maintain written records documenting compliance with the proposed amended rules. Finally, the proposed amendments would conform annual privacy notice delivery provisions to the terms of an exception provided by a statutory amendment to the Gramm-Leach-Bliley Act (''GLBA'').

DATES: Comments should be received on or before June 5, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–05–23 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 S7–05–23. The 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 of submission. The Commission will post all comments on the Commission's website (*http://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; the Commission does not edit personal identifying information from 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: Susan Poklemba, Brice Prince, or James Wintering, Special Counsels; Edward Schellhorn, Branch Chief; Devin Ryan, Assistant Director; John Fahey, Deputy Chief Counsel; Emily Westerberg Russell, Chief Counsel; Office of Chief Counsel, Division of Trading and Markets, (202) 551–5550; Jessica Leonardo or Taylor Evenson, Senior Counsels; Aaron Ellias, Acting Branch Chief; Marc Mehrespand, Branch Chief; Thoreau Bartmann, Co-Chief Counsel, Chief Counsel's Office, Division of Investment Management, (202) 551–6792, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment amendments to 17 CFR 248 (''Regulation S–P'')[1] under Title V of the GLBA [15 U.S.C. 6801–6827], the Fair Credit Reporting Act (''FCRA'') [15 U.S.C. 1681–1681x], the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*], the Investment Company Act of 1940 (''Investment Company Act'') [15 U.S.C. 80a–1 *et seq.*], and the Investment Advisers Act of 1940 (''Investment Advisers Act'') [15 U.S.C. 80b–1 *et seq.*].

[1] Unless otherwise noted, all references below to rules contained in Regulation S–P are to Part 248 of Chapter 17 of the Code of Federal Regulations (''CFR'').

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I. Introduction

The Commission adopted Regulation S–P in 2000.[2] Regulation S–P's provisions include, among other requirements, rule 248.30(a) (''safeguards rule''), which requires brokers, dealers, investment companies,[3] and registered investment advisers to adopt written policies and procedures for administrative, technical, and physical safeguards to protect customer records and information.[4] Another provision of Regulation S–P, rule 248.30(b) (''disposal rule''), which applies to transfer agents registered with the Commission in addition to the institutions covered by the safeguards rule, requires proper disposal of consumer report information.[5] Since Regulation S–P was adopted, evolving digital communications and information storage tools and other technologies have made it easier for firms to obtain, share, and maintain individuals' personal information. This evolution also has changed or exacerbated the risks of unauthorized access to or use of personal information,[6] thus increasing the risk of potential harm to individuals whose information is not protected against unauthorized access or use.[7]

This environment of expanded risks supports our proposing updates to the requirements of Regulation S–P. Currently, the safeguards rule addresses protecting customer information against unauthorized access or use, but it does not include a requirement to notify affected individuals in the event of a data breach. In assessing firm and industry compliance with these requirements, Commission staff typically focus on information security controls, including whether firms have taken appropriate measures to safeguard customer accounts and to respond to data breaches.[8] Commission staff have observed a number of practices with respect to the information safeguards requirements of Regulation S–P and have provided observations on several occasions to assist firms in improving their practices.[9] Although many firms have improved their programs for safeguarding customer records and information in light of these observations, nonetheless we are concerned that some firms may not maintain plans for addressing incidents of unauthorized access to or use of data.[10] We also are concerned the incident response programs that firms have implemented may be insufficient to respond to evolving threats or may not include well-designed plans for customer notification.[11]

We therefore preliminarily believe specifically requiring a reasonably designed incident response program, including policies and procedures for assessment, control and containment, and customer notification, could help reduce or mitigate the potential for harm to individuals whose sensitive information is exposed or compromised in a data breach. Requiring firms to adopt incident response programs to address unauthorized access to or use of customer information, including

[2] *See* Privacy of Consumer Financial Information (Regulation S–P), Exchange Act Release No. 42974 (June 22, 2000) [65 FR 40334 (June 29, 2000)] (''Reg. S-P Release''). Regulation S–P is codified at 17 CFR Part 248, Subpart A.

[3] Regulation S–P applies to investment companies as the term is defined in section 3 of the Investment Company Act (15 U.S.C. 80a–3), whether or not the investment company is registered with the Commission. *See* 17 CFR 248.3(r). Thus, a business development company, which is an investment company but is not required to register as such with the Commission, is subject to Regulation S–P. Similarly, employees' securities companies—including those that are not required to register under the Investment Company Act—are investment companies and are, therefore, subject to Regulation S–P. By contrast, issuers that are excluded from the definition of investment company—such as private funds that are able to rely on section 3(c)(1) or 3(c)(7) of the Investment Company Act—would not be subject to Regulation S–P.

[4] *See* 17 CFR 248.30(a).

[5] *See* 17 CFR 248.30(b). In this release, institutions to which Regulation S–P currently applies, or to which the proposed amendments would apply, are sometimes referred to as ''covered institutions.'' The term, ''covered institution'' is sometimes used in this release to refer to institutions to as ''you'' in Regulation S–P.

[6] Unauthorized use differs from unauthorized access in that a person making unauthorized use of customer information may or many not be authorized to access it. CF. *Van Buren* v. *United States,* 141 S. Ct. 1648, 1652 (2021) (discussing how a person can access a computer without authorization or exceed authorized access). As described in more detail below, covered institutions would have to provide notice to affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.

[7] *See, e.g.,* Federal Bureau of Investigation, 2021 Internet Crime Report (Mar. 22, 2022), at 7–8, *available at https://www.ic3.gov/Media/PDF/AnnualReport/2021_IC3Report.pdf* (stating that the FBI's internet Crime Complaint Center received 847,376 complaints in 2021 (an increase of approximately 181% from 2017). The complaints included 51,629 related to identity theft and 51,829 related to personal data breaches (increases of approximately 193% and 68% from 2017, respectively)); the Financial Industry Regulatory Authority (''FINRA''), *2021 Report on FINRA's Examination and Risk Monitoring Program: Cybersecurity and Technology Governance* (Feb. 2021), *available at https://www.finra.org/sites/default/files/2021-02/2021-report-finras-examination-risk-monitoring-program.pdf* (noting increased cybersecurity or technology-related incidents at firms); Office of Compliance Inspections and Examinations (now the Division of Examinations) (''EXAMS''), Risk Alert, *Cybersecurity: Safeguarding Client Accounts against Credential Compromise* (Sept. 15, 2020), *available at https://www.sec.gov/files/Risk%20Alert%20-%20Credential%20Compromise.pdf* (describing increasingly sophisticated methods used by attackers to gain access to customer accounts and firm systems). This Risk Alert, and any other Commission staff statements represent the views of the staff. They are not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved their content. These staff statements, like all staff statements, have no legal force or effect: they do not alter or amend applicable law; and they create no new or additional obligations for any person.

[8] *See* EXAMS, *2022 Examination Priorities, available at https://www.sec.gov/files/2022-exam-priorities.pdf;* EXAMS, *Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S–P—Privacy Notices and Safeguard Policies* (Apr. 16, 2019) (''Reg. S–P Risk Alert''), *available at https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Regulation%20S-P.pdf.*

[9] *See* Reg. S–P Risk Alert, *supra* note 8 (noting that examples of the most common deficiencies or weaknesses observed by EXAMS staff included that broker-dealer and investment adviser written incident response plans did not address, among other things, actions required to address a cybersecurity incident and assessments of system vulnerabilities); EXAMS, *Observations from Cybersecurity Examinations* (Aug. 7, 2017) (''Observations Risk Alert''), *available at https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf.*

[10] *See* Reg. S–P Risk Alert, *supra* note 8; Observations Risk Alert, *supra* note 9 (noting that some firms lacked plans for addressing access incidents).

[11] *See* Reg. S–P Risk Alert, *supra* note 8. Although broker-dealers are subject to self-regulatory organization (''SRO'') rules requiring written supervisory procedures and written business continuity plans addressing subjects including data back-up and recovery, SRO rules do not require notification to customers whose information is compromised. *See, e.g.,* FINRA Rule 3110 (Supervision) (requiring members to establish, maintain, and enforce written procedures to supervise the types of business in which they engage and the activities of their associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules), and FINRA Rule 4370 (Business Continuity Plans and Emergency Contact Information) (requiring members to create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption that must address specified topics including data back-up and recovery).

customer notification and recordkeeping requirements, would enhance protections for customer information. The advance planning required under an incident response program should improve an institution's preparedness and the effectiveness of its response to data breaches while still being consistent with the requirements for safeguarding standards articulated in the GLBA.[12]

In certain instances, some types of customer notification plans may already be required by existing state laws mandating customer notifications. While all 50 states have enacted laws in recent years requiring firms to notify individuals of data breaches, standards differ by state, with some states imposing heightened notification requirements relative to other states.[13] Currently, broker-dealers, investment companies, and registered investment advisers respond to data breaches according to applicable state laws. For example, states differ in the types of information that, if accessed or used without authorization, may trigger a notification requirement.[14] States also differ regarding a firm's duty to investigate a data breach when determining whether notice is required, deadlines to deliver notice, and the information required to be included in a notice, among other matters.[15] As a result, a firm's notification obligations arising from a single data breach may vary such that customers in one state may receive notice while customers of the same institution in another state may not receive notice or may receive less information. In reviewing these state laws, we determined that certain aspects of these provisions would be appropriately adopted as components of a Federal minimum standard for customer notification, which would help affected customers understand how to respond to a data breach to protect themselves from potential harm that could result.

Our proposal would afford certain individuals greater protections by, for example, defining ''sensitive customer information'' more broadly than the current definitions used by at least 12 states, thereby requiring customers in those states to receive notice for a broader range of personal information included in a breach.[16] Additionally, the 30-day notification deadline proposed in this release is shorter than the timing currently mandated by 15 states, and would also offer enhanced protections to individuals in 32 states with laws that do not include a notification deadline as well as those in states that mandate or permit delayed notifications for law enforcement purposes.[17] A standardized notification deadline ensures timely notice to affected customers and would enhance their ability to take action quickly to protect themselves against the consequences of a breach. Further, consistent with 22 state laws, this proposal would require customer notification unless, after investigation, the covered institution finds no risk of harm.[18] Twenty-one states currently have a presumption against notifying customers of a breach, and only require notice if, after investigation, the covered institution finds risk of harm.[19] In addition, in the 11 states where state customer notification laws do not apply to entities subject to or in compliance with the GLBA, the proposal would help ensure customers of such institutions receive notice of a breach.[20] As discussed more fully below, establishing a federal minimum standard would protect individuals in an environment of enhanced risk.[21]

There are compelling reasons to revisit other aspects of the current safeguards regime as well. As noted above, the safeguards rule currently applies to broker-dealers, investment companies, and registered investment advisers. The safeguards rule does not currently apply to transfer agents, even though they also obtain, share, and maintain personal information on behalf of securityholders who hold securities in registered form (*i.e.,* in their own name rather than indirectly through a broker). Securityholders whose personal information is maintained by transfer agents could be harmed by the unauthorized access or use of such information in the same manner as customers of broker-dealers, investment companies, and registered investment advisers, yet such securityholders are not currently protected by the safeguards rule. The Commission preliminarily believes that extending the safeguards rule to cover transfer agents is necessary to ensure that there is a Federal minimum standard for the notification of securityholders who are affected by a data breach that leads to the unauthorized access or use of their information, regardless of whether that data breach occurs at a broker-dealer, investment company, registered investment adviser, or transfer agent.[22]

In addition, the safeguards rule currently requires only that institutions protect their own customers' information. This potentially overlooks information a broker-dealer, investment company, or registered investment adviser may have received from another financial institution about that financial institution's customers,[23] such as

[12] The GLBA's requirements for standards for safeguarding customer records and information are described in the Background section below. *See infra* section I.A.

[13] Upon its adoption, rule 248.17 essentially restated the then-current text of section 507 of the GLBA, and as such, referenced determinations made by the Federal Trade Commission. *See* Reg. S–P Release, *supra* note 2. The proposal would, however, update rule 248.17 to instead reference determinations made by the Consumer Financial Protection Bureau, consistent with changes made to section 507 of the GLBA by the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Public Law 111–203, sec. 1041, 124 Stat. 1376 (2010).

[14] For example, some states may require a firm to notify individuals when a data breach includes biometric information, while others do not. *Compare* Cal. Civil Code sec. 1798.29 (notice to California residents of a data breach generally required when a resident's personal information was or is reasonably believed to have been acquired by an unauthorized person; ''personal information'' is defined to mean an individual's first or last name in combination with one of a list of specified elements, which includes certain unique biometric data) *with* Ala. Stat. secs. 8–38–2, 8–38–4, 8–38–5 (notice of a data breach to Alabama residents is generally required when sensitive personally identifying information has been acquired by an unauthorized person and is reasonably likely to cause substantial harm to the resident to whom the information relates; ''sensitive personally identifying information'' is defined as the resident's first or last name in combination with one of a list of specified elements, which does not include biometric information).

[15] *See infra* sections II.A.4 and III.C.2.a.

[16] *See infra* section II.C.1.

[17] *See infra* section II.A.4.e.

[18] *See infra* section II.A.4.a.

[19] *See id.*

[20] *See id.*

[21] The effect of any inconsistency between the proposed customer notification and state law requirements may, however, be mitigated because many states offer safe harbors from their notification laws for entities that are subject to or in compliance with requirements under Federal regulations. In particular, as noted, 11 states offer safe harbors for entities subject to or in compliance with the GLBA, while others offer safe harbors for compliance with the notification requirements of the entity's ''primary federal regulator.'' *See, e.g.,* Del. Code Ann. tit. 6 section 12B–103 (providing that a person regulated by the GLBA and maintaining procedures for security breaches pursuant to the law established by its Federal regulator is deemed to be in compliance with the Delaware notification requirements if the person notifies affected Delaware residents in accordance with those procedures). *See infra* note 106 and accompanying text.

[22] *See infra* section II.C.3.

[23] Under section 501(b) of the GLBA, the standards to be established by the Commission must, among other things, ''protect against unauthorized access to or use of'' customer records or information ''which could result in substantial harm or inconvenience to *any* customer.'' *See* 15 U.S.C. 6801(b)(3) (emphasis added). We agree with the Federal Trade Commission (''FTC'') that applying the safeguards rule to cover customer information that a financial institution receives pertaining to another institution's customers is consistent with the purpose and language of the GLBA. Further, the Commission agrees with the FTC that this approach is the most reasonable reading of the statutory language and clearly

nonpublic personal information from an introducing broker or dealer that clears transactions for its customers through a clearing broker on a fully disclosed basis.[24] Applying the safeguards rule and the disposal rule to customer information that a covered institution receives from other financial institutions would better protect individuals by ensuring customer information safeguards are not lost when a third-party financial institution shares that information with a covered institution.[25] Finally, applying the safeguards rule and the disposal rule to a broader set of information should enhance the security and confidentiality of customers' personal information.

Therefore, the Commission is proposing amendments to Regulation S–P to enhance the protection of this information by: (1) requiring covered institutions to include incident response programs in their safeguards policies and procedures to address unauthorized access to or use of customer information, including procedures for providing timely notification to affected individuals; (2) extending the safeguards rule to all transfer agents registered with the Commission or another appropriate regulatory agency as defined in section 3(a)(34)(B) of the Exchange Act (unless otherwise noted, we refer to them collectively as ''transfer agents'' for purposes of this release); (3) more closely aligning the information protected by the safeguards rule and the disposal rule; and (4) broadening the set of customers covered by those rules.

A. Background

Title V of the GLBA,[26] among other things, directed the Commission and other Federal financial regulators to establish and implement standards requiring financial institutions subject to their jurisdiction to adopt administrative, technical, and physical safeguards for the protection of customer records and information.[27] The GLBA specified that these standards were ''(1) to insure the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.'' [28]

As noted above, the safeguards rule sets forth standards for safeguarding customer records and information and currently requires covered institutions to adopt written policies and procedures for administrative, technical, and physical safeguards to protect customer records and information.[29] While the term ''customer records and information'' is not defined in the GLBA or in Regulation S–P,[30] the safeguards must be reasonably designed to meet the GLBA's standards.[31] This approach is designed to provide flexibility for covered institutions to safeguard customer records and information in accordance with their own privacy policies and practices and business models.

Pursuant to the Fair and Accurate Credit Transactions Act of 2003 (''FACT Act''), the Commission amended Regulation S–P in 2004 by adopting the disposal rule to protect against the improper disposal of ''consumer report information.'' [32] ''Consumer report information'' is defined as ''any record about an individual, whether in paper, electronic or other form, that is a consumer report or is derived from a consumer report'' and also means ''a compilation of such records,'' but does not include ''information that does not identify individuals, such as aggregate information or blind data.'' [33] The disposal rule currently applies to the financial institutions subject to the safeguards rule, except that it excludes ''notice-registered broker-dealers,'' [34] and it applies to transfer agents registered with the Commission.[35] The disposal rule requires these entities that maintain or possess ''consumer report information'' for a business purpose, to take ''reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.'' [36]

The GLBA and FACT Act oblige us to adopt regulations, to the extent possible, that are consistent and comparable with those adopted by the Banking Agencies and the FTC.[37] Accordingly, in determining the scope of the proposed amendments contemplated in this proposal, including for example, the definitions of ''customer information'' and ''sensitive customer information'' described below, we are mindful of the need to set standards for safeguarding customer records and information that are consistent and comparable with the corresponding standards set by the Banking Agencies and the FTC.

furthers the express congressional policy to respect the privacy of these customers and to protect the security and confidentiality of their nonpublic personal information. *See* FTC, *Standards for Safeguarding Customer Information,* 67 FR 36484, 36485–86 (May 23, 2002); *see also infra* section II.C.2 (describing proposed new definition of ''customer information'' that would include both nonpublic personal information that a covered institution collects about its own customers and nonpublic personal information about customers of a third-party financial institution that the covered institution receives from the third-party financial institution).

[24] *See* 17 CFR 248.3(g)(2)(iii) (''An individual is not your consumer if he or she has an account with another broker or dealer (the introducing broker-dealer) that carries securities for the individual in a special omnibus account with you (the clearing broker-dealer) in the name of the introducing broker-dealer, and when you receive only the account numbers and transaction information of the introducing broker-dealer's consumers in order to clear transactions.'').

[25] *See infra* section II.C.2.

[26] 15 U.S.C. 6801–6827.

[27] *See* 15 U.S.C. 6801(b) and 6804(a)(1).

[28] 15 U.S.C. 6801(b).

[29] 17 CFR 248.30(a). Other sections of Regulation S–P implement the notice and opt out provisions of the GLBA. *See* 17 CFR 248.1–248.18. In addition to the safeguards rule and the disposal rule (17 CFR 248.30(b)), the GLBA and Regulation S–P require brokers, dealers, investment companies and registered investment advisers to provide an annual notice of their privacy policies and practices to their customers (and notice to consumers before sharing their nonpublic customer information with nonaffiliated third parties outside certain exceptions). *See* 15 U.S.C. 6803(a); 17 CFR 248.4; 17 CFR 248.5. We are also proposing an exception to the annual notice delivery requirement. *See infra* section II.E.

[30] *See* 17 CFR 248.30(a); 15 U.S.C. 6801(b)(1) (discussing but not defining ''customer records or information'').

[31] Specifically, the safeguards must be reasonably designed to insure the security and confidentiality of customer records and information, protect against anticipated threats to the security or integrity of those records and information, and protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer. *See* 17 CFR 248.30(a). *See also* 15 U.S.C. 6801(b).

[32] 17 CFR 248.30(b). *See* Disposal of Consumer Report Information, Exchange Act Release No. 50781 (Dec. 2, 2004) [69 FR 71322 (Dec. 8, 2004)] (''Disposal Rule Adopting Release''). Section 216 of the FACT Act amended the FCRA by adding section 628 (codified at 15 U.S.C. 1681w), which directed the Commission and other Federal financial regulators to adopt regulations ''requiring any person who maintains or possesses consumer information or any compilation of consumer information derived from a consumer report for a business purpose must properly dispose of the information.''

[33] *See* 17 CFR 248.30(b)(1)(ii).

[34] *See* 17 CFR 248.30(b)(1)(iv) (defining ''notice-registered broker-dealers'' as ''a broker or dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(b)(11))''). *See also infra* section II.C.4 further detailing the current regulatory framework for notice-registered broker-dealers under the safeguards rule and the disposal rule.

[35] *See* 17 CFR 248.30(b)(2)(i).

[36] *See* 17 CFR 248.30(b).

[37] *See generally* 15 U.S.C. 6804(a) (directing the agencies authorized to prescribe regulations under title V of the GLBA to assure to the extent possible that their regulations are consistent and comparable); 15 U.S.C. 1681w(a)(2)(A) (directing the agencies with enforcement authority set forth in 15 U.S.C. 1681s to consult and coordinate so that, to the extent possible, their regulations are consistent and comparable). The ''Banking Agencies'' include the Office of the Comptroller of the Currency (''OCC''), the Board of Governors of the Federal Reserve System (''FRB''), the Federal Deposit Insurance Corporation (''FDIC''), and the former Office of Thrift Supervision.

B. 2008 Proposal

In 2008, the Commission proposed amendments to Regulation S–P primarily to help prevent information security breaches in the securities industry and to improve responsiveness when such breaches occur, with the goal of better protecting investors from identity theft and other misuse of what the proposal would have defined as ''personal information.'' [38] The 2008 Proposal would have set out specific standards for safeguarding customer records and information, including requirements for procedures to respond to incidents of unauthorized access to or use of personal information. Those requirements would have included procedures for notifying the Commission (or a broker-dealer's designated examining authority [39]) of data breach incidents, and procedures for notifying individuals of incidents of unauthorized access to or misuse of sensitive personal information, if the misuse had occurred or was reasonably possible. The 2008 Proposal also would have amended the safeguards rule and the disposal rule so that both would have protected ''personal information,'' which would have included any record containing either ''nonpublic personal information'' or ''consumer report information.'' [40] In addition, the 2008 Proposal would have extended the safeguards rule to apply to transfer agents registered with the Commission, and would have extended the disposal rule to apply to natural persons who are associated persons of a broker or dealer, supervised persons of a registered investment adviser, and associated persons of any transfer agent registered with the Commission. The 2008 Proposal would have further required brokers, dealers, investment companies, registered investment advisers, and transfer agents registered with the Commission to maintain and preserve written records of their policies and procedures required under the disposal and safeguards rules and compliance with those policies and procedures.

The Commission received over 400 comment letters in response to the 2008 Proposal.[41] The current proposal to amend Regulation S–P has been informed by comments received on the 2008 Proposal. Most commenters supported requirements for comprehensive information security programs that are consistent and comparable to the rules and guidance of other Federal financial regulators.[42] Many commenters, however, objected to changes in the scope of information and entities covered by the proposed amendments.[43] Many commenters opposed or suggested modifying the proposed amendments' information security breach response provisions.[44] Comments were mixed on the proposed exception for disclosures relating to transfers of representatives from one broker-dealer or registered investment adviser to another.[45]

C. Overview of the Proposal

There are no Commission rules at this time expressly requiring broker-dealers, investment companies, or registered investment advisers to have policies and procedures for responding to data breach incidents or to notify customers of those breaches.[46] As noted above, advance planning would be part of creating a reasonably designed incident response program, and its prompt implementation following a breach (including notification to affected individuals), is important in limiting potential harmful impacts to individuals. While we recognize that state laws require covered institutions to notify state residents of data breaches, those laws are not consistent and exclude some entities from certain requirements. Accordingly, a Federal minimum standard would provide notification to all customers of a covered institution affected by a data breach (regardless of state residency) and provide consistent disclosure of important information to help affected customers respond to a data breach. Other Federal regulators' GLBA safeguarding standards also include a requirement for a data breach response plan or program.[47]

The Commission is proposing amendments to Regulation S–P's safeguards rule. The proposed amendments would require covered institutions to develop, implement, and maintain written policies and

[38] *See* Part 248—Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Customer information, Exchange Act Release No. 57427 (Mar. 4, 2008) [73 FR 13692, 13693–94 (Mar. 13, 2008)] (''2008 Proposal''). The amendments to Regulation S–P referenced in the 2008 Proposal have not been adopted.

[39] A broker-dealer's designated examining authority is the SRO of which the broker-dealer is a member, or, if the broker-dealer is a member of more than one SRO, the SRO designated by the Commission pursuant to 17 CFR 240.17d–1 as responsible for examination of the member for compliance with applicable financial responsibility rules (including the Commission's customer account protection rules at 17 CFR 240.15c3–3). *See* 2008 Proposal, *supra* note 38, at n.44.

[40] The 2008 Proposal would have made both the safeguards rule and the disposal rule, as amended, applicable to ''personal information,'' which would have been defined to include any record containing either ''nonpublic personal information'' or ''consumer report information'' that is identified with any consumer, or with any employee, investor, or securityholder who is a natural person, whether in paper, electronic, or other form, that is handled or maintained by or on behalf of a covered institution. *See* 2008 Proposal, *supra* note 38, at 73 FR 13700.

[41] Comments on the proposal, including comments referenced in this Release are available on the Commission website at *http://www.sec.gov/comments/s7-06-08/s70608.shtml.* Approximately 328 of the comments received contained substantially the same content. *See* example of Letter Type A available at *https://www.sec.gov/comments/s7-06-08/s70608typea.htm.*

[42] *See, e.g.,* Letter from Alan E. Sorcher, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (May 12, 2008) (''SIFMA Letter''); Letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute (May 2, 2008) (''ICI Letter''); Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority (May 12, 2008) (''FINRA Letter'').

[43] *See, e.g.,* SIFMA Letter; Letter from Charles V. Rossi, President, The Securities Transfer Association, Inc. (May 9, 2008) (''STA Letter'').

[44] *See, e.g.,* SIFMA Letter; ICI Letter; Letter from Karen L. Barr, General Counsel, Investment Adviser Association (May 12, 2008) (''IAA Letter''); Letter from Sarah Miller, General Counsel, ABA Securities Association (May 22, 2008) (''ABASA Letter'').

[45] *See, e.g.,* SIFMA Letter; IAA Letter (both in support); Letter from Julius L. Loeser, Chief Regulatory and Compliance Counsel, Comerica Securities, Inc. (May 9, 2008) (''Comerica Letter''); Letter from Steven French, President, MemberMap LLC (May 11, 2008) (''MemberMap Letter'') (both opposed).

[46] As noted above, there are no SRO rules requiring notification to customers whose information has been compromised. *See supra* note 11. The Commission has pending proposals to address cybersecurity risk with respect to investment advisers, investment companies, and public companies. The Commission encourages commenters to review those proposals to determine whether it might affect their comments on this proposing release. *See infra* note 55.

[47] The FTC recently amended its Safeguards Rule by, among other things, adding a requirement for financial institutions under the FTC's GLBA jurisdiction to establish a written incident response plan designed to respond to information security events. *See* FTC, Standards for Safeguarding Customer Information, 86 FR 70272 (Dec. 9, 2021) (''FTC Safeguards Release''). As amended, the FTC's rule requires that a response plan address security events materially affecting the confidentiality, integrity, or availability of customer information in the financial institution's control, and that the plan include specified elements that would include procedures for satisfying an institution's independent obligation to perform notification as required by state law. *See* FTC Safeguards Release, at 70297–98, n.295. Earlier, the Banking Agencies and the National Credit Union Administration (''NCUA'') jointly issued guidance on responding to incidents of unauthorized access to or use of customer information. *See* Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice, 70 FR 15736, 15743 (Mar. 29, 2005) (''Banking Agencies' Incident Response Guidance''). The Banking Agencies' Incident Response Guidance provides, among other things, that when an institution becomes aware of an incident of unauthorized access to sensitive customer information, the institution should conduct a reasonable investigation to determine promptly the likelihood that the information has been or will be misused. If the institution determines that misuse of the information has occurred or is reasonably possible, it should notify affected customers as soon as possible.

procedures for an incident response program that is reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information.[48] The amendments would require that a response program include procedures to assess the nature and scope of any incident and to take appropriate steps to contain and control the incident to prevent further unauthorized access or use.[49]

The proposed response program procedures also would have to include notification to individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.[50] Notice would not be required if a covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.[51] Under the proposed amendments, a customer notice must be clear and conspicuous and provided by a means designed to ensure that each affected individual can reasonably be expected to receive it.[52] A covered institution would be required to provide notice as soon as practicable, but not later than 30 days, that the incident occurred or is reasonably likely to have occurred.[53] To the extent a covered institution would have a notification obligation under both the proposed rules and a similar state law, a covered institution should be able to provide one notice to satisfy notification obligations under both the proposed rules and the state law, provided it included all information required under both the proposed rules and the state law.[54]

The Commission also is proposing amendments to Regulation S–P to enhance the protection of customers' nonpublic personal information. These proposed amendments would more closely align the information protected under the safeguards rule and the disposal rule by applying the protections of both rules to ''customer information,'' a newly defined term. We also propose to broaden the group of customers whose information is protected under both rules. Additionally, we propose to bring all transfer agents within the scope of the safeguards rule.

The proposal is not inconsistent with other recent cybersecurity-related rulemaking proposals.[55] Additionally, as described in greater detail below,[56] the Commission is also proposing rules and rule amendments related to cybersecurity risk and related disclosures as well as Regulation SCI.[57] We encourage commenters to review those other cybersecurity-related rulemaking proposals to determine whether those proposals might affect comments on this proposing release.

II. Discussion

A. Incident Response Program Including Customer Notification

Security incidents can occur in different ways, such as through takeovers of online accounts by bad actors, improper disposal of customer information in areas that may be accessed by unauthorized persons, or the loss or theft of data that includes customer information. Whatever the means, unauthorized access to, or use of, customer information may result in misuse, exposure or theft of a customer's nonpublic personal information, which could result in substantial harm or inconvenience to individuals affected by a security incident. Exposure of customer information in a security incident, whether it results from unauthorized access to or use of customer information by an employee[58] or external actor,[59] could leave affected individuals vulnerable to having their information further compromised.[60] Bad actors can use customer information to cause harm in a number of ways, such as by stealing

[48] *See* proposed rule 248.30(b).

[49] *See* proposed rule 248.30(b)(3).

[50] *See* proposed rule 248.30(b)(4). *See* proposed rule 248.30(e)(9) for the definition of ''sensitive customer information.'' *See also infra* section II.A.4, which includes a discussion of ''sensitive customer information.''

[51] *See id.*

[52] *See* proposed rule 248.30(b)(4)(i).

[53] *See* proposed rule 248.30(b)(4)(iii).

[54] We are not aware of any laws that would require the sending of multiple customer notices.

[55] *See* Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, Securities Act Release No. 11028 (Feb. 9, 2022) [87 FR 13524 (Mar. 9, 2022)] (''Investment Management Cybersecurity Proposal''); *see also* Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Securities Act Release No. 11038 (Mar. 9, 2022) [87 FR 16590 (Mar. 23, 2022) (''Corporation Finance Cybersecurity Proposal'').

[56] *See infra* section II.G.

[57] Regulation SCI is codified at 17 CFR 242.1000 through 1007. As described further below, while the overall nature of each cybersecurity-related proposal is similar given the topic, the scope of each proposal addresses different cybersecurity-related issues as they relate in different ways to different entities, types of covered information or systems, and products. *See* Cybersecurity Risk Management Proposed Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents, Exchange Act Release No. 97142 (Mar. 15, 2023), (''Exchange Act Cybersecurity Proposal'') and Regulation Systems Compliance and Integrity, Exchange Act Release No. 97143 (Mar. 15, 2023), (''Regulation SCI Proposal'').

[58] For example, an employee might access and download confidential customer data to a personal server that is subsequently hacked by a third party. Once the customer data has been stolen, portions of the customer data could be posted on the internet along with an offer to sell a larger quantity of stolen data in exchange for payment. *See, e.g.,* Commission Order, *In the Matter of Morgan Stanley Smith Barney LLC,* Release No. 34–78021 (June 8, 2016), *available at https://www.sec.gov/litigation/admin/2016/34-78021.pdf* (settled order) (finding that an employee misappropriated data regarding approximately 730,000 customer accounts, associated with approximately 330,000 different households, by accessing two of the firm's portals. The misappropriated data included personally identifiable information (''PII'') such as customers' full names, phone numbers, street addresses, account numbers, account balances, and securities holdings).

[59] For example, unauthorized third parties could take over email accounts, resulting in exposure of customer information. An email account takeover occurs when an unauthorized third party gains access to the email account and, in addition to being able to view its contents, is also able to take actions of a legitimate user, such as sending and deleting emails or setting up forwarding rules. *See, e.g.,* Commission Order, *In the Matter of Cambridge Investment Research, Inc., et al.,* Release No. 34–92806 (Aug. 30, 2021) (''Cambridge Order''), *available at https://www.sec.gov/litigation/admin/2021/34-92806.pdf* (settled order) (finding that cloud-based email accounts of over 121 Cambridge independent contractor representatives were taken over by third parties resulting in the exposure of at least 2,177 customers' PII stored in the compromised email accounts and potential exposure of another 3,800 customers' PII); Commission Order, *In the Matter of Cetera Advisor Networks LLC, et al.*, Release No. 34–92800 (Aug. 30, 2021), *available at https://www.sec.gov/litigation/admin/2021/34-92800.pdf* (settled order) (finding that email accounts of over 60 Cetera personnel were taken over by unauthorized third parties resulting in the exposure of over 4,388 of Cetera customers' PII stored in the compromised email accounts); Commission Order, *In the Matter of KMS Financial Services, Inc.,* Release No. 34–92807 (Aug. 30, 2021) (''KMS Order''), *available at https://www.sec.gov/litigation/admin/2021/34-92807.pdf* (settled order) (finding that fifteen KMS financial adviser email accounts were accessed by unauthorized third parties resulting in the exposure of customer records and information, including PII, of approximately 4,900 KMS customers).

[60] Modes of compromise could include, for example, phishing or credential stuffing. ''Phishing'' is a means of gaining unauthorized access to a computer system or service by using a fraudulent or ''spoofed'' email to trick a victim into taking action, such as downloading malicious software or entering his or her log-in credentials on a fake website purporting to be the legitimate log-in website for the system or service, while ''credential stuffing'' is a means of gaining unauthorized access to accounts by automatically entering large numbers of pairs of log-in credentials that were obtained elsewhere. *See* Cambridge Order, *supra* note 59, at 3, n.5 and n.6.

For example, individuals affected by a security incident might receive phishing emails requesting them to wire funds to a bank account or enter PII to access a document, among other things. *See, e.g.,* KMS Order, *supra* note 59, at 4.

customer identities to sell to other bad actors on the dark web,[61] publishing customer information on the dark web, using customer identities to carry out fraud themselves, or taking over a customer's account for malevolent purposes. For example, a bad actor could use compromised customer information such as login credentials (*e.g.,* a username and password), as part of an account takeover scheme to obtain unauthorized entry to a customer's online brokerage account, putting customer assets at risk for unauthorized fund transfers or trades.[62] Similarly, a bad actor could engage in new account fraud by using compromised customer information to establish a brokerage account without the customer's knowledge through identity theft. Once the bad actor has taken over the customer's account, or has opened a fraudulent new account, it could potentially use a separate account at another broker-dealer to trade against these accounts for profit, which could result in harm to the affected customer.[63]

To help protect against harms that may result from a security incident involving customer information, the Commission is proposing to amend the safeguards rule to require that covered institutions' safeguards policies and procedures include a response program for unauthorized access to or use of customer information, which would include customer notification procedures.[64] The proposed amendments would require the response program to be reasonably designed to detect, respond to, and recover from both unauthorized access to and unauthorized use of customer information (for the purposes of this release, an ''incident'').[65] As noted above, any instance of unauthorized access to or use of customer information would trigger a covered institution's incident response protocol. The amendments would also require that the response program include procedures for notifying affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.[66]

In this regard, requiring covered institutions to have this type of incident response program could help mitigate the risk of harm to affected individuals stemming from such incidents. For example, having a response program should help covered institutions to be better prepared to respond to incidents, and providing notice to affected individuals should aid those individuals in taking protective measures that could mitigate harm that might otherwise result from unauthorized access to or use of their information. Further, a reasonably designed response program will help facilitate more consistent and systematic responses to customer information security incidents, and help avoid inadequate responses based on a covered institution's initial impressions of the scope of the information involved in the compromise. In addition, requiring the response program to address any incident involving customer information can help a covered institution better contain and control these incidents and facilitate a prompt recovery.

The amendments would require that a covered institution's response program include policies and procedures containing certain general elements, but would not prescribe specific steps a covered institution must take when carrying out incident response activities. Instead, covered institutions may tailor their policies and procedures to their individual facts and circumstances. We recognize that given the number and varying characteristics (*e.g.,* size, business, and complexity) of covered institutions, each such institution needs to be able to tailor its incident response program procedures based on its individual facts and circumstances. The proposed amendments therefore are intended to give covered institutions the flexibility to address the general elements in the response program based on the size and complexity of the institution and the nature and scope of its activities.

Specifically, a covered institution's incident response program would be required to have written policies and procedures to:

(i) assess the nature and scope of any incident involving unauthorized access to or use of customer information and identify the customer information systems and types of customer information that may have been accessed or used without authorization;[67]

(ii) take appropriate steps to contain and control the incident to prevent

[61] The ''dark web'' is a part of the internet that requires specialized software to access and is specifically designed to facilitate anonymity by obscuring users' identities, including by hiding users' internet protocol addresses. The anonymity provided by the dark web has allowed users to sell and purchase illegal products and services. *See, e.g., SEC* v. *Apostolos Trovias,* Case 1:21–cv–05925 (S.D.N.Y. filed July 9, 2021) Dkt. No. 1 (complaint) at 1–2, *available at https://www.sec.gov/litigation/complaints/2021/comp-pr2021-122.pdf.* The SEC obtained a final judgment against the defendant on July 19, 2022. *See* Litigation Release No. 25447 (July 21, 2022), *available at https://www.sec.gov/litigation/litreleases/2022/judg25447.pdf.*

[62] *See, e.g.,* FINRA Regulatory Notice 20–32, *FINRA Reminds Firms to Be Aware of Fraudulent Options Trading in Connection With Potential Account Takeovers and New Account Fraud* (Sept. 17, 2020), *available at https://www.finra.org/rules-guidance/notices/20-32* (stating that FINRA recently observed an increase in fraudulent options trading being facilitated by account takeover schemes and the use of new account fraud); *see also* FINRA Regulatory Notice 20–13, *FINRA Reminds Firms to Beware of Fraud During the Coronavirus (COVID–19) Pandemic* (May 5, 2020), *available at https://www.finra.org/rules-guidance/notices/20-13* (stating that some firms have reported an increase in newly opened fraudulent accounts, and urging firms to be cognizant of the heightened threat of frauds and scams to which firms and their customers may be exposed during the COVID–19 pandemic).

[63] In 2017, the SEC charged an individual with engaging in an illegal brokerage account takeover and unauthorized trading scheme with at least one other person. The SEC's complaint alleged that, in furtherance of the scheme, the other person(s) accessed at least 110 brokerage accounts of unwitting accountholders, secretly and without authorization, and used those accounts to place securities trades that artificially affected the stock prices of various publicly traded companies. At or about the same time, the charged individual used his brokerage accounts to trade the same securities, generating profits by taking advantage of the artificial stock prices that resulted from the unauthorized trades placed in the victims' accounts. The complaint alleged that the individual generated at least $700,000 in illicit profits through his participation in the scheme by buying or selling stock in his brokerage accounts in his name at artificially low or high prices generated by the unauthorized trading of stock in the victims' accounts. *See SEC* v. *Joseph P. Willner,* Case 1:17–cv–06305 (E.D.N.Y. filed Oct. 30, 2017) (complaint), *available at https://www.sec.gov/litigation/complaints/2017/comp-pr2017-202.pdf.* In Oct. 2020, the U.S. District Court for the Eastern District of New York entered a final consent judgment against this individual for his role in the scheme. *See* Litigation Release No. 24947 (Oct. 19, 2020), *available at https://www.sec.gov/litigation/litreleases/2020/lr24947.htm.*

[64] *See* proposed rule 248.30(b)(3). For clarity, when the proposed amendments to the safeguards rule refer to ''unauthorized access to or use'', the word ''unauthorized'' modifies both ''access'' and ''use.''

[65] *See* proposed rule 248.30(b)(3). *See also infra* section II.C.1 for a discussion of ''customer information.''

[66] *See* proposed rule 248.30(e)(9) for the definition of ''sensitive customer information.'' *See also infra* section II.A.4, which includes a discussion of ''sensitive customer information.'' Notice would have to be provided unless a covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.

[67] *See* proposed rule 248.30(b)(3)(i). The term ''customer information systems'' would mean the information resources owned or used by a covered institution, including physical or virtual infrastructure controlled by such information resources, or components thereof, organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of customer information to maintain or support the covered institution's operations. *See* proposed rule 248.30(e)(6).

further unauthorized access to or use of customer information;[68] and

(iii) notify each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization in accordance with the notification obligations discussed below, unless the covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.[69]

The proposed response program is designed to further the objectives of the safeguards rule, particularly protecting against unauthorized access to or use of customer information. We have also proposed rules that would more broadly address general cybersecurity risks, with which the response program proposed in Regulation S–P is not inconsistent, as discussed in more detail below.[70] Our recent proposals would require investment advisers, investment companies, and certain market entities[71] to adopt and implement written policies and procedures that require measures to detect, respond to, and recover from a cybersecurity incident.[72] The Investment Management Cybersecurity Proposal, including the cybersecurity response measures, is more broadly focused on investment advisers and investment companies and their operations. Among other objectives, the proposed measures would include policies and procedures reasonably designed to ensure the protection of adviser (or fund) information systems and adviser (or fund) information residing therein.[73] Similarly, the Exchange Act Cybersecurity Proposal, which includes cybersecurity response measures, is more broadly focused on Market Entities and their operations, and would include policies and procedures reasonably designed to ensure the protection of the Market Entities' information systems and the information residing on those systems.

The response program proposed in Regulation S–P, however, is narrowly focused and the required incident response policies and procedures should be specifically tailored to address unauthorized access to or use of customer information, including procedures for assessing the nature and scope of such incidents and identifying the customer information and customer information systems that may have been accessed or used without authorization, as well as taking steps to contain and control the incident to prevent further unauthorized access to or use of customer information. Given the risk of harm posed to customers and other affected individuals by incidents involving customer information, it is important that covered institutions' policies and procedures be reasonably designed to implement an incident response under these circumstances.

We request comment on the proposed rule's requirement that covered institutions' policies and procedures include an incident response program that is reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information, including the following:

1. What best practices have commenters developed or become aware of with respect to the types of measures that can be implemented as part of an incident response program? Are there any measures commenters have found to be ineffective or relatively less effective? To the contrary, are there any measures that commenters have found to be effective, or relatively more effective?

2. Should we require the response program procedures to set forth a specific timeframe for implementing incident response activities under Regulation S–P? For example, should the procedures state that incident response activities, such as assessment and containment, should commence promptly, or immediately, once an incident has been discovered?

3. Are the proposed elements for the incident response program appropriate? Should we modify the proposed elements? For instance, should the rule prescribe more specific steps for incident response within the framework of the procedures, such as detailing the steps that an institution should take to assess the nature and scope of an incident, or to contain and control an incident? If so, please describe the steps and explain why they should be included. Alternatively, should the requirements for the incident response program be less prescriptive and more principles-based? If so, please describe how and why the requirements should be modified.

4. Are there additional or different elements that should be included in an incident response program? For example, should the rule require procedures for taking corrective measures in response to an incident, such as securing accounts associated with the customer information at issue? Should the rule require procedures for monitoring customer information and customer information systems for unauthorized access to or use of those systems, and data loss as it relates to those systems? Should the rule require procedures for identifying the titles and roles of individuals or departments (*e.g.,* managers, directors, and officers) who should be responsible for overseeing, implementing, and executing the incident response program, as well as procedures to determine compliance? If additional or different elements should be added, please describe the element, and explain why it should be included in the response program.

5. Is the scope of the incident response program appropriate? For example, is the scope of the incident response program reasonably aligned with the vulnerability of the customer information at issue?

- Should the incident response program be more limited in scope, so that it would only address incidents that involve unauthorized access to or use of a subset of customer information (*e.g.,* sensitive customer information)? If so, please explain the subset of customer information that should require an incident response program.
- Alternatively, should the incident response program be more expansive in scope, so that it would cover additional activity beyond unauthorized access to or use of customer information? For example, should the incident response program address cybersecurity incident response and recovery at large (*i.e.,* should the rule require covered institutions to have a response program reasonably designed to detect, respond to, and recover from a cybersecurity incident)?

1. Assessment

The Commission is proposing to require that the incident response program include procedures for: (1)

[68] *See* proposed rule 248.30(b)(3)(ii).

[69] *See* proposed rule 248.30(b)(3)(iii).

[70] *See infra* section II.G.1–II.G.2, which addresses areas that are related between the Regulation SCI Proposal and the Exchange Act Cybersecurity Proposal, as well as with the Investment Management Cybersecurity Proposal, respectively.

[71] The Exchange Act Cybersecurity Proposal rules would be applicable to ''Market Entities'' including: broker-dealers; clearing agencies; major security-based swap participants; the Municipal Securities Rulemaking Board; national securities exchanges; national securities associations (*i.e.,* FINRA); security-based swap data repositories; security-based swap dealers; and transfer agents (collectively, ''Covered Entities'') as well as broker-dealers that are non-Covered Entities. *See* Exchange Act Cybersecurity Proposal, *supra* note 57.

[72] *See* Investment Management Cybersecurity Proposal, *supra* note 55; Exchange Act Cybersecurity Proposal, *supra* note 57.

[73] *See* Investment Management Cybersecurity Proposal, *supra* note 55, at 13589 for definitions of ''fund information system'' and ''fund information.''

assessing the nature and scope of any incident involving unauthorized access to or use of customer information, and (2) identifying the customer information systems and types of customer information that may have been accessed or used without authorization.[74] For example, a covered institution's assessment may include gathering information about the type of access, the extent to which systems or other assets have been affected, the level of privilege attained by any unauthorized persons, the operational or informational impact of the breach, and whether any data has been lost or exfiltrated.[75] Examining a range of data sources could shed light on the incident timeline, and assessing affected systems and networks could help to identify additional anomalous activity that might be adversarial behavior.[76]

The assessment requirement is designed to require a covered institution to identify both the customer information systems and types of customer information that may have been accessed or used without authorization during the incident, as well as the specific customers affected, which would be necessary to fulfill the obligation to notify affected individuals. Covered institutions generally should evaluate and adjust their assessment procedures periodically, regardless of any specific regulatory requirement, to ensure they remain reasonably designed to accomplish their goals. In addition, assessment should help facilitate the evaluation of whether sensitive customer information has been accessed or used without authorization, which informs whether notice would have to be provided, as discussed below. A covered institution's assessment may also be useful for collecting other information that is required to populate the notice, such as identifying the date or estimated date of the incident, among other details. Information developed during the assessment process may also help covered institutions develop a contextual understanding of the circumstances surrounding an incident, as well as enhance their technical understanding of the incident, which should be helpful in guiding incident response activities such as containment and control measures. The assessment process may also be helpful for identifying and evaluating existing vulnerabilities that could benefit from remediation in order to prevent such vulnerabilities from being exploited in the future.

We request comment on the proposed rule's requirements related to assessing the nature and scope of any incident involving unauthorized access to or use of customer information, including the following:

6. Should we provide additional examples for consideration in assessing the nature and scope of an incident, beyond the examples provided above (*e.g.,* type of access, the extent to which systems or other assets have been affected, the level of privilege attained by any unauthorized persons, the operational or informational impact of the breach, and whether any data has been lost or exfiltrated)?

7. Should we require that the assessment include the specific components referenced in the above question?

8. Should we require any specific training for personnel performing assessments of security incidents? Should the training have to encompass security updates and training sufficient to address relevant security risks?

9. Various rules applicable to certain entities require, among other things, the review, testing, verification, and/or amendment of policies and procedures at regular intervals.[77] Should we specifically require covered institutions to evaluate and adjust, as appropriate, the assessment procedures periodically in this rule? If so, how frequently should the evaluation occur? Should we require any testing (such as a practice exercise) of a covered institution's assessment process?

10. Would covered institutions expect to use third parties to conduct these assessments? If so, to what extent and in what manner? Should there be any additional or specific requirements for third parties that conduct assessments? Why or why not?

2. Containment and Control

The Commission is proposing to require that the response program have procedures for taking appropriate steps to contain and control a security incident, to prevent further unauthorized access to or use of customer information.[78] The objective of containment and control is to prevent additional damage from unauthorized activity and to reduce the immediate impact of an incident by removing the source of the unauthorized activity.[79] Covered institutions generally should evaluate and revise their containment and control procedures periodically, regardless of any specific regulatory requirement, to ensure they remain reasonably designed to accomplish their goals. Strategies for containing and controlling an incident vary depending upon the type of incident and may include, for example, isolating compromised systems or enhancing the monitoring of intruder activities, searching for additional compromised systems, changing system administrator passwords, rotating private keys, and changing or disabling default user accounts and passwords, among other interventions. Some standards advise that after ensuring that all means of persistent access into the network have been accounted for, and any intrusive

[74] *See* proposed rule 248.30(b)(3)(i). The proposed requirements related to assessing the nature and scope of a security incident are consistent with the components of a response program as set forth in the Banking Agencies' Incident Response Guidance. *See* Banking Agencies' Incident Response Guidance, *supra* note 47, at 15752.

[75] *See* Cybersecurity and Infrastructure Security Agency (''CISA''), Cybersecurity Incident & Vulnerability Response Playbooks (Nov. 2021), at 10–13 (''CISA Incident Response Playbook''), *available at https://www.cisa.gov/sites/default/files/publications/Federal_Government_Cybersecurity_Incident_and_Vulnerability_Response_Playbooks_508C.pdf.* While the CISA Incident Response Playbook specifically provides Federal agencies with a standard set of procedures to respond to incidents impacting ''Federal Civilian Executive Branch'' networks, it may also be useful for the purpose of strengthening cybersecurity response practices and operational procedures for public and private sector entities in addition to the Federal government. *See* CISA, Press Release, *CISA Releases Incident and Vulnerability Response Playbooks to Strengthen Cybersecurity for Federal Civilian Agencies* (Nov. 16, 2021), *available at https://www.cisa.gov/news/2021/11/16/cisa-releases-incident-and-vulnerability-response-playbooks-strengthen.* A list of the Federal Civilian Executive Branch agencies identified by CISA is available at *https://www.cisa.gov/agencies.* The National Institute for Standards and Technology (''NIST'') defines ''exfiltration'' as ''the unauthorized transfer of information from a system.'' *See* NIST Special Publication 800–53, Revision 5, *Security and Privacy Controls for Information Systems and Organizations,* Appendix A at 402 (Sept. 2020) *available at https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r5.pdf.*

[76] *See* CISA Incident Response Playbook, *supra* note 75, at 10–13. NIST defines ''adversary'' as ''[a]n entity that is not authorized to access or modify information, or who works to defeat any protections afforded the information.'' *See* NIST Special Publication 800–107, *Recommendation for Applications Using Approved Hash Algorithms,* Section 3.1 Terms and Definitions, at 3 (Aug. 2012), *available at https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-107r1.pdf.*

[77] *See e.g.,* Rule 38a–1(a)(3) under the Investment Company Act; FINRA Rule 3120 (Supervisory Control System) and FINRA Rule 3130 (Annual Certification of Compliance and Supervisory Processes).

[78] *See* proposed rule 248.30(b)(3)(ii). These proposed requirements are consistent with the components of a response program as set forth in the Banking Agencies' Incident Response Guidance. *See* Banking Agencies' Incident Response Guidance, *supra* note 47, at 15752.

[79] For a further discussion of the purposes and practices of such containment measures, *see generally* CISA Incident Response Playbook, *supra* note 76, at 14; *see also* Federal Financial Institutions Examination Council (''FFIEC''), Information Technology Examination Handbook—Information Security (Sept. 2016), at 52, *available at https://ithandbook.ffiec.gov/media/274793/ffiec_itbooklet_informationsecurity.pdf.*

activity has been sufficiently contained, the artifacts of the incident should also be eliminated (*e.g.,* by removing malicious code or re-imaging infected systems) and vulnerabilities or other conditions that were exploited to gain unauthorized access should be mitigated.[80]

Additional eradication activities may include, for example, remediating all infected IT environments (*e.g.,* cloud, operational technology, hybrid, host, and network systems), resetting passwords on compromised accounts, and monitoring for any signs of adversary response to containment activities. Because incident response may involve making complex judgment calls, such as deciding when to shut down or disconnect a system, developing and implementing written containment and control policies and procedures will provide a framework to help facilitate improved decision making at covered institutions during potentially high-pressure incident response situations.

We request comment on the proposed rule's requirement that the incident response program have procedures for taking appropriate steps to contain and control a security incident, including the following:

11. Should there be additional or more specific requirements for containing and controlling a breach of a customer information system? Should the rule prescribe specific minimum steps that need to be taken to remediate any identified weaknesses in customer information systems and associated controls? For example, should we require that a covered institution's containment or control activities be consistent with any current governmental or industry standards or guidance, such as standards disseminated by NIST, guidance disseminated by CISA, or others?[81]

12. Are the examples of steps that may be taken to contain and control an incident (*e.g.,* isolating compromised systems or enhancing the monitoring of intruder activities, searching for additional compromised systems, changing system administrator passwords, rotating private keys, and changing or disabling default user accounts and passwords) appropriate? Are there any additional examples of steps that could be taken to contain and control an incident that should be provided?

13. Are the examples of remediation and eradication activities provided (*e.g.,* remediating all infected IT environments (such as cloud, operational technology, hybrid, host, and network systems, resetting passwords on compromised accounts, and monitoring for any signs of adversary response to containment activities) appropriate? Are there any additional examples of remediation or eradication activities that should be provided?

14. Should the rule require that a covered institution evaluate and revise its incident response plan following a customer information incident?

15. Various rules applicable to certain entities require, among other things, the review, testing, verification, and/or amendment of policies and procedures at regular intervals.[82] Should we specifically require covered institutions to evaluate and revise containment and control procedures related to preventing unauthorized access to or use of customer information periodically? If so, how frequently should the evaluation occur? For example, should a covered institution be required to evaluate and revise these containment and control procedures at least annually?

16. Who should be responsible for making decisions related to containment and control? Should the rule require covered institutions to designate specific personnel to be responsible for making decisions related to containment and control? For example, should a covered institution have to identify specific personnel with sufficient cybersecurity qualifications and experience to either determine if an incident has been contained or controlled themselves, or hire a third party who has the requisite cybersecurity and recovery expertise to perform containment and control functions? If so, what type of qualifications or experience are useful for informing decisions related to containment and control? Or should it be the same individuals who are designated to perform incident response and recovery related functions for cybersecurity incidents under the Investment Management Cybersecurity Proposal and the Exchange Act Cybersecurity Proposal?

3. Service Providers

We understand that a covered institution may contract with third-party service providers to perform certain business activities and functions, for example, trading and order management, information technology functions, and cloud computing services, among others, in a practice commonly referred to as outsourcing.[83] As a result of this outsourcing, service providers may receive, maintain, or process customer information, or be permitted to access a covered institution's customer information systems. These outsourcing relationships or activities may expose covered institutions and their customers to risk through the covered institutions' service providers, including risks related to system resiliency and the ability of a service provider to protect customer information and systems (including service provider incident response programs). Moreover, a security incident at a service provider could lead to the unauthorized access to or use of customer information or customer information systems, which could potentially result in harm to customers. For example, a bad actor could use a service provider's access to a covered institution's systems to infiltrate the covered institution's network through a cybersecurity compromise in the supply chain,[84] which is a vector that can be used to conduct a data breach, and thereby gain unauthorized access to the covered institution's customer information and customer information systems through

[80] *See, e.g.,* CISA Incident Response Playbook, *supra* note 75, at 15.

[81] Examples of such standards and guidance include the NIST Computer Security Incident Handling Guide (NIST Special Publication 800–61, Revision 2, *available at https://csrc.nist.gov/publications/detail/sp/800-61/rev-2/final*) and the CISA Incident Response Playbook, *supra* note 75, among others.

[82] *See e.g.,* Rule 38a–1(a)(3) under the Investment Company Act; FINRA Rule 3120 (Supervisory Control System) and FINRA Rule 3130 (Annual Certification of Compliance and Supervisory Processes).

[83] *See, e.g.,* Outsourcing by Investment Advisers, Investment Advisers Act Release No. 6176 (Oct. 26, 2022) [87 FR 68816 (Nov. 16, 2022)] (''Adviser Outsourcing Proposal''); FINRA Notice to Members 05–48, *Members' Responsibilities When Outsourcing Activities to Third-Party Service Providers* (July 28, 2005), *available at https://www.finra.org/rules-guidance/notices/05-48.*

[84] NIST defines a ''cybersecurity compromise in the supply chain'' as ''an occurrence within the supply chain whereby the confidentiality, integrity, or availability of a system or the information the system processes, stores, or transmits is jeopardized. A supply chain incident can occur anywhere during the life cycle of the system, product or service.'' *See* NIST, Special Publication NIST SP 800–161r1, *Cybersecurity Supply Chain Risk Management Practices for Systems and Organizations,* Glossary at 299, *available at https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-161r1.pdf.* According to NIST, key cybersecurity supply chain risks include risks from third-party service providers with physical or virtual access to information systems, software code, or intellectual property. *See* NIST, *Best Practices in Cyber Supply Chain Risk Management,* Conference Materials (''NIST Best Practices in Cyber Supply Chain Risk Management''), *available at https://csrc.nist.gov/CSRC/media/Projects/Supply-Chain-Risk-Management/documents/briefings/Workshop-Brief-on-Cyber-Supply-Chain-Best-Practices.pdf.*

an initial compromise at the service provider.[85]

Under the proposed amendments, we propose to define the term ''service provider'' to mean any person or entity that is a third party and receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a covered institution.[86] This definition would include affiliates of covered institutions if they are permitted access to this information through their provision of services. The proposed scope is intended to help protect against the risk of harm that may arise from third-party access to a covered institution's customer information and customer information systems. For example, in 2015, Division of Examinations staff released observations following the examinations of some institutions' cybersecurity policies and procedures relating to vendors and other business partners, which revealed mixed results with respect to whether the firms incorporated requirements related to cybersecurity risk into their contracts with vendors and business partners.[87]

Given the potential for bad actors to target third parties with access to a covered institution's systems, it is important to help mitigate the risk of harm posed by security compromises that may occur at service providers. For example, a covered institution could retain a cloud service provider to maintain its books and records.[88] A security incident at this cloud service provider that resulted in unauthorized access to or use of these books and records could create a risk of substantial harm to the covered institution's customers and trigger a need for notification to allow the affected customers to address this risk. Because service providers would be obligated to notify a covered institution in the event of security breaches involving customer information systems, as discussed below, this could potentially help covered institutions implement their own incident response protocol more quickly and efficiently after such breaches, which would include notifying affected individuals as needed.

The proposed amendments would require that a covered institution's incident response program include written policies and procedures that address the risk of harm posed by security compromises at service providers.[89] Specifically, these policies and procedures would require covered institutions, pursuant to a written contract between the covered institution and its service providers, to require service providers to take appropriate measures that are designed to protect against unauthorized access to or use of customer information.[90] Appropriate measures would include the obligation for a service provider to notify a covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security that results in unauthorized access to a customer information system maintained by the service provider, in order to enable the covered institution to implement its incident response program expeditiously.[91] In addition, we are not limiting entities that can provide customer notification for or on behalf of covered institutions. A covered institution may, as part of its incident response program, enter into a written agreement with its service provider to have the service provider notify affected individuals on its behalf in accordance with the notification obligations discussed below.[92] In that circumstance, the covered institution could delegate performance of its notice obligation to a service provider through written agreement, but the covered institution would remain responsible for any failure to provide a notice as required by the proposed rules, if adopted.[93]

We request comment on the proposed requirements related to service providers, including the following:

17. Should we modify the proposed definition of ''service provider''? For example, should we exclude a covered institution's affiliates from the definition? Alternatively, should we define ''service provider'' in this rule in a manner similar to proposed rule 206(4)–11 under the Investment Advisers Act? Are there any other alternative definitions of ''service provider'' that should be used?[94]

18. Should there be additional or more specific requirements for entities that are included in the definition of ''service providers?''

19. The proposed definition of service providers applies to entities that receive, maintain or process customer information, or are permitted access to a covered institution's customer information. Is this scope of activities appropriate? Should we exclude any of these activities? Should we include any other activities?

20. To what extent do covered institutions already have written policies and procedures that include contractually requiring service providers to take appropriate measures designed to protect against unauthorized access to or use of customer information? For example, to what extent have contractual requirements been incorporated pursuant to an exception from Regulation S–P's opt-out requirements for service providers and joint marketing provided by 17 CFR 248.13, which is conditioned on having a contractual agreement prohibiting the service provider from disclosing or using customer information other than to carry out the purposes for which it is disclosed, or pursuant to Regulation S–ID's requirements[95] at 17 CFR

[85] For example, in a 2013 cyber supply chain attack, a bad actor breached the Target Corporation's network and was able to steal personal information for up to 70 million customers. The bad actor was able to gain a foothold in Target's network through a third-party vendor. *See* U.S. Senate, Committee on Commerce, Science, and Transportation, *A ''Kill Chain'' Analysis of the 2013 Target Data Breach,* Majority Staff Report (Mar. 26, 2014), *available at https://www.commerce.senate.gov/services/files/24d3c229-4f2f-405d-b8db-a3a67f183883.*

[86] *See* proposed rule 248.30(e)(10).

[87] *See* EXAMS, Cybersecurity Examination Sweep Summary, National Exam Program Risk Alert, Volume IV, Issue 4 (Feb. 3, 2015), at 4, *available at https://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf.*

[88] According to NIST, key cybersecurity supply chain risks include risks from third-party data storage or data aggregators. *See* NIST Best Practices in Cyber Supply Chain Risk Management, *supra* note 84.

[89] *See* proposed rule 248.30(b)(5)(i).

[90] *Id.*

[91] *Id.*

[92] *See* proposed rule 248.30(b)(5)(ii).

[93] Covered institutions may delegate other functions to service providers, such as reasonable investigation to determine whether sensitive customer information has not been and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. Covered institutions would remain responsible for these functions even if they are delegated to service providers.

[94] *See* Adviser Outsourcing Proposal *supra* note 83. In proposed rule 206(4)–11, ''service provider'' would mean a person or entity that performs one or more covered functions, and is not a supervised person as defined in 15 U.S.C. 80b–2(a)(25) of the Investment Advisers Act, of the investment adviser. In the proposal, a ''covered function'' would mean a function or service that is necessary for the investment adviser to provide its investment advisory services in compliance with the Federal securities laws, and that, if not performed or performed negligently, would be reasonably likely to cause a material negative impact on the adviser's clients or on the adviser's ability to provide investment advisory services. In the proposal, a covered function would not include clerical, ministerial, utility, or general office functions or services.

[95] *See* 17 CFR 248.201(d)(2)(iii) and (e)(4). As discussed further below, Regulation S–ID, among other things, requires financial institutions subject to the Commission's jurisdiction with covered accounts to develop and implement a written identity theft prevention program that is designed to detect, prevent, and mitigate identity theft in connection with covered accounts, which must include, among other things, policies and procedures to respond appropriately to any red

248.201(d)(2)(iii) to respond appropriately to any detected identity theft red flags to prevent and mitigate identity theft, and under 17 CFR 248.201(e)(4) to exercise appropriate and effective oversight of service provider arrangements?

21. The proposed rule would require policies and procedures requiring a covered institution, by contract, to require that its service providers take appropriate measures designed to protect against unauthorized access to or use of customer information, including notification to a covered institution in the event of certain types of breaches in security. Are there any contexts in which a written contract may be more feasible than others? Rather than using a contractual approach to implement this requirement that a covered institution take the required appropriate measures, should the rule require policies and procedures that require due diligence of or some type of reasonable assurances from its service providers? What should reasonable assurances include? For example, should they cover notification to the covered institution as soon as possible in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider to enable the covered institution to implement its response program? Are there other reasonable assurances we should require? Alternatively, should we only require disclosure of whether a covered institution has or does not have a written contract with service providers?

22. Should there be a written contract requirement for certain service providers and not others? For example, should the rule identify a sub-set of service providers as critical service providers and require a written agreement in those circumstances only, and if so, what service providers should be included?

23. Are there other methods that we should permit or require covered institutions to use to help ensure that service providers take appropriate measures that are designed to protect against unauthorized access to or use of customer information (for example, a security certification or representation)? Should we have different requirements for smaller covered institutions?

24. The proposed rule would require policies and procedures requiring a covered institution, by contract, to require its service providers to provide notification to a covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider. Is ''as soon as possible, but no later than 48 hours after becoming aware of a breach'' an appropriate timeframe for service providers to provide notification to a covered institution after such a breach occurs? Why or why not? Should we use a different timeframe such as ''as soon as practicable''?

25. Is it appropriate to permit covered institutions to delegate providing notice to service providers? If service providers are permitted to provide notice on behalf of covered institutions, should there be additional or specific requirements for a service provider that provides notification on behalf of a covered institution? If so, please describe those requirements and why they should be included.

26. The proposed rule would set forth that as part of its incident response program, a covered institution may enter into a written agreement with its service provider for the service provider to notify affected individuals on its behalf (*i.e.,* to delegate the notice functions required under the rule to service providers while remaining responsible for the notice obligation). Should we set forth that a covered institution may enter into a written agreement with its service provider for other potentially delegated functions as discussed in this proposal? For example, should we set forth that a covered institution may enter into a written agreement for delegating the performance of a reasonable investigation (*e.g.,* to determine whether sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience) to a service provider? Should we set forth that a covered institution may enter into a written agreement for delegating the performance of assessment activities, or containment and control activities, to a service provider? Additionally, is it appropriate for a service provider to assist with these functions, with the responsibility remaining with the covered institution? Why or why not?

27. To what extent do service providers sub-delegate functions provided in this proposal to third parties? If so, how should the rule address sub-delegations between service providers and third parties?

4. Notice to Affected Individuals

Under the proposed amendments, a covered institution must notify each affected individual whose sensitive customer information was, or was reasonably likely to have been, accessed or used without authorization, unless the covered institution has determined, after a reasonable investigation of the incident, that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. The covered institution must provide a clear and conspicuous notice to each affected individual by a means designed to ensure that the individual can reasonably be expected to receive actual notice in writing. The notice must be provided as soon as practicable, but not later than 30 days, after the covered institution becomes aware that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred.

a. Standard for Providing Notice

The proposed amendments would create an affirmative requirement for a covered institution to provide notice to individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.[96] These notices would be designed to give affected individuals an opportunity to respond to and remediate issues arising from an information security incident, such as monitoring credit reports for unauthorized activity, placing fraud alerts on relevant accounts, or changing passwords used to access accounts.[97] Such measures, when taken in a timely fashion, may help affected individuals avoid or mitigate the risk of substantial harm or inconvenience (''harm risk''),[98] and in an environment of expanded risk of cyber incidents,[99] taking such actions may be particularly important to protect individuals. Conversely, giving covered institutions greater discretion to determine whether and when to provide notices could jeopardize affected

flags that are detected pursuant to the program. *See also infra* note 547.

[96] *See* proposed rule 248.30(b)(3)(iii). As noted above, a covered institution could delegate its responsibility for providing notice to an affected individual to a service provider, by contract, but the covered institution would remain responsible for any failure to provide a notice as required by the proposed rules. *See infra* section II.A.

[97] Affected individuals include individuals with whom the covered institution has a customer relationship, or are individuals that are customers of other financial institutions whose information has been provided to the covered institution, and whose sensitive information was, or is reasonably likely to have been, accessed or used without authorization. *See infra* note 127.

[98] *See infra* section II.A.4.e (Timing Requirements); *see also supra* note 7 and accompanying text (addressing environment of expanded risks).

[99] *See supra* note 7 and accompanying text.

individuals' ability to evaluate the risk of harm posed by an incident and choose how to respond to and remediate it.

A covered institution would not have to provide notice if, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, it determines that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.[100] To be clear, although the incident response program would be required to address information security incidents involving any form of customer information, the notice requirement would only be triggered by unauthorized access to or use of sensitive customer information.[101] Unauthorized access to or use of sensitive customer information presents an increased risk of harm to the affected individual and accordingly is the appropriate trigger for customer notification.[102]

The proposed amendment is designed to permit covered institutions to rebut the affirmative presumption of notification based on a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information. Such an investigation would have to provide a sufficient basis for the determination that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. In these limited circumstances, the proposed amendments would not require the covered institution to provide a notice.

In contrast, if a malicious actor has gained access to a customer information system and the covered institution simply lacked information indicating that any particular individual's data stored in that customer information system was or was not used in a manner that would result in substantial harm or inconvenience, a covered institution would not have a sufficient basis to make this determination.[103] In order to have a sufficient basis to determine that notice is not required, a covered institution's investigation would need to have revealed information sufficient for the institution to conclude that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.

For any determination that a covered institution makes that notice is not required, the covered institution generally should maintain a record of the investigation and basis for its determination.[104] Whether an investigation qualifies as reasonable would depend on the particular facts and circumstances of the unauthorized access or use. For example, unauthorized access that is the result of intentional intrusion by a bad actor may warrant more extensive investigation than inadvertent unauthorized access by an employee. The investigation may occur in parallel with an initial assessment and scoping of the incident and may build upon information generated from those activities, and the scope of the investigation may be refined by using available data and the results of ongoing incident response activities. Information related to the nature and scope of the incident may be relevant to determining the extent of the investigation, such as whether the incident is the result of internal unauthorized access or an external intrusion, the duration of the incident, what accounts have been compromised and at what privilege level, and whether and what type of customer information may have been copied, transferred, or retrieved without authorization.[105]

As discussed above, while some state laws currently include similar standards for providing notifications, the proposed rules would impose a minimum standard to help ensure all individuals would presumptively receive notifications.[106] Twenty-one states only require notice if, after an investigation, the institution finds that a risk of harm exists, and in eleven states, customer notification laws do not apply to entities subject to or in compliance with the GLBA.[107] We preliminarily believe that setting a minimum standard based on an affirmative presumption of notification appropriately balances the need for transparency (*i.e.,* the need for affected individuals to be informed so that they can take steps to protect themselves, including for example, by placing fraud alerts in credit reports) with concerns that the volume of notices that individuals would receive could erode their efficacy or lead to complacency by affected individuals. Notice of every incident could diminish the impact and effectiveness of the notice in a situation where enhanced vigilance is necessary.[108] Covered institutions likely would be able to send a single notice that complies with multiple regulatory requirements, which may reduce the number of notices an individual

[100] *See* proposed rule 248.30(b)(3)(iii). In 2003, the Banking Agencies also proposed a similar standard for customer notification, though it was not ultimately adopted. *See* Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice, 68 FR 47954 (Aug. 12, 2003) (''Banking Agencies' Proposing Release''). The proposed guidance stated that an institution should notify affected customers whenever it becomes aware of unauthorized access to sensitive customer information, unless the institution, after an appropriate investigation, reasonably concludes that misuse of the information is unlikely to occur. *See id.* at 47960. In adopting the Banking Agencies' Incident Response Guidance, the Banking Agencies indicated that they wanted to give institutions greater discretion in determining whether to send notices, to avoid alarming customers with too many notices and not to require institutions to prove a negative. *See* the Banking Agencies' Incident Response Guidance, *supra* note 47, at 15743. We preliminarily believe, however, that a presumption that individuals would be timely provided with the information in the notifications would enable them to make their own determinations regarding the incident.

[101] *See infra* section II.A.4.a and section II.A.4.b.

[102] Customer information that is not disposed of properly could trigger the requirement to notify affected individuals under proposed rule 248.30(b)(4)(i). For example, a covered institution whose employee leaves un-shredded customer files containing sensitive customer information in a dumpster accessible to the public would be required to notify affected customers, unless the institution has determined that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.

[103] *See also infra* section II.A.4.d (discussing the identification of affected individuals in such circumstances).

[104] Proposed rules 248.30(d), 240.17a–4, 240.17ad–7, 270.31a–1, 270.31a–2, and 275.204–2; *see infra* section II.C. The Commission's proposal includes an amendment to a CFR designation in order to ensure regulatory text conforms more consistently with section 2.13 of the Document Drafting Handbook. *See* Office of the Federal Register, Document Drafting Handbook (Aug. 2018 Edition, Revision 1.4, dated January 7, 2022), *available at https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf.* In particular, the proposal is to amend the CFR section designation for Rule 17Ad–7 (17 CFR 240.17Ad–7) to replace the uppercase letter with the corresponding lowercase letter, such that the rule would be redesignated as Rule 17ad–7 (17 CFR 240.17ad–7).

[105] For example, depending on the nature of the incident, it may be necessary to consider how a malicious intruder might use the underlying information in light of current trends in identity theft.

[106] A risk of harm provision under a particular state's rules may either (i) require a notice only after an entity performs a required analysis to determine that there is a reasonable likelihood of harm, or (ii) require notice unless a permitted analysis determines that there is no reasonable likelihood of harm. This latter approach is a stricter standard imposed by 22 states and is consistent with the standard we are proposing. *See* National Conference of State Legislatures, Security Breach Notification Laws, (''NCSL Security Breach Notification Law Resource''), *available at https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.*

[107] *See* NCSL Security Breach Notification Law Resource, *supra* note 106.

[108] Eight states do not have risk of harm provisions, including California and Texas. *See* NCSL Security Breach Notification Law Resource, *supra* note 106. In these states, notices must generally be provided in all cases of a breach.

receives. In addition, the proposed standard would help to improve security outcomes in general by incentivizing covered institutions to conduct more thorough investigations after an incident occurs, because a reasonable investigation provides the only means to rebut the presumption of notification. Reasonably designed policies and procedures generally should include that a covered institution would revisit a determination whether a notification is required based on its investigation if new facts come to light. For example, if a covered institution determines that risk of use in a manner that would result in substantial harm or inconvenience is not reasonably likely based on the use of encryption in accordance with industry standards at the time of the incident, but subsequently the encryption is compromised or it is discovered that the decryption key was also obtained by the threat actor, the covered institution generally should consider revisiting its determination.

We request comment on the proposed standard for notification to affected individuals, including the following:

28. The proposed standard requires providing notice to affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization. Is the proposed standard for providing notification sufficiently clear? Is a standard of ''reasonably likely'' appropriate? Should the trigger for notification be a determination by a covered institution that the risk of unauthorized access or use of sensitive customer information has occurred or is ''reasonably possible'' which would suggest a more expansive standard than ''likely''?

29. A covered institution can rebut the presumption of notification if it determines that, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. Is this standard ''not reasonably likely to be'' for rebutting the presumption to notify the appropriate standard? Should the standard be ''not reasonably possible''?

30. Should customer notification be required for any incident of unauthorized access to or use of sensitive customer information regardless of the risk of use in a manner that would result in substantial harm or inconvenience? Is there a risk that the volume of notices received under such a standard would inure affected individuals to notices of potentially harmful incidents and result in their not taking protective actions?

31. Do covered institutions expect to be able to perform reasonable investigations in order to rebut the notification presumption? Why or why not? Would it be helpful to include specific requirements for a reasonable investigation? Are there other factors that would influence whether a covered institution decides to conduct a reasonable investigation or notify individuals? If additional clarity would assist covered institutions in making these determinations, please explain.

32. Should we require a covered institution to revisit a determination that notification is not required based on its investigation if new facts come to light? If yes, should the rule provide specific requirements for a covered institution to revisit its determination?

33. Should we incorporate any additional aspects of the protections offered to individuals under state laws into the proposed rules? Alternatively, should any components of the proposal that offer additional protections to individuals beyond some states' laws be omitted? Please explain.

34. Under what scenarios would a covered institution be unable to comply with both the proposed rules and applicable state laws? Please explain.

35. Should the proposed rules be modified in order to help ensure covered institutions would not need to provide multiple notices in order to satisfy obligations under the proposed rules and similar state laws?

b. Definition of ''Sensitive Customer Information''

We propose to define the term ''sensitive customer information'' to mean ''any component of customer information alone or in conjunction with any other information, the compromise of which could create a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information.'' [109] This definition is intended to cover the types of information that could most likely be used in a manner that would result in substantial harm or inconvenience, such as to commit fraud, including identify theft.[110] We do not believe that notification would be appropriate if unauthorized access to customer information is not reasonably likely to cause a harm risk because a customer is unlikely to need to take protective measures. Moreover, the large volume of notices that individuals might receive in the event of unauthorized access to such customer information could erode their efficacy. Accordingly, the proposed definition is limited to information that, if compromised, could create a ''reasonably likely risk of substantial harm or inconvenience.'' [111]

The definition also provides examples of the types of information included within the definition of ''sensitive customer information.'' [112] These examples include certain customer information identified with an individual that, without any other identifying information, could create a substantial risk of harm or inconvenience to an individual identified with the information.[113] For example, Social Security numbers alone, without any other information linked to the individual, would be sensitive because they have been used in ''Social Security number-only'' or ''synthetic'' identity theft. In this type of identity theft, a Social Security number,

[109] *See* proposed rule 248.30(e)(9)(i). Our proposed definition is limited to information identified with customers of financial institutions. *See* proposed rule 248.30(e)(5)(i); *infra* section II.C.1. Information subject to the safeguards rule, including the incident response program and customer notice requirements would be information pertaining to a covered institution's customers and to customers of other financial institutions that the other institutions have provided to the covered institution. *See* proposed rule 248.30(a); *infra* section II.C.1.

[110] *See supra* note 6 and accompanying text (noting increased risks of unauthorized access and use of personal information).

[111] *See* proposed rule 248.30(e)(9)(i).

[112] *See* proposed rule 248.30(e)(9)(ii). While the information cited in these examples is sensitive customer information, when that information is encrypted, it would not necessarily be sensitive customer information. That cipher text (*i.e.,* the data rendered in a format not understood by people or machines without an encryption key) may be analyzed as such (rather than as the decrypted sensitive customer information, *e.g.,* a Social Security number referenced in the examples provided in 248.30(e)(9)(ii)(A)(1)–(4) or in 248.30(e)(9)(ii)(B), and be determined not to be sensitive customer information). And as discussed *infra* note 119, a covered institution could consider the strength of the encryption and the security of the associated decryption key as factors in determining whether information is sensitive customer information. Accordingly, in certain circumstances, information that is an encrypted representation of, for example, a customer's Social Security number may not be sensitive customer information under the proposed definition.

[113] In this respect, our proposed definition is broader than the definition of ''sensitive customer information'' provided in the Banking Agencies' Incident Response Guidance. That definition includes a customer's name, address, or telephone number, only in conjunction with other pieces of information that would permit access to a customer account. Our proposed definition would also be broader than similar definitions of personal information used in some state statutes to determine the scope of information that, when subject to breaches, requires notification. *See infra* note 103 and accompanying text.

combined with identifying information of another real or fictional person, is used to create a new (or ''synthetic'') identity, which then may allow the malicious actor to, among other things, open new financial accounts.[114] A similar sensitivity exists with other types of identifying information that can be used alone to authenticate an individual's identity. A biometric record of a fingerprint or iris image would present a significant threat of account fraud, identity theft, or other substantial harm or inconvenience if the image is used to authenticate a customer of a financial institution.

The proposed definition also provides examples of combinations of identifying information and authenticating information that could create a harm risk to an individual identified with the information. These examples include information identifying a customer, such as a name or online user name, in combination with authenticating information such as a partial Social Security number, access code, or mother's maiden name. A mother's maiden name, for example, in combination with other identifying information, would present a harm risk because it may be so widely used for authentication purposes, even if the maiden name is not used as a password or security question at the covered institution. For these reasons, we are proposing that covered institutions should notify customers if this sensitive information is compromised.[115]

In determining whether the compromise of customer information could create a reasonably likely harm risk to an individual identified with the information, a covered institution could consider encryption as a factor.[116] Most states except encrypted information in certain circumstances, including, for example, where the covered institution can determine that the encryption offers certain levels of protection or the decryption key has not also been compromised.[117]

Specifically, encryption of information using current industry standard best practices is a reasonable factor for a covered institution to consider in making this determination. To the extent encryption in accordance with current industry standards minimizes the likelihood that the cipher text could be decrypted, it would also reduce the likelihood that the cipher text's compromise could create a risk of harm, as long as the associated decryption key is secure. Covered institutions may also reference commonly used cryptographic standards to determine whether encryption does, in fact, substantially impede the likelihood that the cipher text's compromise could create such risks.[118] As industry standards continue to develop in the future, covered institutions generally should review and update, as appropriate, their encryption practices.[119]

We request comment on the proposed rule's definition of sensitive customer information, including the following:

36. Should we broaden the proposed definition of ''sensitive customer information'' to cover additional information? Alternatively, should we remove some information covered under the proposed definition or conform the definition to the Banking Agencies' Incident Response Guidance?[120] Are there operational or compliance challenges to the proposed definition?

37. Should the rule limit the definition to information or data elements that alone or when linked would permit access to an individual's accounts? Should the rule specify the identifying information or data elements (*e.g.,* name, address, Social Security number, driver's license or other government identification number, account number, credit or debit card number)?

38. Is the proposed standard in the definition, which covers any component of customer information the compromise of which could create a ''reasonably likely'' risk of substantial harm or inconvenience, the appropriate standard? Do commenters believe that a different standard would be more appropriate for the proposed rule? For example, would a ''reasonably foreseeable'' standard be more appropriate, even if harm is not likely to occur? Instead of covering any component of customer information the compromise of which ''could'' create a reasonably likely risk of substantial harm or inconvenience, should the standard cover components of customer information that ''would'' create such risk?

39. Should we provide additional or alternative examples of what constitutes ''sensitive customer information'' in the rule text? Do covered persons or individuals widely use other pieces of information for authentication purposes, such that our examples should explicitly reference other authenticating or identifying information that, in combination, could create a harm risk?

40. Is encryption a relevant factor to a covered institution's determination of the harm risk? Could encrypted information not present such risks because of the current strength of the relevant encryption algorithm, even if this could change in the future because, for example, of future developments in quantum computing? If a covered institution determines that encrypted information is not sensitive customer information, should the covered institution be required to monitor decryption risk based on, for example, advances in technology or a future compromise of a decryption key? If such risks do arise, should a covered institution be required to deliver a notice for a past incident?

41. Do covered institutions' encryption practices commonly adhere to particular cryptographic standards, such as those included in FIPS 140–3?[121] Should we recognize adherence to

[114] *See, e.g., generally* Michael Kan, *More Crooks Tapping ''Synthetic Identity Fraud'' to Commit Financial Crimes,* PCMag (June 8, 2022), *available at https://www.pcmag.com/news/more-crooks-tapping-synthetic-identity-fraud-to-commit-financial-crimes* (describing recent increased frequency of synthetic identity fraud).

[115] While some states currently define the scope of personal information incurring a notification obligation in ways that generally align with our proposed definition of ''sensitive customer information,'' at least 12 states generally do not include information we propose to include, such as identifying information that, in combination with authenticating information, would create a substantial risk of harm or inconvenience. *See* NCSL Security Breach Notification Law Resource, *supra* note 106.

[116] We also considered a safe harbor from the definition of sensitive customer information for encrypted information. *See infra* section III.F.

[117] *See e.g.,* R.I. Gen. Laws sec. 11–49.3–3(a) (defining a security breach as unauthorized access to or acquisition of certain ''unencrypted, computerized data information,'' and defining ''encrypted'' as data transformed ''through the use of a one hundred twenty-eight (128) bit or higher algorithmic process into a form in which there is a low probability of assigning meaning without use of a confidential process or key'' unless the data was ''acquired in combination with any key, security code, or password that would permit access to the encrypted data.''). *See also* NCSL Security Breach Notification Law Resource, *supra* note 106.

[118] For example, we understand that standards included in Federal Information Processing Standard Publication 140–3 (FIPS 140–3) are widely referenced by industry participants.

[119] Encryption alone does not determine whether data is ''sensitive customer information.'' For example, to the extent a covered institution determines that cipher text is itself sensitive customer information, for example because the encryption was compromised, an investigation of the incident would likely indicate that there is a risk that the compromised information could be used in a way to result in substantial harm or inconvenience. A covered institution may, however, still be able to determine that the risk of use in this manner is not reasonably likely for reasons unrelated to the encryption, including for example, because the cipher text was only momentarily compromised. *See generally supra* note 115 and accompanying text.

[120] *See supra* note 116.

[121] *See supra* note 121.

particular standards as a requirement when determining that encryption is relevant to a covered institution's determination that cipher text's compromise would not create a reasonably likely harm risk to an individual identified with the information?

42. Should we except from the definition of ''sensitive customer information'' encrypted information, as certain states do? Should any such exception only apply in limited circumstances, including, for example, for certain types of information or where the covered institution can determine that the encryption offers certain levels of protection (including where the decryption key has not been compromised)? Would such an exception prevent individuals from receiving beneficial notifications, including where, for example, information could be easily decrypted? Should any other type of information be excepted?

c. Definition of ''Substantial Harm or Inconvenience''

We propose to define ''substantial harm or inconvenience'' to mean ''personal injury, or financial loss, expenditure of effort or loss of time that is more than trivial,'' and provide examples of included harms.[122] As noted above, Regulation S–P requires a covered institution's policies and procedures to be reasonably designed to, among other things, protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.[123] Although GLBA and the safeguards rule use the term ''substantial harm or inconvenience,'' neither defines the term. The proposed definition is intended to include a broad range of financial and non-financial harms and inconveniences that may result from failure to safeguard sensitive customer information.[124] For example, a malicious actor could use sensitive customer information about an individual to engage in identity theft or as a means of extortion by threatening to make the information public unless the individual agrees to the malicious actor's demands.[125] This could cause a customer to incur financial loss, or experience personal injury, such as physical harm or damaged reputation, or cause the customer to expend effort to remediate the breach or avoid losses. All of these effects would be included under our proposed definition.

The proposed definition would include all personal injuries due to the significance of their impact on customers. However, the proposed definition includes other harms or inconveniences only when they are, in each case, more than trivial. More than trivial financial loss, expenditure of effort, or loss of time would generally include harms that are likely to be of concern to customers and are of the nature such that customers are likely to take further action to protect themselves. By contrast, where a covered institution, its affiliate, or the individual simply changes the individual's account number as the result of an incident, this likely would be a trivial effect since it is not likely to be of concern to the individual or of the nature that the individual would be likely to take further action. Similarly, in the absence of additional effects, accidental access of information by an employee or other agent of the covered institution, its affiliate, or its service provider would also likely be trivial harms. We do not intend for covered institutions to design programs and incur costs to protect customers from harms of such trivial significance that the customer would be unconcerned with remediating. In this regard, our proposal to adopt standards that protect customers against substantial harm or inconvenience from failures to safeguard information is intended to be consistent with the purposes of the GLBA and Congress's goals.[126]

We request comment on the proposed rule's definition of substantial harm or inconvenience, including the following:

43. Should we expand the proposed definition of ''substantial harm or inconvenience''? Alternatively, should we exclude some harms covered under the proposed definition? Should we exclude some smaller (but more than trivial) effects? If so, please explain why the rule should not address these potential harms.

44. Do commenters believe that the proposed rule should reference a term or terms other than ''substantial'' and ''more than trivial'' in describing the types of harms that meet our definition? Are additional or alternative clarifications needed? Is ''more than trivial'' the appropriate standard? Should we instead use a term such as ''immaterial'' or ''insignificant''?

45. Would a numerical or other objective standard for ''substantial'' harm or inconvenience be appropriate, given the definition includes harms that would present substantial difficulty in quantifying, including damaged reputation? If so, please describe how such an objective standard could be designed and provide examples.

46. Should a harm that is a ''personal injury,'' such as physical, emotional, or reputational harm, only be included in the proposed definition if it is more than ''trivial,'' similar to our proposed treatment of financial loss, expenditure of effort or loss of time? Should the standard for a harm that is a ''personal injury'' be something other than ''trivial?''

47. What kinds of financial loss, expenditure of effort or loss of time would individuals likely be unconcerned with and/or likely not to try to mitigate? Please provide data, such as customer surveys, to support your response.

48. Are the rule's proposed examples of certain effects that would be unlikely to meet the definition of substantial harm or inconvenience appropriate? If so, please provide examples and explain why.

d. Identification of Affected Individuals

Under the proposed rules, covered institutions would be required to provide a clear and conspicuous notice to each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.[127] We believe notices

[122] *See* proposed rule 248.30(e)(11).

[123] *See supra* section I.A.

[124] Data security incidents may result in varied types of harms. *See generally* Alex Scroxton, *Data Breaches Are a Ticking Timebomb for Consumers, ComputerWeekly.com* (Feb. 9, 2021), *available at https://www.computerweekly.com/news/252496079/Data-breaches-are-a-ticking-timebomb-for-consumers* (citing a report in which consumers reported financial loss, stress, and loss of time among other effects, from data breaches); Jessica Guynn, *Anxiety, Depression and PTSD: The Hidden Epidemic of Data Breaches and Cyber Crimes,* USA TODAY (Feb. 24, 2020), *available at https://www.usatoday.com/story/tech/conferences/2020/02/21/data-breach-tips-mental-health-toll-depression-anxiety/4763823002/* (describing significant psychological effects of data breach incidents); Eleanor Dallaway, *#ISC2Congress: Cybercrime Victims Left Depressed and Traumatized,* INFO. SEC. (Sept. 12, 2016), *available at https://www.infosecurity-magazine.com/news/isc2congress-cybercrime-victims/* (describing mental health effects of cybercrime).

[125] The proposed definition of ''sensitive customer information'' is discussed *supra* in section II.A.4.b.

[126] *See* 15 U.S.C. 6801(a) (stating that it is ''the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of these customers' nonpublic personal information.''). *See also supra* note 26, *infra* note 160, and accompanying text.

[127] As discussed below, proposed rule 248.30(a) explains that the safeguards rule, including the response program and customer notification,

Continued

should be provided to these affected individuals because they would likely need the information contained in the notices to respond to and remediate the incident.

We understand, however, that notwithstanding a covered institution's determination to provide notices, the identification of affected individuals may be difficult in circumstances where a malicious actor has accessed or used information without authorization in a customer information system. It may, for example, be clear that a malicious actor gained access to the entire customer information system, but the covered institution may not be able to determine which specific individuals' data has been accessed or used. In such cases, we preliminarily believe that all individuals whose sensitive customer information is stored in that system should be notified so that they may have an opportunity to review the information in the required notification, and take remedial action as they deem appropriate. For example, individuals may be more vigilant in reviewing account statements or place fraud alerts in a credit report. They may also be able to place a hold on opening new credit in their name, or take other protective actions. Accordingly, the proposed rule would require a covered institution that is unable to identify which specific individuals' sensitive customer information has been accessed or used without authorization to provide notice to all individuals whose sensitive customer information resides in the affected system that was, or was reasonably likely to have been, accessed or used without authorization.[128]

We request comment on the proposed rule's requirements for the identification of affected individuals, including the following:

49. Does the standard ''all individuals whose sensitive customer information resides in the customer information system'' adequately cover all of the individuals who are potentially at risk as a result of unauthorized access to or use of a customer information system? Should the rule require notice to additional or different individuals?

50. To the extent covered institutions are not able to determine which individuals are affected with certainty, should the rule require notice only to those individuals whose sensitive customer information was ''reasonably likely'' to have been accessed or used without authorization? Alternatively, should the rule require notice unless it is ''unlikely'' that the information was not accessed, or would some other standard be appropriate? Please address how any such standard would help ensure that all individuals potentially at risk because of unauthorized access to or use of the customer information system receive notice.

51. The proposed rule would require covered institutions to provide notice to each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization, including customers of other financial institutions where information has been provided to the covered institution. Do covered institutions have the contact information for customers of other financial institutions necessary to send the notices as required? Alternatively, should the rule require only that a covered institution provide notices to their own customers or to the institution that provided the covered institution the sensitive customer information? Are there other operational or compliance challenges to identifying affected individuals? Would this requirement result in the practical effect of requiring covered institutions to send notices to all individuals potentially subject to a breach of their systems (regardless of whether they are a customer or not) due to the difficulty of determining an affected individual's status?

e. Timing Requirements

As proposed, the rule would require covered institutions to provide notices as soon as practicable, but not later than 30 days, after the covered institution becomes aware that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred except under limited circumstances, discussed below.[129] We propose that covered institutions provide notices ''as soon as practicable'' to expeditiously notify individuals whose information is compromised, so that these individuals may take timely action to protect themselves from identity theft or other harm. The amount of time that would constitute ''as soon as practicable'' may vary based on several factors, such as the time required to assess, contain, and control the incident, and if the institution conducts one, the time required to investigate the likelihood the information could be used in a manner that would result in substantial harm or inconvenience. For example, ''as soon as practicable'' may be longer with an incident involving a significant number of customers.

Consistent with the approach taken by many states, we have included an outside date to ensure that all covered institutions meet a minimum standard of timeliness. We preliminarily believe that a 30-day period after becoming aware that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred would permit customers to take actions in response to an incident, including by placing fraud alerts on relevant accounts or changing passwords used to access accounts.[130] The proposal's 30-day period would establish a shorter notification deadline than those currently used in 15 states, and would also offer enhanced protections to individuals in 32 states with laws that do not include an outside date.[131] At the same time, this 30-day period would generally allow sufficient time for covered institutions to perform their assessments, take remedial measures, conclude any investigation, and prepare notices.[132] Accordingly, we preliminarily believe that establishing a minimum requirement to provide notifications as soon as practicable, together with a 30-day outside date, strikes the appropriate balance between promoting timely notice to affected individuals and allowing institutions sufficient time to implement their incident response programs.[133]

applies to all customer information that pertains to individuals with whom the covered institution has a customer relationship or to customers of other financial institutions and has been provided to the covered institution. *See infra* section II.C.1. Accordingly, proposed rule 248.30(b)(3)(iii) and (b)(4)(i) refers to ''affected individuals whose sensitive customer information was or is reasonably likely to have been accessed or used without authorization'' rather than ''customer.'' This is because the term ''customer'' is defined in section 248.3(j) as ''a consumer that has a customer relationship with the [covered] institution,'' and would not include customers of financial institutions that had provided information to the covered institution (within the scope of proposed rule 248.30(a)).

[128] *See* proposed rule 248.30(b)(4)(ii).

[129] *See* proposed rule 248.30(b)(4)(iii).

[130] Nineteen states provide an outside date for providing customer notification, which range from 30 to 90 days. *See, e.g.,* Colo. Rev. Stat. sec. 6–1–716(2) (providing that notifications be provided not later than thirty days after the date of determination that a security breach occurred); Conn. Gen. Stat. sec. 36a–701b (b)(1) (providing that notifications be provided not later than ninety days after the date of determination that a security breach occurred).

[131] *See* NCSL Security Breach Notification Law Resource, *supra* note 106.

[132] *See supra* section II.A.4.a (discussing the standard of notice, including that a covered institution must provide clear and conspicuous notice unless it has determined, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience). *See* proposed rule 284.30(b)(4)(i).

[133] An institution that has completed the required tasks and has undertaken an investigation before the end of the 30-day period would be required to

Further, the proposed requirement that a covered institution have written policies and procedures that provide for a systematic response to each incident also may facilitate the institution's preparation and ability to perform an assessment, remediation, and investigation in a timely manner and within the 30-day period required for providing customer notices. At the same time, a covered institution would be required to provide notice within 30 days after becoming aware that an incident occurred even if the institution had not completed its assessment or control and containment measures.

Similarly, the proposal would effectively impose a uniform 30-day notification time-period and would not generally provide for a notification delay. For example, when there is an ongoing internal or external investigation related to an incident involving sensitive customer information.[134] On-going internal or external investigations—which often can be lengthy—on their own would not provide a basis for delaying notice to customers that their sensitive customer information has been compromised.[135] Additionally, any such delay provision could undermine timely and uniform customer notification that customers' sensitive customer information has been compromised, as investigations and resolutions of incidents may occur over an extended period of time and may vary widely in timing and scope.

At the same time, we recognize that a delay in customer notification may facilitate law enforcement investigations aimed at apprehending the perpetrators of the incident and preventing future incidents. Many states have laws that either mandate or allow entities to delay providing customer notifications regarding an incident if law enforcement determines that notification may impede its investigation.[136] The principal function of such a delay would be to allow a law enforcement or national security agency to keep a cybercriminal unaware of their detection.

The proposed rule would allow a covered institution to delay providing notice after receiving a written request from the Attorney General of the United States that the notice required under this rule poses a substantial risk to national security.[137] The covered institution may delay such a notice for an initial period specified by the Attorney General of the United States, but not for longer than 15 days. The notice may be delayed an additional 15 days if the Attorney General of the United States determines that the notice continues to pose a substantial risk to national security. This would allow a combined delay period of up to 30 days, upon the expiration of which the covered institution must provide notice immediately.

A covered institution, in certain instances, may be required to notify customers under the proposal even though that covered institution could have separate delay reporting requirements under a particular state law. On balance, it is our current view that timely customer notification would allow the customer to take remedial actions and, thereby, would justify providing only for a limited delay.[138]

We request comment on the proposed rule's notification timing requirements, including the following:

52. Does this proposed requirement provide covered institutions with sufficient time to perform assessments, collect the information necessary to include in customer notices, perform an investigation if appropriate, and provide notices? Alternatively, does the proposed ''as soon as practicable'' or 30 day outside date provide too much time? Should the rule require institutions to provide notice ''as soon as possible,'' for example? Should the rule provide parameters to define ''as soon as practicable,'' ''as soon as possible,'' ''as soon as reasonably practicable'' or an alternate standard? If so, please describe the parameters or other standard. Should the rule require less time for an outside date, such as 10, 15, or 20 days? Should the rule provide more time for an outside date, such as 45, 60, or 90 days? Please be specific on the appropriate outside date and the basis for the shorter or longer time period. Also, please specify the potential costs and benefits to a different outside date.

53. Should the proposed timing requirement begin to run upon an event other than ''becoming aware that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred''? Should the timing requirement begin to run, for example, after the covered institution ''reasonably should have been aware'' of the incident or, alternatively, after completing its assessment of the incident or containment? If the timing requirement should begin upon ''becoming aware that that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred,'' should we provide covered institutions with examples of what would constitute becoming aware?

54. Should the proposed rules incorporate any exceptions from the timing requirement that would allow for delays under limited circumstances? If so, what restrictions or conditions should apply to any such delay and why?

55. Are there other challenges to meeting the proposed timing requirements, including the requirement to provide notices within 30 days of becoming aware of the incident? If yes, please describe.

56. What operational or compliance challenges arise from the proposed limited delay for notice or its expiration? Should the proposed rule have a different delay for notice, for example, by providing that the Commission shall allow covered institutions to delay notification to customers where any law enforcement agency requests such a delay from the covered institution? If so, what restrictions or conditions should apply to any such law enforcement delay, for example, a certification, or a different outside time limit on the delay?

f. Notice Contents and Format

We are proposing to require that notices include key information with details about the incident, the breached data, and how affected individuals could respond to the breach to protect themselves. This requirement is

provide notices to affected customers ''as soon as practicable.'' For example, an incident of unauthorized access by a single employee to a limited set of sensitive customer information may take only a few days to assess, remediate, and investigate. In those circumstances we believe a covered institution generally should provide notices to affected individuals at the conclusion of those tasks and as soon as the notices have been prepared.

[134] Internal investigation refers to an investigation conducted by a covered institution or a third party selected by a covered institution. An external investigation refers to any investigation not conducted by, or at the request of, a covered institution.

[135] *See* Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Release No. 33–10459 (Feb. 26, 2018) [83 FR 8166, 8169 (Feb. 26, 2018)].

[136] Of the 40 states that allow entities to delay providing notices to individuals for law enforcement investigations, 11 deem entities to be in compliance with state notification laws if the entity is subject to or in compliance with GLBA, and nine states mandate the delay of notices to individuals for law enforcement investigations, with forty states permitting such delays. *See* NCSL Security Breach Notification Law Resource, *supra* note 106. *See supra* note 14 for information regarding the interaction between Regulation S–P and state laws.

[137] Any such written request from the Attorney General of the United States would be subject to the recordkeeping requirements for covered institutions discussed in section II.D.

[138] For example, after timely notice of a breach, individuals can take important steps to safeguard their information, including changing passwords, freezing their accounts, and putting a hold on their credit.

designed to help ensure that covered institutions provide basic information to affected individuals that would help them avoid or mitigate substantial harm or inconvenience.

More specifically, some of the information required, including information regarding a description of the incident, type of sensitive customer information accessed or used without authorization, and what has been done to protect the sensitive customer information from further unauthorized access or use, would provide customers with basic information to help them understand the scope of the incident and its potential ramifications.[139] We also propose to require covered institutions to include contact information sufficient to permit an affected individual to contact the covered institution to inquire about the incident, including a telephone number (which should be a toll-free number if available), an email address or equivalent method or means, a postal address, and the name of a specific office to contact for further information and assistance, so that individuals can more easily seek additional information from the covered institution.[140] All of this information may help an individual assess the risk posed and whether to take additional measures to protect against harm from unauthorized access or use of their information.

Similarly, if the information is reasonably possible to determine at the time the notice is provided, information regarding the date of the incident, the estimated date of the incident, or the date range within which the incident occurred would help customers understand the circumstances related to the breach.[141] We understand that a covered institution may have difficulty determining a precise date range for certain incidents because it may only discover an incident well after an initial time of access. As a result, similar to the approach taken by California, the covered institution would only be required to include a date, or date range, if it is possible to determine at the time the notice is provided.[142]

Finally, we propose that covered institutions include certain information to assist individuals in evaluating how they should respond to the incident. Specifically, if the individual has an account with the covered institution, the proposed rule would require inclusion of a recommendation that the customer review account statements and immediately report any suspicious activity to the covered institution.[143] The proposed rule would also require covered institutions to explain what a fraud alert is and how an individual may place a fraud alert in credit reports.[144] Further, the proposed rule would require inclusion of a recommendation that the individual periodically obtain credit reports from each nationwide credit reporting company and have information relating to fraudulent transactions deleted, as well as explain how a credit report can be obtained free of charge.[145] In particular, information addressing potential protective measures could help individuals evaluate how they should respond to the incident. We also propose for notices to include information regarding FTC and *usa.gov* guidance on steps an individual can take to protect against identity theft, a statement encouraging the individual to report any incidents of identity theft to the FTC, and include the FTC's website address.[146] This would give individuals resources for additional information regarding how they can respond to an incident.

We propose that covered institutions should be required to provide the information specified in proposed rule 248.30(b)(4)(iv) in each required notice. While we recognize that relevant information may vary based on the facts and circumstances of the incident, we believe that customers would benefit from the same minimum set of basic information in all notices. We propose, therefore, to permit covered institutions to include additional information, but the rule would not permit omission of the prescribed information in the notices provided to affected individuals.

The proposed rule would require covered institutions to provide the notice in a clear and conspicuous manner and by means designed to ensure that the customer can reasonably be expected to receive actual notice in writing.[147] Notices, therefore, would be required to be reasonably understandable and designed to call attention to the nature and significance of the information required to be provided in the notice.[148] Accordingly, to the extent that a covered institution includes information in the notice that is not required to be provided to customers under the proposed rules or provides notice contemporaneously with other disclosures, the covered institution would still be required to ensure that the notice is designed to call attention to the important information required to be provided under the proposed rule; additional information generally should not prevent covered institutions from presenting required information in a clear and conspicuous manner. The requirement to provide notices in writing, further, would ensure that customers receive the information in a format appropriate for receiving important information, with accommodation for those customers who agree to receive the information electronically. This proposed requirement to provide notice ''in writing'' could be satisfied either through paper or electronic means, consistent with existing Commission guidance on electronic delivery of documents.[149] Notification in other formats, including, for example, by a recorded telephone message, may not be retained and referenced as easily as a notification in writing. These requirements would help ensure that customers are provided notifications and alerted to their importance.

We request comment on the notification content, format, and delivery requirements, including the following:

57. Should we require that notices include additional information? If so, what specific information should we

[139] *See* proposed rule 248.30(b)(4)(iv)(A)–(B).

[140] *See* proposed rule 248.30(b)(4)(iv)(D). A method or means equivalent to email generally, for example, includes an internet web page easily allowing for the submission of inquiries.

[141] *See* proposed rule 248.30(b)(4)(iv)(C).

[142] *See* Cal. Civ. Code sec. 1798.29(d)(2).

[143] *See* proposed rule 248.30(b)(4)(iv)(E).

[144] *See* proposed rule 248.30(b)(4)(iv)(F). We recognize that, under the Fair Credit Reporting Act (15 U.S.C. 1681a(d)), individuals may obtain ''consumer reports'' from consumer reporting agencies. Nevertheless, we refer to ''credit reports'' in proposed rule 248.30(b)(4)(iv)(G), in part, because the Banking Agencies' Incident Response Guidance also includes a requirement that notices include a recommendation that customers obtain ''credit reports,'' and in part, because we believe individuals would generally be more familiar with this term than the term ''consumer reports.'' *See, e.g.,* Consumer Financial Protection Bureau (''CFPB''), *Check your credit, https://www.consumerfinance.gov/owning-a-home/prepare/check-your-credit/* (explaining how to check credit reports); CFPB, *Credit reports and scores, https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/* (explaining how to understand credit reports and scores, how to correct errors and improve a credit record).

[145] *See* proposed rule 248.30(b)(4)(iv)(G)–(H).

[146] *See* proposed rule 248.30(b)(4)(iv)(I). *See, e.g.,* Identity Theft: How to Protect Yourself Against Identity Theft and Respond if it Happens, *available at https://www.usa.gov/identity-theft.*

[147] *See* proposed rule 248.30(b)(4)(i); *see also* 17 CFR 248.9(a) (delivery requirements for privacy and opt out notices) and 17 CFR 248.3(c)(1) (defining ''clear and conspicuous'').

[148] *See* 17 CFR 248.3(c)(2) (providing examples explaining what is meant by the terms ''reasonably understandable'' and ''designed to call attention'').

[149] *See* Use of Electronic Media by Broker Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, 61 FR 24644 (May 15, 1996); Use of Electronic Media, 65 FR 25843 (May 4, 2000).

include? Please explain why any recommended additional information would be important to include.

58. Is there prescribed notice information that we should eliminate or revise? Please explain. For example, should we add information about security freezes on credit reports, and should that replace fraud alert information? Should the required information on the notice to assist individuals in evaluating how they should respond to the incident be replaced? Please explain. For example, should the notice instead be required to include an appropriate website that describes then-current best practices in how to respond to an incident? Are there other websites, for example, *IdentityTheft.gov,* that should be included in the notice?

59. Should some of the information we propose to include in the notices only be required in limited circumstances? For example, should we only require including information relating to credit reports if the underlying incident relates to access or use of a subset of sensitive customer information (perhaps only information of a particular financial nature)? Should covered institutions be able to determine whether to provide certain information ''as appropriate'' on a case-by-case basis? If so, please explain which information and why.

60. In what other formats, if any, should we permit covered institutions to provide notices? What formats do covered institutions customarily use to communicate with individuals (*e.g.,* text messages or some other abbreviated format that might require the use of hyperlinks) and for which types of communications are those formats generally used? To the extent we allow such additional formats, would such notices adequately signal the significance of the information to the individual—or otherwise present disadvantages to covered institutions or individuals?

61. The proposed rule amendments would require that covered institutions provide certain contact information sufficient to permit an individual to contact the covered institution to inquire about the incident. Should we require additional or different contact information? Is the required contact information appropriate or would a general customer service number suffice? Should the amendments also require that covered institutions ensure that they have reasonable policies and procedures in place, including trained personnel, to respond appropriately to customer inquiries and requests for assistance?

62. Should we require that covered institutions include specific and standardized information about steps to protect against identity theft, instead of requiring inclusion of information about online guidance from the FTC and *usa.gov*?

63. Should we require that covered institutions reference ''consumer reports'' instead of ''credit reports'' in notifications under the proposed rules? Would individuals be more familiar with the term ''credit report''?

64. To the extent that a covered institution determines it is not reasonably possible to provide in the notice information regarding the date of the incident, the estimated date of the incident, or the date range within which the incident occurred, should that financial institution be required to state this to customers? In addition, should the institution be required to state why it is not possible to make such a determination?

65. Should the notice require that covered institutions describe what has been done to protect the sensitive customer information from further unauthorized access or use? Would this description provide a roadmap for further incidents? If yes, is there other information rather than this description that may help an individual understand what has been done to protect their information?

66. Should we incorporate other prescriptive formatting requirements (*e.g.,* length of notice, size of font, etc.) for the notice requirement under the proposed rules?

67. Should we require covered institutions to follow plain English or plain writing principles?

B. Remote Work Arrangement Considerations

Following the onset of the COVID–19 pandemic in the United States in 2020, the use of remote work arrangements has expanded significantly throughout the labor force. The U.S. Census Bureau recently announced that the number of people primarily working from home tripled between 2019 and 2021, from 5.7% to 17.9% of all workers.[150] In the financial services industry specifically, the Bureau of Labor Statistics found in its 2021 Business Response Survey that firms reported 27.5% of jobs in the industry currently involve full-time telework, with a total of 45% of jobs involving teleworking ''at least some of the time.''[151]

Although recent reports indicate that a growing number of workers are returning to the office,[152] as certain members of the securities industry have previously noted, when covered institutions permit their own employees to work from remote locations, rather than one of the firm's offices, it raises particular compliance questions under Regulation S–P.[153] In the case of the proposed rule, a covered institution's policies and procedures under the safeguards rule would need to be reasonably designed to ensure the security and confidentiality of customer information, protect against any threats or hazards to the security or integrity of customer information, and protect against the unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.[154] Similarly, under the proposed amendments to the disposal rule, covered institutions, other than notice-registered broker-dealers, would need to adopt and implement written policies and procedures under the disposal rule that address the proper disposal of consumer information and customer information according to a standard of taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[155] In satisfying each of these proposed obligations, covered institutions will need to consider any additional challenges raised by the use of remote work locations within their policies and procedures.

[150] Press Release, *U.S. Census Bureau releases new 2021 American Community Survey 1-year estimates for all geographic areas with populations of 65,000 or more* (Sept.15, 2022), *available at https://www.census.gov/newsroom/press-releases/2022/people-working-from-home.html#:~:text=SEPT.,by%20the%20U.S.%20Census%20Bureau.*

[151] Bureau of Labor Statistics, *Telework during the COVID–19 pandemic: estimates using the 2021 Business Response Survey* (Mar. 2022), *available at https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm#_edn6.*

[152] *See* Joseph Pisiani and Kailyn Rhone, *U.S. Return-to-Office Rate Rises Above 50% for First Time Since Pandemic Began,* Wall Street Journal (Feb. 1, 2023), *available at https://www.wsj.com/articles/u-s-return-to-office-rate-rises-above-50-for-first-time-since-pandemic-began-11675285071.*

[153] *See e.g.,* Letter from Michael Decker, Senior Vice President, Bond Dealers of America, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, re FINRA Regulatory Notice 20–42 (Feb. 16, 2021), *available at https://www.finra.org/sites/default/files/NoticeComment/Bond%20Dealers%20of%20America%20%5BMichael%20Decker%5D%20-%20FINRA_COVID_lessons_final.pdf;* letter from Kelli McMorrow, Head of Government Affairs, American Securities Association, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, re FINRA Regulatory Notice 20–42 (Feb. 16, 2021), *available at https://www.finra.org/sites/default/files/NoticeComment/American%20Securities%20Association%20%5BKelli%20McMorrow%5D%20-%202021.02.16%20-%20ASA%20FINRA%20Covid%20Lessons%20Learned.pdf.*

[154] *See* proposed rule 248.30(b)(2).

[155] *See* proposed rule 240.30(c).

In light of these considerations, we request comment on whether the remote work arrangements of the personnel of covered institutions should be addressed under both the safeguards rule and the disposal rule, including as to the following:

68. Should the proposed safeguards rule and/or the proposed disposal rule be amended in any way to account for the use of remote work arrangements by covered institutions? If so, how? How would such amendments impact the costs and benefits of the proposed rule?

69. Are there any additional costs and/or benefits of the proposed rule related to remote work arrangements that the Commission should be aware of? If so, in particular, how would those be impacted by whether or not remote work arrangements by covered institutions have increased, decreased, or remained the same? If so, please explain, and please provide any data available.

70. Are there any specific aspects of the proposed safeguards rule or the disposal rule, relating to compliance with either rule where the covered institution permits employees to work remotely, on which the Commission should provide guidance to covered institutions? If so, please explain.

C. Scope of Information Protected Under the Safeguards Rule and Disposal Rule

The Commission adopted the safeguards rule and the disposal rule at different times under different statutes—respectively, the GLBA and the FACT Act—that differ in the scope of information they cover. We are proposing to broaden and more closely align the information covered by the safeguards rule and the disposal rule by applying the protections of both rules to ''customer information,'' a newly defined term. We also propose to add a new section that describes the extent of information covered under both rules, which includes nonpublic personal information that a covered institution collects about its own customers and that it receives from a third party financial institution about a financial institution's customers.

We preliminarily believe the scope of information protected by the safeguards rule and the disposal rule should be broader and more closely aligned to provide better protection against unauthorized disclosure of personal financial information, consistent with the purposes of the GLBA [156] and the FACT Act.[157] Applying both the safeguards rule and the disposal rule to a more consistent set of defined ''customer information'' also could reduce any burden that may have been created by the application of the safeguards rule and the disposal rule to different scopes of information. Further, protecting nonpublic personal information of customers that a financial institution shares with a covered institution furthers congressional policy to protect personal financial information on an ongoing basis.[158] Applying the safeguards rule and the disposal rule to customer information that a covered institution receives from other financial institutions should ensure customer information safeguards are not lost because a third party financial institution shares that information with a covered institution.

1. Definition of Customer Information

Currently, Regulation S–P's protections under the safeguards rule and disposal rule apply to different, and at times overlapping, sets of information.[159] Specifically, as required under the GLBA, the safeguards rule requires broker-dealers, investment companies, and registered investment advisers (but not transfer agents) to maintain written policies and procedures to protect ''customer records and information,'' [160] which is not defined in the GLBA or in Regulation S–P. The disposal rule requires every covered institution properly to dispose of ''consumer report information,'' a different term, which Regulation S–P defines consistently with the FACT Act provisions.[161]

To align more closely the information protected by both rules, we propose to amend rule 248.30 by replacing the term ''customer records and information'' in the safeguards rule with a newly defined term ''customer information'' and by adding customer information to the coverage of the disposal rule.

For covered institutions other than transfer agents,[162] the proposed rule would define ''customer information'' to encompass any record containing ''nonpublic personal information'' (as defined in Regulation S–P) about ''a customer of a financial institution,'' whether in paper, electronic or other form that is handled or maintained by the covered institution or on its behalf.[163] This definition in the coverage of the safeguards rule is intended to be consistent with the objectives of the GLBA, which focuses on protecting ''nonpublic personal information'' of those who are ''customers'' of financial institutions.[164] The proposed definition would also conform more closely to the definition of ''customer information'' in the safeguards rule adopted by the FTC.[165]

[156] The Commission has ''broad rulemaking authority'' to effectuate ''the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of these customers' nonpublic personal information.'' *Trans Union LLC* v. *FTC,* 295 F.3d 42, 46 (D.C. Cir. 2002) (quoting 15 U.S.C. 6801(a)).

[157] The disposal rule was intended to reduce the risk of fraud or related crimes, including identity theft, by ensuring that records containing sensitive financial or personal information are appropriately redacted or destroyed before being discarded. *See* 108 Cong. Rec. S13,889 (Nov. 4, 2003) (statement of Sen. Nelson).

[158] *See* 15 U.S.C. 6801(a) (''It is the policy of the Congress that each financial institution has an affirmative *and continuing obligation* to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information.'') (emphasis added).

[159] *See* Disposal Rule Adopting Release, *supra* note 32, at 69 FR 71323 n.13.

[160] *See* 17 CFR 248.30; 15 U.S.C. 6801(b)(1).

[161] 17 CFR 248.30(b)(2). Section 628(a)(1) of the FCRA directed the Commission to adopt rules requiring the proper disposal of ''consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose.'' 15 U.S.C. 1681w(a)(1). Regulation S–P currently uses the term ''consumer report information'' and defines it to mean a record in any form about an individual ''that is a consumer report or is derived from a consumer report.'' 17 CFR 248.30(b)(1)(ii). ''Consumer report'' has the same meaning as in section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681(d)). 17 CFR 248.30(b)(1)(i). We are proposing to change the term ''consumer report information'' currently in Regulation S–P to ''consumer information'' (without changing the definition) to conform to the term used by other Federal financial regulators in their guidance and rules. *See, e.g.* 16 CFR 682.1(b) (FTC); 17 CFR 162.2(g) (CFTC); 12 CFR Appendix B to Part 30: Interagency Guidelines Establishing Information Security Standards (''OCC Information Security Guidance''), at I.C.2.b; 12 CFR Appendix D–2 to Part 208 (''FRB Information Security Guidance''), at I.C.2.b.

[162] We propose a separate definition of ''customer information'' applicable to transfer agents. *See infra* section II.C.3.

[163] *See* proposed rule 248.30(e)(5)(i). As noted below in note 175, transfer agents typically do not have consumers or customers for purposes of Regulation S–P because their clients generally are not individuals, but are the issuer in which investors, including individuals, hold shares. With respect to a transfer agent registered with the Commission, under the proposal *customer* means any natural person who is a securityholder of an issuer for which the transfer agent acts or has acted as transfer agent. *See* proposed rule 248.30(e)(4)(ii).

[164] *See* 15 U.S.C. 6801(a).

[165] *See* 16 CFR 314.2(d) (FTC safeguards rule defining ''customer information'' to mean ''any record containing nonpublic personal information, as defined in 16 CFR 313.3(n) about a customer of a financial institution, whether in paper, electronic, or other form, that is handled or maintained by or on behalf of you or your affiliates''). The proposed rules would not require covered institutions to be responsible for their affiliates' policies and procedures for safeguarding customer information because we believe that covered institutions affiliates generally are financial institutions subject to the safeguards rules of other Federal financial regulators.

Additionally, adding customer information to the coverage of the disposal rule is also intended to be consistent with the objectives of the GLBA. Under the GLBA, an institution has a ''continuing obligation'' to protect the security and confidentiality of customers' nonpublic personal information.[166] The proposed rule clarifies that this obligation continues through disposal of customer information. The proposed rule is also intended to be consistent with the objectives of the FACT Act. The FACT Act focuses on protecting ''consumer information,'' a category of information that will remain within the scope of the disposal rule.[167] Adding customer information to the disposal provisions will simplify compliance with the FACT Act by eliminating an institution's need to determine whether its customer information is also consumer information subject to the disposal rule. Institutions should also be less likely to fail to dispose of consumer information properly by misidentifying it as customer information only. In addition, including customer information in the coverage of the disposal rule would conform the rule more closely to the Banking Agencies' Safeguards Guidance.[168] These proposed amendments are intended to be consistent with the Commission's statutory mandates under the GLBA and the FACT Act to adopt final financial privacy regulations and disposal regulations, respectively, that are consistent with and comparable to those adopted by other Federal financial regulators.[169]

We request comment on the proposed definition of ''customer information,'' including the following:

71. Is the proposed definition of ''customer information,'' which includes any records containing nonpublic personal information about a customer of a financial institution that is handled or maintained by the covered institution or on its behalf, too narrow? If so, how should we expand the definition? Should the definition also include customer information maintained on behalf of a covered institutions' affiliates?

72. Do covered institutions share customer information with affiliates that are neither financial institutions subject to the safeguards rules of other Federal financial regulators nor service providers? If so, please explain. If so, should customer information be subject to the same protections when a covered institution shares it with such an affiliate?

73. Are there any aspects of the proposed definition that may be too broad? If so, how is it broad? For example, should the definition limit customer information to nonpublic personal information about an institution's own customers that is maintained by or on behalf of the covered institution?

74. Is the safeguards rule too narrow? Should it extend to consumer information that is not customer information (*e.g.,* information from a consumer report about an employee or prospective employee)?

75. Under the proposed amendments, the disposal rule would apply to both customer information and consumer information. Is the proposed amended disposal rule too broad? If so, how should we narrow the coverage? For example, should the disposal rule protect customer information that is not consumer information, *i.e.,* nonpublic personal information, such as transaction information, that does not appear in a consumer report? Are there benefits to having the safeguards rule and the disposal rule apply to a more consistent set of information?

76. For covered institutions that are owned or controlled by affiliates based in another jurisdiction, what is the risk that customer information, including sensitive customer information, may be shared and used by such other affiliates? Would such practices raise concerns about potential harm related to the use or possession of customer information by such foreign affiliates? Should the rule include additional requirements that would restrict the transmission of such customer information to foreign affiliates and others? If so, what should these be?

2. Safeguards Rule and Disposal Rule Coverage of Customer Information

We also propose to amend rule 248.30 to add a new section that would provide that the safeguards rule and disposal rule apply to both nonpublic personal information that a covered institution collects about its own customers and to nonpublic personal information it receives from a third party financial institution about that institution's customers. Currently, Regulation S–P defines ''customer'' as ''a consumer who has a customer relationship with you.'' The safeguards rule, therefore, only protects the ''records and information'' of individuals who are customers of the particular institution and not others, such as individuals who are customers of another financial institution. The disposal rule, on the other hand, requires proper disposal of certain records about individuals without regard to whether the individuals are customers of the particular institution.

Proposed new paragraph (a) would provide that the safeguards rule and the disposal rule apply to all customer information in the possession of a covered institution, and all consumer information that a covered institution maintains or otherwise possesses for a business purpose, as applicable,[170] regardless of whether such information pertains to the covered institution's own customers or to customers of other financial institutions and has been provided to the covered institution.[171] For example, information that a registered investment adviser has received from the custodian of a former client's assets would be covered under both rules if the former client remains a customer of either the custodian or of another financial institution, even though the individual no longer has a customer relationship with the investment adviser. Similarly, any individual's customer information or consumer information that a transfer agent has received from a broker-dealer holding an omnibus account with the transfer agent would be covered under both rules, even where the individual has no account in her own name at the transfer agent, as long as the individual is a customer of the broker-dealer or another financial institution. This

[166] *See* 15 U.S.C. 6801(a).

[167] *See* 15 U.S.C. 1681w(a)(1) *and* proposed rule 248.30(c)(1). ''Consumer information'' is not included within the scope of the safeguards rule, except to the extent it overlaps with any ''customer information,'' because the safeguards rule is adopted pursuant to the GLBA and therefore is limited to information about ''customers.''

[168] *See, e.g.,* OCC Information Security Guidance, *supra* note 161 (OCC guidelines providing that national banks and Federal savings associations' must develop, implement, and maintain appropriate measures to properly dispose of customer information and consumer information.''); FRB Information Security Guidance, *supra* note 161 (similar Federal Reserve Board provisions for state member banks).

[169] *See* 15 U.S.C. 6804(a) (directing the agencies authorized to prescribe regulations under title V of the GLBA to assure to the extent possible that their regulations are consistent and comparable); *and* 15 U.S.C. 1681w(2)(B) (directing the agencies with enforcement authority set forth in 15 U.S.C. 1681s to consult and coordinate so that, to the extent possible, their regulations are consistent and comparable).

[170] The safeguards rule is applicable to ''consumer information'' only to the extent it overlaps with ''customer information.'' *See supra* note 166.

[171] Regulation S–P defines ''financial institution'' generally to mean any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)). Rule 248.3(n).

approach is consistent with the FTC's safeguards rule.[172]

We request comment on the proposed scope of customer information covered under the safeguards rule and the disposal rule, including the following:

77. Is the proposed scope too broad or too narrow? If so, how should we broaden or narrow the scope? For example, should the rules' protections for ''customer information'' only extend to nonpublic personal information of the customers of another financial institution if the covered institution received the information from that financial institution (*e.g.,* an employee's or former customer's bank account information that the covered institution received directly from the individual, or prospective customers' information that the covered institution purchased or otherwise acquired from a third party would not be covered)?

78. Should employees' nonpublic personal information be protected under the safeguards rule? Why or why not? Would such coverage reduce the risk that unauthorized access to employee nonpublic personal information, such as a user name or password, could facilitate unauthorized access to customer information?

79. Do covered institutions receive nonpublic personal information about individuals who are not their customers from other financial institutions, such as custodians? If so, please provide examples. Do covered institutions take the same or different measures in safeguarding and disposing of information of individuals who are not their customers, such as employees or former customers? Please explain.

80. If covered institutions receive nonpublic personal information about individuals who are not their customers, are covered institutions able to determine whether such individuals are customers of other financial institutions? Would that be known as a result of any existing legal obligations?

81. Would the proposed rule result in covered institutions treating all nonpublic personal information about individuals as subject to the safeguards and disposal rules?

82. Should the proposed rule include a section describing scope? Does the scope section help clarify the information that a covered institution would have to protect under the safeguards rule and the disposal rule? Would the rule be clearer if it defined the scope of information protected within the definition of customer information?

3. Extending the Scope of the Safeguards Rule and the Disposal Rule To Cover All Transfer Agents

The proposed amendments would extend both the safeguards rule and the disposal rule to apply to any transfer agent registered with the Commission or another appropriate regulatory agency.[173] As discussed above, the safeguards rule currently applies to brokers, dealers, registered investment advisers, and investment companies, while the disposal rule currently applies to those entities as well as to transfer agents registered with the Commission.

The Safeguards Rule

Among other functions, transfer agents: (i) track, record, and maintain on behalf of issuers the official record of ownership of such issuer's securities; (ii) cancel old certificates, issue new ones, and perform other processing and recordkeeping functions that facilitate the issuance, cancellation, and transfer of both certificated securities and book-entry only securities; (iii) facilitate communications between issuers and securityholders; and (iv) make dividend, principal, interest, and other distributions to securityholders.[174] To perform these functions, transfer agents maintain records and information related to securityholders that may include names, addresses, phone numbers, email addresses, employers, employment history, bank and specific account information, credit card information, transaction histories, securities holdings, and other detailed and individualized information related to the transfer agents' recordkeeping and transaction processing on behalf of issuers. With advances in technology and the expansion of book-entry ownership of securities, transfer agents today increasingly rely on technology and automation to perform the core recordkeeping, processing, and transfer services described above, including the use of computer systems to store, access, and process the customer information related to securityholders they maintain on behalf of issuers.

Like other market participants, systems maintained by transfer agents are subject to threats and hazards to the security or integrity of customer information,[175] which could create a reasonably likely risk of harm to an individual identified with the information. Specifically, the systems maintained by transfer agents are subject to similar types of risks of breach as other covered institutions, and as a consequence, the individuals whose customer information is maintained by transfer agents are subject to similar risks of substantial harm and inconvenience as individuals whose customer information is maintained by other covered institutions. To account for this, the proposed definition of ''customer information'' with respect to a transfer agent would include ''any record containing nonpublic personal information . . . identified with any natural person, who is a securityholder of an issuer for which the transfer agent acts or has acted as transfer agent, that is handled or maintained by the transfer agent or on its behalf.'' [176]

In light of these risks, the proposed amendments would require transfer agents to protect the customer information they maintain by adopting and implementing appropriate safeguards in addition to taking measures to dispose of the information properly. Transfer agents would be required to develop, implement, and maintain written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer information. They would also be required to develop, implement, and maintain an incident response program, including customer notifications, for unauthorized access to or use of customer information.

The Disposal Rule

Currently, the disposal rule only applies to those transfer agents ''registered with the Commission.'' [177] However, the proposed amendments would also extend the application of the disposal rule to all transfer agents, including those transfer agents that are registered with another appropriate regulatory agency other than the Commission, by defining transfer agent in the proposed definition of a ''covered institution'' as ''a transfer agent

[172] 15 CFR 314.1(b) (providing that the FTC's safeguards rule ''applies to all customer information in your possession, regardless of whether such information pertains to individuals with whom you have a customer relationship, or pertains to the customers of other financial institutions that have provided such information to you'').

[173] The term ''transfer agent'' would be defined by proposed rule 248.30(e)(12) to have the same meaning as in section 3(a)(25) of the Exchange Act (15 U.S.C. 78c(a)(25)).

[174] *See* Advanced Notice of Proposed Rulemaking, Concept Release, Transfer Agent Regulations, Exchange Act Release No. 76743 (Dec. 22, 2015) [80 FR 81948, 81949 (Dec. 31, 2015)] (''2015 ANPR Concept Release'').

[175] As noted above in note 163, transfer agents typically do not have consumers or customers for the purposes of Regulation S–P, because their clients generally are not individual securityholders, but rather the issuers (*e.g.,* companies) in which the individual securityholders invest. However, as noted above, they maintain extensive securityholder records in connection with performing various processing, recordkeeping, and other services on behalf of their issuer clients.

[176] *See* proposed rule 248.30(e)(5)(ii).

[177] *See* 17 CFR 248.30(b)(2)(i).

registered with the Commission or another appropriate regulatory agency.'' [178]

When the Commission initially proposed the disposal rule, it noted that the purpose of section 216 of the FACT Act was to ''prevent unauthorized disclosure of information contained in a consumer report and to reduce the risk of fraud or related crimes, including identity theft.'' [179] Through the disposal rule, the Commission asserted that covered entities' consumers would benefit by reducing the incidence of identity theft losses.[180] At the same time, the Commission indicated that the disposal rule as proposed would impose ''minimal costs'' on firms in the form of providing employee training, or establishing clear procedures for consumer report information disposal.[181] Further, the Commission proposed that covered entities satisfy their obligations under the disposal rule through the taking of ''reasonable measures'' to protect against unauthorized access or use of the related customer information, the rule was designed to ''minimize the burden of compliance for smaller entities.'' [182] At adoption, a majority of commenters supported the flexible standard for disposal that the Commission proposed, and no commenter opposed the standard.[183]

The Commission believes that extending the disposal rule now to cover those transfer agents registered with another appropriate regulatory agency would provide the same investor protection benefits and impose the same minimal costs on such firms as in the case of transfer agents registered with the Commission. When coupled with the additional benefit of providing a minimum industry standard for the proper disposal of all customer information or consumer information that any transfer agent maintains or possesses for a business purpose, the Commission preliminarily believes that extending the disposal rule to now cover all transfer agents would be appropriate for the protection of investors, and in the public interest.

Statutory Authority Over Transfer Agents

When the Commission initially proposed and adopted the disposal rule, it did so to implement the congressional directive in section 216 of the FACT Act to adopt regulations to require any person who maintains or possesses a consumer report or consumer information derived from a consumer report for a business purpose to properly dispose of the information.[184] The Commission determined at that time that, through the FACT Act, Congress intended to instruct the Commission to adopt a disposal rule to apply to transfer agents registered with the Commission.[185] The Commission also stated at that time that the GLBA did not include transfer agents within the list of covered entities for which the Commission was required to adopt privacy rules.[186] Accordingly, the Commission extended the disposal rule only to those transfer agents registered with the Commission to carry out its directive under the FACT Act, while deferring to the FTC to utilize its ''residual jurisdiction'' under the same congressional mandate, to enact both a disposal rule and broader privacy rules that might apply to transfer agents registered with another appropriate regulatory agency.[187]

Separate from these conclusions, however, under section 17A of the Exchange Act, the Commission has broad authority, independent of either the FACT Act or the GLBA, to prescribe rules and regulations for transfer agents as necessary or appropriate in the public interest, for the protection of investors, for the safeguarding of securities and funds, or otherwise in furtherance of funds, or otherwise in furtherance of the purposes of Title I of the Exchange Act.[188] Specifically, regardless of whether transfer agents initially register with the Commission or another appropriate regulatory agency,[189] section 17A(d)(1) of the Exchange Act authorizes the Commission to prescribe such rules and regulations as may be necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act with respect to any transfer agents, so registered. Once a transfer agent is registered, the Commission ''is empowered with broad rulemaking authority over all aspects of a transfer agent's activities as a transfer agent.'' [190]

Accordingly, as the FTC has not adopted similar disposal and privacy rules to govern transfer agents registered with another appropriate regulatory agency, the Commission is proposing to extend the safeguards rule to apply to any transfer agent registered with either the Commission or another appropriate regulatory agency and extend the disposal rule to apply to transfer agents registered with another appropriate regulatory agency (*i.e.,* not the Commission). Here, the Commission has an interest in addressing the risks of market disruptions and investor harm posed by cybersecurity and other operational risks faced by transfer agents, and extending the safeguards rule and disposal rule to address those risks is in the public interest and necessary for the protection of investors and safeguarding of funds and securities.

Transfer agents are subject to many of the same risks of data system breach or failure that other market participants face. For example, transfer agents are vulnerable to a variety of software, hardware, and information security risks that could threaten the ownership interest of securityholders or disrupt trading within the securities markets.[191] Yet, based on the Commission's experience administering the transfer agent examination program, we are aware that practices among transfer agents related to information security and other operational risks vary widely.[192] A transfer agent's failure to account for such risks and take appropriate steps to mitigate them can

[178] Proposed rule 248.30(e)(3). *See also* discussion of Exchange Act Section 17A(d)(1) authority *infra* note 189.

[179] Disposal of Consumer Report Information, Exchange Act Release No. 50361 (Sept. 14, 2004) [69 FR 56304 (Sept. 20, 2004)] (''2004 Proposing Release''), at 56308.

[180] *Id.* at 56308–09.

[181] *Id.*

[182] *Id.*

[183] *See* Disposal Rule Adopting Release, *supra* note 32.

[184] *See* 15 U.S.C. 1681w.

[185] *See* 2004 Proposing Release, *supra* note 179, at n.23.

[186] *Id.* at n.27.

[187] *Id.*

[188] 15 U.S.C 78q–1.

[189] *See* Exchange Act Section 17A(d)(1), 15 U.S.C 78q–1(d)(1) (providing that ''no registered clearing agency or registered transfer agent shall . . . engage in any activity as . . . transfer agent in contravention of such rules and regulations'' as the Commission may prescribe); Exchange Act Section 17A(d)(3)(b), 15 U.S.C 78q-1(d)(3)(b) (providing that ''Nothing in the preceding subparagraph or elsewhere in this title shall be construed to impair or limit . . . the Commission's authority to make rules under any provision of this title or to enforce compliance pursuant to any provision of this title by any . . . transfer agent . . . with the provisions of this title and the rules and regulations thereunder.'').

[190] *See* Senate Report on Securities Act Amendments of 1975, S. Rep. No. 94–75, at 57.

[191] For example, a software or hardware glitch, technological failure, or processing error by a transfer agent could result in the corruption or loss of securityholder information, erroneous securities transfers, or the release of confidential securityholder information to unauthorized individuals. A concerted cyber-attack or other breach could have the same consequences, or result in the theft of securities and other crimes. *See generally,* SEC Cybersecurity Roundtable transcript (Mar. 26, 2014), *available at https://www.sec.gov/spotlight/cybersecurity-roundtable/cybersecurity-roundtable-transcript.txt.*

[192] *See* 2015 ANPR Concept Release, *supra* note 174, at 81985.

directly lead to the loss of funds or securities, including through theft or misappropriation.

At the same time, the scope and volume of funds and securities that are processed or held by transfer agents have increased dramatically. The risk of loss of such funds and securities presents significant risks to issuers, securityholders, other industry participants, and the U.S. financial system as a whole. Transfer agents that provide paying agent services on behalf of issuers play a significant role within that system.[193] According to Form TA–2 filings in 2021, transfer agents distributed approximately $3.8 trillion in securityholder dividends and bond principal and interest payments. Critically, because Form TA–2 does not include information relating to the value of purchase, redemption, and exchange orders by mutual fund transfer agents, the $3.8 trillion amount noted above does not include these amounts. If the value of such transactions by mutual fund transfer agents was captured by Form TA–2 it is possible that the $3.8 trillion number would be significantly higher.[194]

By extending the safeguards rule and disposal rule to cover *all* transfer agents, the Commission anticipates the rules would be in the public interest and would help protect investors and safeguard their securities and funds. Specifically, extending the safeguards rule to cover any transfer agent in order to address the risks to the security or integrity of customer information found on the systems they maintain will help prevent securityholders' customer information from being compromised, which, as noted above, could threaten the ownership interest of securityholders or disrupt trading within the securities markets. It also would help establish minimum nationwide standards for the notification of securityholders who are affected by a transfer agent data breach that leads to the unauthorized access or use of their information so that affected securityholders could take additional mitigating actions to protect their customer information, ownership interest in securities, and trading activity. Similarly, extending the disposal rule to cover those transfer agents registered with another appropriate regulatory agency would help protect investors and safeguard their securities and funds by reducing the risk of fraud or related crimes, including identity theft, which can lead to the loss of securities and funds.

The Commission acknowledges that if the proposal is adopted it would also impose costs on transfer agents that would be subject to both the safeguards rule and the disposal rule for the first time.[195] For all transfer agents, such costs would include the development and implementation of the policies and procedures required under the safeguards rule, the ongoing costs of complying with required recordkeeping and maintenance requirements, and, in the event of the unauthorized access or use of their customer information, the costs necessary to comply with the customer notification requirements of the proposal. With respect to transfer agents registered with another appropriate regulatory agency that are not currently subject to the disposal rule, such costs would also include the same costs incurred by the transfer agents registered with the Commission that are currently subject to the disposal rule to establish written policies and procedures for consumer and customer information disposal, as well as the minimal employee training costs necessary to address adherence to those policies and procedures.

However, because many of the transfer agents registered with another appropriate regulatory agency that are not currently subject to the disposal rule are banking entities subject to Federal and state banking laws and other requirements, it is likely that a large percentage of them already train their employees and have procedures for consumer report information disposal that likely would comply with the disposal rule.[196] Further, although transfer agents would face higher costs of compliance from this proposal than those covered institutions already subject to the safeguards rule and the disposal rule, the Commission believes the additional cost to such transfer agents will be comparable to the costs of compliance that was incurred by covered institutions (such as registered investment advisers and broker dealers) when they first became subject to these rules.[197] When considered in the context of protecting investors and safeguarding securities and funds, as discussed above, the Commission preliminarily believes that such costs are appropriate.

We seek comment on the proposal to extend the application of the safeguards rule and the disposal rule to both cover all transfer agents.

83. What would be the comparative advantages and disadvantages and costs and benefits of expanding the definition of customer information with respect to transfer agents? Is the proposed definition of ''customer information'' appropriate with respect to transfer agents?

84. Are some transfer agents, for example those that are registered with another appropriate regulatory agency, subject to duplicative or conflicting requirements as those that would be imposed under the safeguards rule? If so, please explain.

85. Should the definition of ''customer information'' be expanded to cover other stakeholders or individuals whose information may be handled or maintained by a transfer agent, such as employees, investors or contractors? If so, please explain why.

86. Are there particular concerns that transfer agents might have in implementing or meeting the requirements of the safeguards rule? Should we modify any of the requirements of the safeguards rule to take into account other regulatory requirements to which some transfer agents might be subject, or the differences between the operations of transfer agents and other covered institutions?

87. Are there other registrants or market participants to whom we should extend the safeguards rule and the disposal rule? If so, which ones?

88. Would transfer agents be subject to any compliance costs under this proposed rule that differ materially from those costs that covered institutions that are already subject to the safeguards rule and the disposal rule will have incurred through both past compliance, as well as the additional costs associated with this proposed rule? If so, please explain why and quantify these costs.

4. Maintaining the Current Regulatory Framework for Notice-Registered Broker-Dealers

The proposed amendments would also continue to maintain the same regulatory treatment for notice-registered broker-dealers as they do under the current safeguards rule and the disposal rule. Notice-registered broker-dealers are futures commission merchants and introducing brokers

[193] We use the term ''paying agent services'' here to refer to administrative, recordkeeping, and processing services related to the distribution of cash and stock dividends, bond principal and interest, mutual fund redemptions, and other payments to securityholders. There are numerous, often complex, administrative, recordkeeping, and processing services that are associated with, and in many instances are necessary prerequisites to, the acceptance and distribution of such payments.

[194] For example, our staff has observed that, aggregate gross purchase and redemption activity for some of the larger mutual fund transfer agents has ranged anywhere from $3.5 trillion to nearly $10 trillion just for a single entity in a single year.

[195] *See infra* section III.D.2.

[196] *See infra* text accompanying notes 367–373.

[197] *See* Reg. S–P Release, *supra* note 2.

registered with the CFTC that are permitted to register as broker-dealers by filing a notice with the Commission for the limited purpose of effecting transactions in security futures products.[198] These notice-registered broker-dealers are currently explicitly excluded from the scope of the disposal rule,[199] but subject to the safeguards rule. However, under substituted compliance provisions, notice-registered broker-dealers are deemed to comply with the safeguards rule where they are subject to, and comply with, the financial privacy rules of the CFTC,[200] including similar obligations to safeguard customer information.[201] The Commission adopted substituted compliance provisions with regard to the safeguards rule in acknowledgment that notice-registered broker-dealers are subject to primary oversight by the CFTC, and to mirror similar substituted compliance provisions afforded by the CFTC to broker-dealers registered with the Commission.[202] When the Commission thereafter adopted the disposal rule, it excluded notice-registered broker-dealers from the rule's scope noting its belief that Congress did not intend for the Commission's FACT Act rules to apply to entities subject to primary oversight by the CFTC.[203]

For these reasons, the Commission has tailored the proposed amendments to ensure there will be no change in the treatment of notice-registered broker-dealers under the safeguards rule and the disposal rule. First, the proposed rule would define a ''covered institution'' to include ''any broker or dealer,'' without excluding notice-registered broker-dealers, thus ensuring that Regulation S–P's substituted compliance provisions would still apply to notice-registered broker-dealers with respect to the safeguards rule.[204] Second, although the proposed disposal rule would also employ this proposed definition of a ''covered institution,'' it would retain the disposal rule's current exclusion for notice-registered broker-dealers.[205]

This approach will provide notice-registered broker-dealers with the benefit of consistent regulatory treatment under Regulation S–P, without imposing any additional costs, while also maintaining the same investor protections that the customers of notice-registered broker-dealers currently receive. To the extent notice-registered broker-dealers opt to comply with Regulation S–P and the proposed safeguards rule rather than avail themselves of substituted compliance by complying with the CFTC's financial privacy rules, the Commission believes the benefits and costs of complying with the proposed rule would be the same as those for other broker-dealers. Notice-registered broker-dealers should not face additional costs under the proposed amendments to the disposal rule, as they would remain excluded from its scope.

We seek comment on the proposal to maintain the same regulatory framework for notice-registered broker-dealers under the safeguards rule and the disposal rule:

89. Does the current regulatory framework for notice-registered broker-dealers under the safeguards rule and the disposal rule adequately protect investors who are clients of such institutions? If not, how is the current regulatory framework for notice-registered broker-dealers inadequate in this regard?

90. Should the rule alter the scope of either rule's application to notice-registered broker-dealers? If so, what alterations should be considered, and why? What would the costs and benefits be of such alterations in approach?

D. Recordkeeping

The proposed amendments would require covered institutions to make and maintain written records documenting compliance with the requirements of the safeguards rule and of the disposal rule. Specifically, the proposal would amend (i) Investment Company Act rules 31a–1(b) and 31a–2(a) for investment companies that are registered under the Investment Company Act,[206] (ii) Investment Advisers Act rule 204–2 for registered investment advisers,[207] (iii) Exchange Act rule 17a–4 for broker-dealers,[208] and (iv) Exchange Act rule 17Ad–7 for transfer agents.[209] The proposal would also include a recordkeeping provision in proposed rule 248.30(d) under Regulation S–P for investment companies that are not registered under the Investment Company Act (''unregistered investment companies'').[210] In each case, the proposed amendments would require the covered institution to maintain written records documenting the covered institution's compliance with the requirements set forth in proposed rule 248.30(b) (procedures to safeguard customer information) and (c)(2) (disposal of consumer information and customer information).

The records required pursuant to Investment Company Act proposed rules 31a–1(b) and 31a–2(a), proposed rule 248.30(d) under Regulation S–P, Investment Advisers Act proposed rule 204–2, Exchange Act proposed rule 17a–4, and Exchange Act proposed rule 17ad–7 would include, for example, records of policies and procedures under the safeguards rule that address administrative, technical, and physical safeguards for the protection of customer information as well as the proposed incident response program for unauthorized access to or use of customer information, including customer notice. Covered institutions would also be required to make and maintain written records documenting, among other things: (i) its assessments of the nature and scope of any incidents involving unauthorized access to or use

[198] *See* Registration of Broker-Dealers Pursuant to section 15(b)(11) of the Securities Exchange Act of 1934, Exchange Act Release No. 44730 (Aug. 21, 2001) [66 FR 45138 (Aug. 27, 2001)] (''Notice-Registered Broker-Dealer Release'').

[199] *See* 17 CFR 248.30(b)(2)(i).

[200] *See* 17 CFR 248.2(c) and 248.30(b). Under the substituted compliance provision in rule 248.2(c), notice-registered broker-dealers operating in compliance with the financial privacy rules of the CFTC are deemed to be in compliance with Regulation S–P, except with respect to Regulation S–P's disposal rule (currently rule 248.30(b)).

[201] *See* 17 CFR 160.30.

[202] *See* Notice-Registered Broker-Dealer Release, *supra* note 198; *see also* CFTC, Privacy of Customer Information [66 FR 21236 at 21252 (Apr. 27, 2001)].

[203] *See* 2004 Proposing Release, *supra* note 179, at n.23 (stating ''There is no legislative history on this issue. As discussed in our recent proposal for rules implementing section 214 of the FACT Act, Congress' inclusion of the Commission as one of the agencies required to adopt implementing regulations suggests that Congress intended that our rules apply to brokers, dealers, investment companies, registered investment advisers, and registered transfer agents. Consistent with that proposal, however, notice-registered broker-dealers would be excluded from the scope of the proposed disposal rule.''); *see also* Limitations on Affiliate Marketing (Regulation S–AM), Exchange Act Release No. 49985 (July 8, 2004); [69 FR 42302 (July 14, 2004)], at n.22 (stating ''We interpret Congress' exclusion of the CFTC from the list of financial regulators required to adopt implementing regulations under section 214(b) of the FACT Act to mean that Congress did not intend for the Commission's rules under the FACT Act to apply to entities subject to primary oversight by the CFTC.'').

[204] *See* proposed rule 248.30(e)(3); *see also* 17 CFR 248.2(c).

[205] *See* proposed rule 248.30(c)(1). The proposed rule would also include a technical amendment to 17 CFR 248.2(c), which, as to the disposal rule, provides an exception from the substituted compliance regime afforded to notice-registered broker-dealers for Regulation S–P. Specifically, section 248.2(c) would include an amended citation to the disposal rule, to reflect its shift from 17 CFR 248.30(b) to proposed rule 248.30(c). *See* proposed rule 248.2(c).

[206] *See* proposed rule 270.31a–1(b) and proposed rule 270.31a–2(a).

[207] *See* proposed rule 275.204–2(a).

[208] *See* proposed rule 240.17a–4(e).

[209] *See* proposed rule 240.17ad–7(k). *See also* discussion on redesignation of 17 CFR 240.17Ad–7 as 17 CFR 240.17ad–7 *supra* note 104.

[210] *See* proposed rule 248.30(d). Certain investment companies, such as some employees' securities companies, are not required to register under the Investment Company Act.

of customer information; (ii) steps taken to contain and control such incidents; and (iii) its notifications to affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization, including, where applicable, any determinations, after a reasonable investigation of the facts and circumstances of an incident of unauthorized access to or use of sensitive customer information, that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience, and the basis for that determination.[211]

The rule proposals would also require covered institutions to keep records of those written policies and procedures requiring any service providers to take appropriate measures that are designed to protect against unauthorized access to or use of customer information, including notification to the covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider to enable the covered institution to implement its response program, as well as related records of written contracts and agreements between the covered institution and the service provider.[212] These records would help covered institutions periodically reassess the effectiveness of their policies and procedures, and determine whether they are reasonably designed, and would help our examiners and enforcement program to monitor compliance with the requirements of the amended rules.

With respect to the disposal rule, the proposed rules require that every covered institution adopt and implement written policies and procedures that address the proper disposal of consumer information and customer information.[213] The proposed recordkeeping requirements are not intended to require covered institutions to document every act of disposing of an item of information. For example, a covered institution's periodic review and written documentation of its disposal practices generally should be sufficient to satisfy the proposed recordkeeping requirements as they relate to the disposal rule.

Under the proposed rules, the time periods for preserving records would vary by covered institution to be consistent with existing recordkeeping rules. Broker-dealers would have to preserve the records for a period of not less than three years, in an easily accessible place.[214] Transfer agents would have to preserve the records for a period of not less than three years, in an easily accessible place.[215] Investment companies registered under the Investment Company Act and unregistered investment companies would have to preserve the records, apart from any policies and procedures, for a period of not less than six years, the first two years in an easily accessible place; and in the case of any policies and procedures, preserve a copy of such policies and procedures in effect, or that at any time within the past six years were in effect, in an easily accessible place.[216] Registered investment advisers would have to preserve the records for five years, the first two years in an appropriate office of the investment adviser.[217] These proposed recordkeeping provisions, while varying among covered institutions, should result in the maintenance of the proposed records for sufficiently long periods of time and in locations in which they would be useful to staff examiners and the enforcement program. The proposal to conform the retention periods to existing requirements is intended to allow covered institutions to minimize their compliance costs by integrating the proposed requirements into their existing recordkeeping systems and record retention timelines.

We request comment on the proposed requirements for making and maintaining records, including the following:

91. Are the records that we propose to require appropriate? Should covered institutions be required to keep any additional or fewer records? If so, what records and why?

92. Should the rule limit the list of required records to assessments, containment or control measures or investigations only for certain information security incidents? Are some information security incidents not sufficiently consequential as compared to the amount of time required to record the institution's response? If so, please explain. How should the rule distinguish between information security incidents that require a record to be made and maintained and those that do not? If a record is not required for certain investigations, should a covered institution nevertheless be required to record a determination that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience?

93. Are the proposed periods of time for preserving records appropriate, or should certain records be preserved for different periods of time? Should the recordkeeping time periods be the same across covered institutions? Would the costs associated with preserving records for periods of time consistent with covered institutions' existing recordkeeping requirements be less than if all covered institutions were required to keep these records for the same period of time?

94. Are the rule proposals sufficiently explicit about the specific records that covered institutions must maintain? The proposed amendments for investment companies and registered investment advisers require these covered institutions to make and maintain written records documenting compliance with paragraphs (b)(1) and (c)(2) of Regulation S–P. In contrast, the proposed amendments for broker-dealers and transfer agents, specifically identify the records that should be maintained and preserved. Would investment companies and registered investment advisers benefit from additional specificity, such as requiring that investment companies and registered advisers keep the same records as those proposed to be required for broker-dealers and transfer agents? On the other hand, are the proposed rules for broker-dealers and transfer agents too granular? Please explain why or why not. Should the rule specifically require that a covered institution keep records of requests to delay notice from the Attorney General of the United States or any other specific records? In what respect should the rule proposals be made more or less explicit?

[211] *See* proposed rule 248.30(b)(3)(i)–(iii).

[212] *See* proposed rule 248.30(b)(5)(i)–(ii).

[213] *See* proposed rule 248.30(c)(2). While the disposal rule does not currently require covered institutions to adopt and implement written policies and procedures, those adopted pursuant to the current safeguards rule should already cover disposal. *See* Disposal Rule Adopting Release, *supra* note 32, at 69 FR 71325 (''proper disposal policies and procedures are encompassed within, and should be a part of, the overall policies and procedures required under the safeguard rule.''). Therefore, proposed rule 248.30(c)(2) is intended primarily to seek sufficient documentation of policies and practices addressing the specific provisions of the disposal rule.

[214] *See* proposed rule 240.17a–4(e)(14).

[215] *See* proposed rule 270.31a–2(a)(8) (registered investment companies) and proposed rule 248.30(d)(2) (unregistered investment companies). Unregistered investment companies may have a third party maintain and preserve the records required by the proposed rule, but any such unregistered investment company will remain fully responsible for compliance with the recordkeeping requirements under the proposed rule.

[216] *See id.*

[217] *See* proposed rule 275.204–2(a)(20) and current rule 275.204–2(e)(1).

E. Exception From the Annual Notice Delivery Requirement

The GLBA requires financial institutions to provide customers with annual notices informing them about the institution's privacy policies.[218] In certain circumstances, institutions must also provide their customers with an opportunity to opt out before the institution shares their information.[219] Regulation S–P includes provisions implementing these notice and opt out requirements for broker-dealers, investment companies and registered investment advisers.[220]

In the 2015 Fixing America's Surface Transportation Act (''FAST Act''), Congress added new section 503(f) to GLBA (''statutory exception'').[221] This provision provides an exception to the annual notice delivery requirements for a financial institution that meets certain requirements, and became effective when it was enacted on December 4, 2015.[222]

We are proposing amendments to the annual notice provision requirement in Regulation S–P to include the exception to the annual notice delivery added by the statutory exception.[223] In addition, we propose to provide timing requirements for delivery of annual privacy notices if a broker-dealer, investment company, or registered investment adviser that qualifies for the annual notice exception later changes its policies and practices in such a way that it no longer qualifies for the exception.[224]

1. Current Regulation S–P Requirements for Privacy Notices

Currently, Regulation S–P generally requires a broker-dealer, investment company or registered investment adviser to provide an initial privacy notice to its customers not later than when the institution establishes the customer relationship and annually after that for as long as the customer relationship continues.[225] If an institution chooses to share nonpublic personal information with a nonaffiliated third party other than as disclosed in an initial privacy notice, the institution must send a revised privacy notice to its customers.[226]

Regulation S–P also requires that before an institution shares nonpublic personal information with nonaffiliated third parties, the institution must provide the customer with an opportunity to opt out of sharing, except in certain circumstances.[227] A broker-dealer, investment company, or registered investment adviser is not required to provide customers the opportunity to opt out if the institution shares nonpublic personal information with nonaffiliated third parties (i) pursuant to a joint marketing arrangement with third party service providers, subject to certain conditions,[228] (ii) related to maintaining and servicing customer accounts, securitization, effecting certain transactions, and certain other exceptions[229] and (iii) related to protecting against fraud and other liabilities, compliance with certain legal and regulatory requirements, consumer reporting, and certain other exceptions.[230]

The types of information required to be included in the initial, annual, and revised privacy notices are identical. Each privacy notice must describe the categories of information the institution shares and the categories of affiliates and nonaffiliates with which it shares nonpublic personal information.[231] The privacy notices also must describe the type of information the institution collects, how it protects the confidentiality and security of nonpublic personal information, a description of any opt out right, and certain disclosures the institution makes under the FCRA.[232]

2. Proposed Amendment

Section 248.5 of Regulation S–P sets forth the requirements for an annual privacy notice, including delivery. We are proposing to add a new paragraph (e) to the section, which would include the statutory exception from the annual privacy notice requirement.[233]

a. Conditions for the Exception

To qualify for the statutory exception, a financial institution must satisfy two conditions.[234] First, an institution must share nonpublic personal information only in accordance with the exceptions in GLBA sections 502(b)(2) and (e).[235] These sections set forth exceptions to the requirement to provide customers an opportunity to opt out of the institution's information sharing with nonaffiliated third parties. Second, an institution relying on the exception cannot have changed its policies and practices with regard to disclosing nonpublic personal information from those that were disclosed in the most recent disclosure sent to consumers.[236]

Our proposed amendment to Regulation S–P would implement the statutory exception. In particular, our proposed amendment would provide that a broker-dealer, investment company, or registered investment adviser is not required to deliver an annual privacy notice if it satisfies two conditions that reflect those the FAST Act added to the GLBA. First, an institution relying on the exception could only provide nonpublic personal information to nonaffiliated third parties in accordance with the exceptions set forth in Regulation S–P sections 248.13, 248.14 and 248.15, which implement the exceptions to the opt out requirement in GLBA sections 502(b) and (e).[237]

Second, an institution cannot have changed its policies and practices with regard to disclosing nonpublic personal information from those it most recently

[218] 15 U.S.C. 6803(a). GLBA provisions regarding disclosure of nonpublic personal information are set forth in Title V, Subtitle A of GLBA, sections 501–509, codified at 15 U.S.C. 6801–6809.

[219] 15 U.S.C. 6802(b). Under Regulation S–P, an institution's customer is a ''consumer'' that has a continuing relationship with the institution. 17 CFR 248.3(j). Regulation S–P defines a ''consumer'' as ''an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual's legal representative.'' 17 CFR 248.3(g).

[220] Regulation S–P provisions requiring institutions to provide notice and opt out to customers are set forth in 17 CFR 248.1 through 248.18. Rule 248.5 sets forth requirements for annual notices and their delivery. *See* Reg. S–P Release, *supra* note 2.

[221] *See* FAST Act, Public Law 114094, section 75001, adding section 503(f) to the GLBA, codified at 15 U.S.C. 6803(f).

[222] *Id.*

[223] *See* proposed rule 248.5(e)(1).

[224] *See* proposed rule 248.5(e)(2). In developing this proposal, as directed by GLBA, we consulted and coordinated with the CFTC, CFPB, FTC and the National Association of Insurance Commissioners, including regarding consistency and comparability with the regulations prescribed by these entities. *See* 15 U.S.C 6804(a)(2). The proposed amendment implementing the exception under GLBA section 503(f) is designed to be consistent and comparable to those of the CFTC, CFPB, and FTC.

[225] 17 CFR 248.4; 248.5.

[226] 17 CFR 248.8. Regulation S–P provides certain exceptions to the requirement for a revised privacy notice, including if the institution is sharing as permitted under rules 248.13, 248.14, and 248.15 or to a new nonaffiliated third party that was adequately disclosed in the prior privacy notice.

[227] 17 CFR 248.10.

[228] 17 CFR 248.13.

[229] 17 CFR 248.14.

[230] 17 CFR 248.15.

[231] *See* 17 CFR 248.6(a)(2)–(5) and 248.6(a)(9).

[232] *See* 17 CFR 248.6(a)(1) (information collection); 248.6(a)(8) (protecting nonpublic personal information), 248.6(a)(6) (opt out rights); 248.6(a)(7) (disclosures the institution makes under section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)), notices regarding the ability to opt out of disclosures of information among affiliates).

[233] The proposal also would clarify that the rule includes an exception by amending the general requirement in paragraph 248.5(a)(1) that institutions provide the annual privacy notices to add the words ''Except as provided by paragraph (e) of this section . . .''.

[234] *See* 15 U.S.C. 6803(f).

[235] *See* 15 U.S.C. 6803(f)(1).

[236] *See* 15 U.S.C. 6803(f)(2).

[237] Proposed rule 248.5(e)(1)(i).

disclosed to the customer.[238] Specifically, an institution would satisfy this condition if the institution's policies and practices regarding the information described under paragraphs 248.6(a)(2) through (5) and (9), each of which relates to the disclosure of nonpublic personal information, are unchanged from those included in the institution's most recent privacy notice sent to customers. We are not including in the exception the other information that an institution is required to include in its privacy notices pursuant to paragraph 248.6(a) because such other information either does not relate to the disclosure of nonpublic personal information[239] or is not relevant to the exception.[240] Our proposed approach to the condition is designed to be consistent with and comparable to that of the CFTC, CFPB, and FTC, which reference the same disclosures of nonpublic personal information in the conditions to the exceptions to their annual privacy notice delivery requirements.[241]

b. Resumption of Annual Privacy Notice Delivery

The statutory exception states that a financial institution that meets the requirements for the annual privacy notice exception will not be required to provide annual privacy notices ''until such time'' as that financial institution fails to comply with the conditions to the exception, but does not specify a date by which the annual privacy notice delivery must resume.[242] Under our proposed amendment, when an institution would need to resume delivering annual privacy notices depends on whether or not it must issue a revised privacy notice.[243]

First, if a financial institution changes its policies so that it triggers the existing requirement to issue a revised privacy notice under rule 248.8, that institution would be required to provide an annual privacy notice in accordance with the timing requirement in paragraph 248.5(a).[244] As noted above, Regulation S–P generally requires an institution to provide an initial privacy notice to an individual who becomes the institution's customer no later than when it establishes a customer relationship.[245] Paragraph 248.5(a) requires a financial institution to provide a privacy notice to its customers ''not less than annually'' during the continuation of any customer relationship. Thus, the rule provides institutions with the flexibility to select a specific date during the year to provide annual privacy notices to all customers, regardless of when a particular customer relationship began.[246]

We propose to use the same approach to the resumption of delivery of annual privacy notices when a change in practice requires an institution to send a revised notice to customers.[247] The revised privacy notice would be treated as analogous to an initial notice for purposes of determining the timing of the subsequent delivery of annual privacy notices. This would allow institutions to preserve their existing approach to selecting a delivery date for annual privacy notices, thereby avoiding the potential burdens of determining delivery dates based on a new approach.

In the second circumstance, if the institution's change in policies or practices does not require a revised privacy notice, the institution would be required to provide an annual privacy notice to customers within 100 days of the change.[248] This 100-day period is intended to provide timely delivery of the updated privacy notice to customers who were not informed prior to the institution's change in policies or practices. Moreover, we preliminarily believe that a 100-day period also generally avoids imposing significant additional costs on the institution. Any 100-day period will accommodate the institution delivering the privacy notice alongside any quarterly reporting to customers. Proposed paragraph 248.5(e)(2)(iii) provides an example for each scenario described above in which an institution must resume delivering annual privacy notices.

The proposed timing requirements for when an institution no longer meets requirements for the exception and must resume delivering annual privacy notices are designed to be consistent with the existing timing requirements for privacy notice delivery in Regulation S–P, where applicable. The proposed timing requirements also are intended to be consistent with parallel CFTC, CFPB, and FTC rules.[249] They also are intended to provide clarity to institutions when a change in policies and practices prevent an institution from relying on the annual privacy notice delivery exception. In addition, providing timing provisions consistent with those of the CFTC, CFPB, and FTC would facilitate privacy notice delivery for affiliated financial institutions subject to GLBA that are not broker-dealers, investment companies, or registered investment advisers.

We request comment on the proposed exception to the annual privacy notice delivery requirement provisions, including the following:

95. The proposed annual privacy notice exception is conditioned on a broker-dealer, investment company, or registered investment adviser not changing policies and practices related to the disclosure of nonpublic personal information (*i.e.,* information on policies and practices required to be in a privacy notice under paragraphs 248.6(a)(2) through (5) and (9)). Should the exception remain available when the institution makes minor or non-substantive changes to its policies and practices? If so, how should we define the scope of changes that would allow use of the exception?

96. Should the proposed amendment include a provision for timing in these circumstances? Should the rule require an institution to provide notice by the time it has changed its disclosure policies and practices so that it no longer meets the proposed conditions of the rule in all circumstances? Should the proposed 100-day time period for

[238] Proposed rule 248.5(e)(1)(ii).

[239] *See* paragraph 248.6(a)(1) (categories of information the institution collects) and paragraph 248.6(a)(8) (policies and practices with respect to confidentiality and security).

[240] *See* paragraph 248.6(a)(6) (requiring the notice to describe the customer's right to opt out of the information sharing, which would not be applicable for institutions that qualify for the proposed exception) and paragraph 248.6(a)(7) (requiring an institution's privacy notice to include any disclosures the institution makes under FCRA section 603(d)(2)(A)(iii), which describe sharing with an institution's affiliates and do not affect whether the statutory exception is satisfied); *see also* 15 U.S.C. 603(d)(2)(iii) (excluding from the term ''consumer report'' communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons).

[241] *See* CFTC, Privacy of Consumer Financial Information—Amendment to Conform Regulations to the Fixing America's Surface Transportation Act, 83 FR 63450 (Dec. 10, 2018), at n.17; CFPB, Amendment to the Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P) 83 FR 40945 (Aug. 17, 2018), at 40950; FTC, Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act, 84 FR 13150 (Apr. 4, 2019), at 13153.

[242] *See supra* note 231.

[243] Proposed rule 248.5(e)(2).

[244] Proposed rule 248.5(e)(2)(i).

[245] Rule 248.5(a)(1).

[246] Paragraph 248.5(a)(1) requires privacy notices to be delivered annually, which means at least once in any period of 12 consecutive months during which the relationship exists. An institution can define the 12-consecutive-month period, but must apply it to the customer on a consistent basis. Paragraph 248.5(a)(2) illustrates how to apply a 12-consecutive-month period to a given customer.

[247] *See* 17 CFR 248.8.

[248] Proposed rule 248.5(e)(2)(ii).

[249] *See* 17 CFR 160.5(D) (CFTC); 12 CFR 1016.5(e)(2) (CFPB); 16 CFR 313.5(e)(2) (FTC).

resumption of delivery of annual privacy notices be shorter or longer? For example, should the period be shorter, such as 30, 60, or 90 days? Should the period be longer, such as 120 or 150 days? Should it be a qualitative standard? Or a qualitative standard with an upper ceiling? Please explain.

F. Request for Comment on Limited Information Disclosure When Personnel Leave Their Firms

The Commission requests comment on adding an exception from the notice and opt out requirements that would permit limited information disclosure when personnel move from one brokerage or advisory firm to another. The 2008 Proposal included an exception from the notice and opt out requirements to permit limited disclosures of investor information when a registered representative of a broker-dealer or a supervised person of a registered investment adviser (collectively, ''departing personnel'') moved from one brokerage or advisory firm to another. The exception that was previously proposed would have permitted firms with departing personnel to share certain limited customer contact information and supervise the information transfer, and required them to retain the related records.[250] To limit the risk of identity theft or other abuses, the shared information could not include any customer's account number, Social Security number, or securities positions.[251] In the 2008 Proposal, the Commission noted that most firms seeking to rely on this proposed exception would not have needed to revise their GLBA privacy notices, because they already state in the notices that their disclosures of information not specifically described include disclosures permitted by law, which would include disclosures made pursuant to the proposed exception and the other exceptions provided in section 15 of Regulation S–P.[252] Although a few commenters supported the exception as proposed, many expressed concerns about at least certain aspects of the exception.[253]

As noted above, the Commission is not adding an exception from the notice and opt out requirements in connection with this proposal. However, the Commission requests comment on whether to permit the limited disclosure of certain investor information when departing personnel move from one brokerage or advisory firm to another, including whether an exception from this proposal's notice and opt out requirements would be appropriate:

97. Would adopting such an exception from the notice and opt out provisions of Regulation S–P be appropriate in light of the GLBA's goals? If so, is there a need for an exception to permit a limited disclosure of investor information when departing personnel moves from one brokerage or advisory firm to another? If so, what are other limitations, benefits, risks, or other considerations related to such an exception?

G. Other Current Commission Rule Proposals

1. Covered Institutions Subject to the Regulation SCI Proposal and the Exchange Act Cybersecurity Proposal

a. Discussion

i. Introduction

In addition to the Regulation S–P proposal, the Commission is proposing the Exchange Act Cybersecurity Proposal and is proposing to amend Regulation SCI.[254] As discussed in more detail below, certain types of entities that would be subject to the proposed amendments to Regulation S–P would also be subject to those proposed rules, if adopted.[255] As a result, such entities could be subject to multiple requirements to maintain policies and procedures that address certain types of cybersecurity risk,[256] as well as obligations to provide multiple forms of disclosure or notification related to a cybersecurity event under the various proposals.[257] While the Commission preliminarily believes that these requirements are nonetheless appropriate, it is seeking comment on the proposed amendments, given the following: (1) each proposal has a different scope and purpose; (2) the policies and procedures related to cybersecurity that would be required under each of the proposed rules would not be inconsistent; (3) the public disclosures or notifications required by the proposed rules would require different types of information to be disclosed, largely to different audiences at different times; and (4) it should be appropriate for entities to comply with the proposed requirements.

The specific instances in which the regulations, currently and as proposed to be amended, may relate to each other are discussed briefly below. In addition, we encourage interested persons to provide comments on the discussion below.

More specifically, the Commission encourages commenters to identify any areas where they believe the requirements of the proposed amendments to Regulation S–P and the requirements of Regulation SCI (currently and as it would be amended) and the Exchange Act Cybersecurity Proposal is particularly costly or creates practical implementation difficulties, provide details on what in particular about implementation would be difficult, and how the duplication will be costly or create such difficulties, and to make recommendations on how to minimize these potential impacts. In addition, the Commission encourages comments that explain how to achieve the goal of this proposal to reduce or help mitigate the potential for harm to individuals whose sensitive customer information has been accessed or used without authorization. To assist this effort, the Commission is seeking specific comment below on this topic.

b. Covered Institutions That Are or Would Also Be Subject to Regulation SCI and the Exchange Act Cybersecurity Proposal

Various covered institutions under this proposal are or would be subject to Regulation SCI (currently and as it would be amended) and the Exchange

[250] *See* 2008 Proposal, *supra* note 38, at 13702–04.

[251] *See id. See* 2008 Proposal, *supra* note 38, at 13703, n.94.

[252] *See* 2008 Proposal, *supra* note 38, at 13703, n.94.

[253] *See e.g.,* Letter from Brendan Daly, Compliance Manager, Commonwealth Financial Network (May 12, 2008); Letter from Alan E. Sorcher, Managing Director and Associate General Counsel, SIFMA (May 12, 2008); Letter from Michael J. Mungenast, Chief Executive Officer and President, ProEquities, Inc.; Julius L. Loeser, Chief Regulatory and Compliance Counsel, Comerica Tower at Detroit Center, Corporate Legal Department (May 9, 2008); and Letter from Becky Nilsen, Chief Executive Officer, Desert Schools Federal Credit Union (May 12, 2008).

[254] *See* Exchange Act Cybersecurity Proposal and Regulation SCI Proposal, *supra* note 57.

[255] *See* 17 CFR 242.1000 through 1007 (Regulation SCI); Regulation SCI Proposal, *supra* note 57; 17 CFR 248.1 through 248.30 (Regulation S–P); and Exchange Act Cybersecurity Proposal, *supra* note 57.

[256] As discussed in more detail in the Exchange Act Cybersecurity Proposal, NIST defines ''cybersecurity risk'' as ''an effect of uncertainty on or within information and technology.'' *See* Exchange Act Cybersecurity Proposal, *supra* note 57.

[257] For example, with respect to cybersecurity, both Regulation SCI (currently and as it would be amended) and the Exchange Act Cybersecurity Proposal have or would have provisions requiring policies and procedures to address certain types of cybersecurity risks. The proposed amendments to Regulation S–P also would require policies and procedures regarding cybersecurity risks to the extent that customer information or consumer information is stored on an electronic information system that could potentially be compromised (*e.g.,* on a computer).

Act Cybersecurity Proposal.[258] For example, alternative trading systems (''ATSs'') that trade certain stocks exceeding specific volume thresholds are SCI Entities [259] and would also be covered institutions subject to the requirements of the proposed amendments to Regulation S–P.[260] Therefore, if the proposed amendments to Regulation S–P are adopted (as proposed), broker dealers that operate ATSs would be subject to its requirements in addition to the requirements of Regulation SCI that apply to the ATS (currently and as it would be amended).

The Commission is also proposing to revise Regulation SCI to expand the definition of ''SCI entity'' to include broker-dealers that exceed an asset-based size threshold or a volume-based trading threshold in national market system (''NMS'') stocks, exchange-listed options, agency securities, or U.S. treasury securities.[261] These entities would also be Market Entities [262] for the purposes of the Exchange Act Cybersecurity Proposal, if adopted as proposed. If the amendments to Regulation SCI are adopted and the proposed amendments to Regulation S–P are adopted (as proposed), these additional Market Entities would be subject to Regulation SCI and also would be subject to the requirements of the proposed amendments to Regulation S–P as well as the requirements of the Exchange Act Cybersecurity Proposal (if adopted).

Additionally, broker-dealers and transfer agents that would be subject to the Exchange Act Cybersecurity Proposal also would be subject to some or all of the requirements of Regulation S–P (currently and as it would be amended).[263]

c. Policies and Procedures To Address Cybersecurity Risks

i. Different Scope of the Policies and Procedures Requirements

Each of the policies and procedures requirements has a different scope and purpose. Regulation SCI (currently and as it would be amended) limits the scope of its requirements to certain systems of the SCI Entity that support securities market related functions. Specifically, it does and would require an SCI Entity to have reasonably designed policies and procedures applicable to its *SCI systems* and, for purposes of security standards, its *indirect SCI systems.*[264] While certain aspects of the policies and procedures required by Regulation SCI (as it exists today and as proposed to be amended) are designed to address certain cybersecurity risks (among other things),[265] the policies and procedures required by Regulation SCI focus on the SCI entities' operational capability and the maintenance of fair and orderly markets.

Similarly, Regulation S–P (currently and as it would be amended) also has a distinct focus. The policies and procedures required under Regulation S–P, both currently and as proposed to be amended, are limited to protecting a certain type of information—customer records or information and consumer report information [266]—and they apply to such information even when stored outside of SCI systems or indirect SCI systems. Furthermore, these policies and procedures need not address other types of information stored on the systems of the broker-dealer or transfer agent. Consequently, while Regulation SCI and Regulation S–P may relate to each other, each serves a distinct purpose, and the Commission believes it would be appropriate to apply both requirements to SCI Entities that are covered institutions.

The policies and procedures requirements of the Exchange Act Cybersecurity Proposal are broader in scope with respect to cybersecurity than either the current or proposed forms of Regulation SCI or Regulation S–P. The Exchange Act Cybersecurity Proposal would require Market Entities to establish, maintain, and enforce written policies and procedures that are reasonably designed to address their cybersecurity risks.[267] Unlike Regulation SCI, these requirements would therefore cover both SCI systems and information systems that are not SCI systems. And, unlike Regulation S–P, the proposed requirements would also encompass information beyond customer information and consumer information. As discussed below, however, the narrower scope of the cybersecurity-related requirements discussed in this proposal are not intended to be inconsistent with the policies and procedures that would be required under the Exchange Act Cybersecurity Proposal, despite the differences in scope and purpose, which could reduce duplicative burdens for entities to comply with both requirements.[268]

To illustrate, a covered institution could use one comprehensive set of policies and procedures to satisfy the cybersecurity-related requirements of the Regulation S–P proposed

[258] *See supra* note 3 and surrounding text as to the meaning of ''covered institution.''

[259] An ''SCI Entity'' is currently defined to include an ATS that trades certain stocks exceeding specific volume thresholds. As noted below, the Commission is proposing in the Regulation SCI Proposal to expand the scope of entities that would be considered SCI Entities. *See* 17 CFR 242.1000 and Regulation SCI Proposal, *supra* note 57.

[260] *See* 17 CFR 242.1000 (defining the terms ''SCI alternative trading system,'' ''SCI self-regulatory system,'' and ''Exempt clearing agency subject to ARP,'' and including all of those defined terms in the definition of ''SCI Entity''). The definition of ''SCI Entities'' also includes plan processors and SCI competing consolidators.

[261] *See* Regulation SCI Proposal, *supra* note 57. *See* paragraph (a)(1)(i)(D) of the Exchange Act Cybersecurity Proposal proposed Rule. To be subject to the Exchange Act Cybersecurity Proposal, the broker-dealer would either be a carrying broker-dealer, have regulatory capital equal to or exceeding $50 million, have total assets equal to or exceeding $1 billion, or operate as a market maker. *See also* paragraphs (a)(1)(i)(A), (C), (D), and (E) of the Exchange Act Cybersecurity Proposal proposed rule.

[262] *See supra* note 71 for a description of the entities subject to the definition of ''Market Entity'' under the Exchange Act Cybersecurity Proposal.

[263] Broadly, Regulation S–P's requirements apply to all broker-dealers, except for ''notice-registered broker-dealers'' (as defined in 17 CFR 248.30), who in most cases will be deemed to be in compliance with Regulation S–P where they instead comply with the financial privacy rules of the CFTC, and are otherwise explicitly excluded from certain of Regulation S–P's obligations. *See* 17 CFR 248.2(c). For the purposes of this section II.G. of this release, the term ''broker-dealer'' when used to refer to broker-dealers that are subject to Regulation S–P (currently and as it would be amended) excludes notice-registered broker-dealers. Currently, transfer agents registered with the Commission (''registered transfer agents'') (but not transfer agents registered with another appropriate regulatory agency) are subject to Regulation S–P's disposal rule. *See* 17 CFR 248.30(b). However, no transfer agent is currently subject to any other portion of Regulation S–P, including the safeguards rule. *See* 17 CFR 248.30(a). Under the proposed amendments to Regulation S–P, both those transfer agents registered with the Commission, as well as those registered with another appropriate regulatory agency (as defined in 15 U.S.C. 78c(34)(B)) would be subject to both the disposal rule and the safeguards rule.

[264] *See* 17 CFR 242.1001(a)(1). Regulation SCI also requires that each SCI Entity's policies and procedures must, at a minimum, provide for, among other things, regular reviews and testing of SCI systems and indirect SCI systems, including backup systems, to identify vulnerabilities from internal and external threats. 17 CFR 242.1001(a)(2)(iv).

[265] *See* 17 CFR 242.1000 (defining ''indirect SCI systems''). The distinction between SCI systems and indirect SCI systems seeks to encourage SCI Entities that their SCI systems, which are core market-facing systems, should be physically or logically separated from systems that perform other functions (*e.g.,* corporate email and general office systems for member regulation and recordkeeping). *See* Regulation Systems Compliance and Integrity, Release No. 34–73639 (Dec. 5, 2014) [79 FR 72251], at 79 FR at 72279–81 (''Regulation SCI 2014 Adopting Release''). Indirect SCI systems are subject to Regulation SCI's requirements with respect to security standards.

[266] Or as proposed herein, ''customer information'' and ''consumer information.'' *See* proposed rules 248.30(e)(5) and (e)(1), respectively.

[267] *See* paragraphs (b) and (e) of the Exchange Act Cybersecurity Proposal (setting forth the requirements of Covered Entities and Non-Covered Entities, respectively, to have policies and procedures to address their cybersecurity risks).

[268] *See infra* section III.D.1.a.

amendments and the cybersecurity-related policies and procedures requirements of the Regulation SCI Proposal and the Exchange Act Cybersecurity Proposal, so long as the cybersecurity-related policies and procedures required under Regulation S–P and Regulation SCI fit within and are consistent with the scope of the policies and procedures required under the Exchange Act Cybersecurity Proposal, and the Exchange Act Cybersecurity Proposal policies and procedures also address the more narrowly-focused cybersecurity-related policies and procedures requirements under the Regulation S–P and Regulation SCI proposals.

ii. Consistency of the Policies and Procedures Requirements

The safeguards rule currently requires broker-dealers (but not transfer agents) to adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information.[269] The safeguards rule further provides that these policies and procedures must: (1) insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of customer records and information; and (3) protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer.[270] Additionally, the disposal rule currently requires broker-dealers *and* transfer agents that maintain or otherwise possess consumer report information for a business purpose to properly dispose of the information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[271]

The proposed amendments to the Regulation S–P safeguards rule would require policies and procedures to include a response program for unauthorized access to or use of customer information. Further, the response program would need to be reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information, including procedures, among others, to: (1) assess the nature and scope of any incident involving unauthorized access to or use of customer information and identify the customer information systems and types of customer information that may have been accessed or used without authorization;[272] and (2) take appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information.[273]

The Exchange Act Cybersecurity Proposal would have several policies and procedures requirements that are designed to address similar cybersecurity-related risks to these proposed requirements of Regulation S–P. First, under the Exchange Act Cybersecurity Proposal, a Covered Entity's[274] policies and procedures would require measures designed to detect, mitigate, and remediate any cybersecurity threats and vulnerabilities with respect to the Covered Entity's information systems and the information residing on those systems.[275] Second, under the Exchange Act Cybersecurity Proposal, a Covered Entity's policies and procedures would require incident response measures designed to detect, respond to, and recover from a cybersecurity incident, including policies and procedures that are reasonably designed to ensure, among other things, the protection of the Covered Entity's information systems and the information residing on those systems.[276] Therefore, the incident response program policies and procedures requirements under the Regulation S–P proposal, which are specifically tailored to address unauthorized access to or use of customer information, would serve a different purpose than, and are not intended to be inconsistent with, the broader cybersecurity and information protection requirements of the incident response policies and procedures required under the Exchange Act Cybersecurity Proposal.

Accordingly, policies and procedures implemented by a broker-dealer that are reasonably designed in compliance with the requirements of the Exchange Act Cybersecurity Proposal discussed above also should generally satisfy the existing policies and procedures requirements of the Regulation S–P safeguards rule to protect customer records or information against unauthorized access or use that could result in substantial harm or inconvenience to any customer, to the extent that such information is stored electronically and, therefore, falls within the scope of the Exchange Act Cybersecurity Proposal.[277] In addition, reasonably designed policies and procedures implemented by a broker-dealer or transfer agent in compliance with the requirements of the Exchange Act Cybersecurity Proposal also should generally satisfy the existing requirements of the disposal rule related to properly disposing of consumer report information, to the extent that such information is stored electronically and, therefore, falls within the scope of the Exchange Act Cybersecurity Proposal.

In addition, with respect to service providers, the proposed amendments to the safeguards rule would require broker-dealers, other than notice-registered broker-dealers, and transfer agents registered with the Commission or another appropriate regulatory agency to include written policies and procedures within their response programs that require their service providers, pursuant to a written contract, to take appropriate measures that are designed to protect against unauthorized access to or use of customer information, including

[269] *See* 17 CFR 248.30(a).

[270] *See* 17 CFR 248.30(a)(1) through (3).

[271] *See* 17 CFR 248.30(b)(2). Regulation S–P currently defines the term ''disposal'' to mean: (1) the discarding or abandonment of consumer report information; or (2) the sale, donation, or transfer of any medium, including computer equipment, on which consumer report information is stored. *See* 17 CFR 248.30(b)(1)(iii).

[272] Regulation SCI's obligation to take corrective action may include a variety of actions, such as determining the scope of the SCI event and its causes, among others. *See* Regulation SCI 2014 Adopting Release, *supra* note 265, at 72251, 72317. *See also* Regulation SCI sec. 242.1002(a).

[273] *See supra* section II.A. As discussed, the response program also would need to have procedures to notify each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization unless the covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. *See id.*

[274] *See supra* note 71 for a description of the entities proposed as ''Covered Entities'' under the Exchange Act Cybersecurity Proposal.

[275] *See* paragraph (b)(1)(iv) of the Exchange Act Cybersecurity Proposal proposed Rule; *see also* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing this requirement in more detail).

[276] *See* paragraph (b)(1)(v) of the Exchange Act Cybersecurity Proposal proposed Rule; *see also* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing this requirement in more detail).

[277] To the extent an entity's policies and procedures under the Exchange Act Cybersecurity Proposal would, or do, not satisfy the policies and procedures requirements in this proposal, we believe that the requirements proposed here, such as procedures to notify affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization, could be added to and should fit within the policies and procedures required under the Exchange Act Cybersecurity Proposal that more comprehensively address cybersecurity risks to the extent that such information is stored electronically. Furthermore, any burdens from the proposal that do not fit within the requirements of the Exchange Act Cybersecurity Proposal may relate to the scope of Regulation S–P and would be appropriate given their purpose.

notification to the broker-dealer or transfer agent as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider to enable the broker-dealer or transfer agent to implement its response program expeditiously.[278]

The Exchange Act Cybersecurity Proposal also would have several policies and procedures requirements that are designed to address similar cybersecurity-related risks that relate to service providers. First, as part of the Exchange Act Cybersecurity Proposal's risk assessment requirements, a Covered Entity's policies and procedures under that proposal would need to require periodic assessments of cybersecurity risks associated with the Covered Entity's information systems and information residing on those systems.[279] This element of the policies and procedures would need to require that the Covered Entity identify its service providers that receive, maintain, or process information, or are otherwise permitted to access the Covered Entity's information systems and any of the Covered Entity's information residing on those systems, and assess the cybersecurity risks associated with the Covered Entity's use of these service providers.[280]

Second, under the Exchange Act Cybersecurity Proposal, a Covered Entity's policies and procedures would require oversight of service providers that receive, maintain, or process the Covered Entity's information, or are otherwise permitted to access the Covered Entity's information systems and the information residing on those systems, pursuant to a written contract between the Covered Entity and the service provider. Through that written contract the service providers would be required to implement and maintain appropriate measures that are designed to protect the Covered Entity's information systems and information residing on those systems.[281] Unlike the Exchange Act Cybersecurity Proposal, however, Regulation S–P's proposed policy and procedure requirements related to service providers would specifically require notification to a covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider, in order to enable the covered institution to implement its response program. Therefore, reasonably designed policies and procedures implemented by a broker-dealer or transfer agent pursuant to the requirements of the Exchange Act Cybersecurity Proposal largely would satisfy these proposed requirements of Regulation S–P, to the extent that such information is stored electronically.[282]

The proposed amendments to the disposal rule would require broker-dealers, other than notice-registered broker-dealers, and transfer agents registered with the Commission or another appropriate regulatory agency that maintain or otherwise possess consumer information or customer information for a business purpose, to properly dispose of this information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal. Any broker-dealer or transfer agent subject to the disposal rule would be required to adopt and implement written policies and procedures that address the proper disposal of consumer information and customer information in accordance with this standard.[283]

The Exchange Act Cybersecurity Proposal would have several policies and procedures requirements that are designed to address similar cybersecurity-related risks as this proposed requirement of the disposal rule. First, a Covered Entity's policies and procedures under the Exchange Act Cybersecurity Proposal would need to include controls: (1) requiring standards of behavior for individuals authorized to access the Covered Entity's information systems and the information residing on those systems, such as an acceptable use policy;[284] (2) identifying and authenticating individual users, including but not limited to implementing authentication measures that require users to present a combination of two or more credentials for access verification;[285] (3) establishing procedures for the timely distribution, replacement, and revocation of passwords or methods of authentication;[286] (4) restricting access to specific information systems of the Covered Entity or components thereof and the information residing on those systems solely to individuals requiring access to the systems and information as is necessary for them to perform their responsibilities and functions on behalf of the covered entity;[287] and (5) securing remote access technologies.[288]

Second, under the Exchange Act Cybersecurity Proposal, a Covered Entity's policies and procedures would need to include measures designed to protect the Covered Entity's information systems and protect the information residing on those systems from unauthorized access or use, based on a periodic assessment of the Covered Entity's information systems and the information that resides on the systems.[289] The periodic assessment would need to take into account: (1) the sensitivity level and importance of the information to the Covered Entity's business operations; (2) whether any of the information is personal information; (3) where and how the information is accessed, stored and transmitted, including the monitoring of information in transmission; (4) the information systems' access controls and malware protection; and (5) the potential effect a cybersecurity incident involving the information could have on the Covered Entity and its customers, counterparties, members, registrants, or users, including the potential to cause a significant cybersecurity incident.[290] A broker-dealer or transfer agent that implements these requirements of the Exchange Act Cybersecurity Proposal should generally satisfy the proposed requirements of the disposal rule that customer information or consumer information held for a business purpose must be properly disposed of, to the extent that such information is stored electronically and, therefore, falls within the scope of the Exchange Act Cybersecurity Proposal.

For these reasons, the more narrowly focused existing and proposed policies and procedures requirements of Regulation S–P that address particular

[278] *See supra* section II.A.3.

[279] *See* paragraph (b)(1)(i)(A) of the Exchange Act Cybersecurity Proposal proposed Rule; *see also* Exchange Act Cybersecurity Proposal, *supra* note 57, at section II.B.1.a. (discussing this requirement in more detail).

[280] *See* paragraph (b)(1)(i)(A)(2) of the Exchange Act Cybersecurity Proposal proposed Rule.

[281] *See* paragraphs (b)(1)(iii)(B) of the Exchange Act Cybersecurity Proposal proposed Rule; *see also* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing this requirement in more detail).

[282] *See supra* section II.A.3.

[283] *See* proposed rule 248.30(c).

[284] *See* paragraph (b)(1)(ii)(A) of the Exchange Act Cybersecurity Proposal proposed Rule.

[285] *See* paragraph (b)(1)(ii)(B) of the Exchange Act Cybersecurity Proposal proposed Rule.

[286] *See* paragraph (b)(1)(ii)(C) of the Exchange Act Cybersecurity Proposal proposed Rule.

[287] *See* paragraph (b)(1)(ii)(D) of the Exchange Act Cybersecurity Proposal proposed Rule.

[288] *See* paragraphs (b)(1)(ii)(A) through (E) of the Exchange Act Cybersecurity Proposal proposed Rule; *see also* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing these requirements in more detail).

[289] *See* paragraph (b)(1)(iii)(A) of the Exchange Act Cybersecurity Proposal proposed Rule; *see also* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing these requirements in more detail).

[290] *See* paragraphs (b)(1)(iii)(A)(1) through (5) of the Exchange Act Cybersecurity Proposal proposed Rule.

cybersecurity risks should fit within and are not intended to be inconsistent with the broader policies and procedures required under the Exchange Act Cybersecurity Proposal that more comprehensively address cybersecurity risks. Therefore, it should be appropriate for a broker-dealer or transfer agent to comply with the policies and procedures requirements of the Exchange Act Cybersecurity Proposal (if adopted) and the existing and proposed cybersecurity-related policies and procedures requirements of Regulation S–P with an augmented set of policies and procedures that addresses the requirements of both rules, to the extent that such information is stored electronically and, therefore, falls within the scope of the Exchange Act Cybersecurity Proposal.

d. Disclosure

The proposed amendments to Regulation S–P and Regulation SCI, and the Exchange Act Cybersecurity Proposal also have similar, but distinct, requirements related to notification about certain cybersecurity incidents. The proposed amendments to Regulation S–P would require broker-dealers, other than notice-registered broker-dealers, and transfer agents registered with the Commission or another appropriate regulatory agency to notify affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization.[291] These broker-dealers and transfer agents would not have to provide notice if, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, they determine that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.[292] Moreover, if the cybersecurity incident is or would be an SCI event under the current or proposed requirements of Regulation SCI, a Covered Entity that is or would be subject to the current and proposed requirements of Regulation SCI also could be required to disseminate certain information about the SCI event to certain of its members, participants, or in the case of an SCI broker-dealer, customers, as applicable, promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred.

Under the Exchange Act Cybersecurity Proposal, a Market Entity that is a Covered Entity would, if it experiences a ''significant cybersecurity incident,'' be required to disclose a summary description of each such incident that has occurred during the current or previous calendar year and to provide updated disclosures if the information required to be disclosed materially changes, including after the occurrence of a new significant cybersecurity incident or when information about a previously disclosed significant cybersecurity incident materially changes. These disclosures would be required to be made by filing Part II of proposed Form SCIR on EDGAR,[293] posting a copy of the form on its corporate internet website, and, in the case of a carrying or introducing broker-dealer, by sending the disclosure to its customers using the same means that the customer elects to receive account statements.

However, despite these similarities, there are distinct differences. First, the Exchange Act Cybersecurity Proposal, Regulation SCI (currently and as proposed to be amended), and Regulation S–P (as proposed to be amended) require different types of information to be disclosed. Second, the disclosures generally would be made to different persons: (1) the public at large in the case of the Exchange Act Cybersecurity Proposal; [294] (2) members, participants, or customers, as applicable, of the SCI entity in the case of the Regulation SCI Proposal; [295] and (3) affected individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization or, in some cases, all individuals whose information resides in the customer information system that was accessed or used without authorization in the case of Regulation S–P (as proposed to be amended).[296]

Additionally, the notification provided about certain cybersecurity incidents is different under each of these proposals given the distinct goals of each proposal. For example, the requirement to disclose summary descriptions of certain cybersecurity incidents from the current or previous calendar year publicly on EDGAR under the Exchange Act Cybersecurity Proposal serves a different purpose than the customer notification obligation proposed by the Regulation S–P amendments, which would provide more specific information to individuals affected by a security compromise involving their sensitive customer information, so that those individuals may take remedial actions if they so choose.[297] For these reasons, the customer notification requirements of the proposed amendments to Regulation S–P are proposed to apply to covered institutions even if they would be subject to the disclosure requirements of Regulation SCI and/or the Exchange Act Cybersecurity Proposal (as proposed).

[291] *See supra* section II.A.4.

[292] *See id.*

[293] The Exchange Act Cybersecurity Proposal would also require Covered Entities to publicly disclose summary descriptions of the cybersecurity risks that could materially affect the covered entity's business and operations and how the covered entity assesses, prioritizes, and addresses those cybersecurity risks on Part II of proposed Form SCIR. *See* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing this requirement in more detail).

[294] A carrying broker-dealer would be required to make the disclosures to its customers as well through the means by which they receive account statements. As discussed above, the Exchange Act Cybersecurity Proposal would require Covered Entities to make the public disclosures by (1) filing Part II of Form SCIR with the Commission electronically through the EDGAR system, and (2) posting a copy of the Part II of Form SCIR most recently filed on an easily accessible portion of its business internet website that can be viewed by the public without the need of entering a password or making any type of payment or other consideration. *See* Exchange Act Cybersecurity Proposal, *supra* note 57 (discussing this requirement in more detail).

[295] Regulation SCI, as amended, would require SCI entities to disseminate information required under sec. 242.1002(c)(1) and (c)(2) of Regulation SCI promptly to those members, participants, or in the case of an SCI broker-dealer, customers, of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event, or to any additional members, participants, or in the case of an SCI broker-dealer, customers, that any responsible SCI personnel subsequently reasonably estimates may have been affected by the SCI event. *See* Regulation SCI Proposal, *supra* note 57 (discussing this requirement in more detail).

[296] Under the Regulation S–P and Regulation SCI proposals, there could be circumstances in which a compromise involving sensitive customer information at a broker-dealer that is an SCI entity could result in two forms of notification being provided to customers for the same incident. In addition, under the Exchange Act Cybersecurity Proposal, the broker-dealer also may need to publicly disclose a summary description of the incident via EDGAR and the entity's business internet website, and, in the case of an introducing or carrying broker-dealer, send a copy of the disclosure to its customers.

[297] Among other things, the disclosure requirements for certain cybersecurity incidents under the other proposals would serve the following purposes: (1) with respect to the Exchange Act Cybersecurity Proposal, the public disclosure would provide greater transparency about the Covered Entity's exposure to material harm as a result of the cybersecurity incident, and provide a way for market participants to evaluate the Covered Entity's cybersecurity risks and vulnerabilities; (2) with respect to the Regulation SCI Proposal, the dissemination would provide market participants who have been affected by an SCI event, including customers of an SCI broker-dealer, with information they can use to evaluate the event's impact on their trading and other activities to develop an appropriate response.

a. Request for Comment

The Commission requests comment on the multiple requirements under Regulation S–P (as currently exists and as proposed to be amended), the Exchange Act Cybersecurity Proposal, and Regulation SCI (as currently exists and as proposed to be amended). In addition, the Commission is requesting comment on the following matters:

98. Would it be costly or create practical implementation difficulties to apply the proposed requirements of Regulation S–P to have policies and procedures related to addressing cybersecurity risks to covered institutions if these institutions also would be required to have policies and procedures under Regulation SCI (currently and as it would be amended) and/or the Exchange Act Cybersecurity Proposal (if it is adopted) that address certain cybersecurity risks? If so, explain why. If not, explain why not. Conversely, would there be benefits to this approach? Why or why not? Are there ways the policies and procedures requirements of the proposed amendments to Regulation S–P could be modified to minimize these potential impacts while achieving the separate goals of this proposal? If so, explain how and suggest specific modifications.

99. Would it be costly or create practical implementation difficulties to require covered institutions to provide notification to affected individuals under Regulation S–P (as proposed), as well as requiring disclosure for certain cybersecurity-related incidents under the Exchange Act Cybersecurity Proposal and Regulation SCI? If so, explain why. If not, explain why not. Conversely, would there be benefits to this approach? Why or why not? Are there ways the notification requirements of the proposed amendments to Regulation S–P could be modified to minimize the potential impacts while achieving the separate goals of this proposal? If so, explain how and suggest specific modifications.

2. Investment Management Cybersecurity

On February 9, 2022, the Commission proposed new rules and amendments relating to the cybersecurity practices and response measures of registered investment advisers, registered investment companies, and business development companies (''covered IM entities'').[298] The Investment Management Cybersecurity Proposal would require written cybersecurity policies and procedures reasonably designed to address cybersecurity risks; disclosures regarding certain cybersecurity risks and significant cybersecurity incidents; confidential reporting to the Commission within 48 hours of having a reasonable basis to conclude that a significant cybersecurity incident has occurred or is occurring; and certain cybersecurity-related recordkeeping.[299]

If the Investment Management Cybersecurity Proposal and this proposal are both adopted as proposed, covered IM entities would be required to comply with certain similar requirements under both sets of rules. Both sets of rules would require covered IM entities to have policies and procedures regarding measures to detect, respond to, and recover from certain security incidents. Both also address oversight over certain service providers as a part of the required policies and procedures, specifically, requiring the service provider to have appropriate measures that are designed to protect customer, fund, or adviser information, as applicable, pursuant to a written contract.[300]

In addition to similar policies and procedures requirements, covered IM entities would potentially be required to make disclosures to the public and report to the Commission under the Investment Management Cybersecurity Proposal, as well as provide notice to an affected individual under Regulation S–P, for the same incident. The disclosure and reporting that would be required under the Investment Management Cybersecurity Proposal, however, differ in purpose from the notification that would be provided to individuals whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization under the proposed amendments to Regulation S–P.[301]

The disclosures and reporting contemplated in the Investment Management Cybersecurity Proposal would generally require disclosure of information appropriate to a wider audience of current and prospective advisory clients and fund shareholders, and would better inform their investment decisions, as well as provide reporting to the Commission of significant cybersecurity incidents.[302] For example, advisers would be required to describe cybersecurity risks that could materially affect the advisory services they offer and how they assess, prioritize, and address cybersecurity risks created by the nature and scope of their business. The Investment Management Cybersecurity Proposal would also require disclosure about significant cybersecurity incidents to prospective and current clients, shareholders, and prospective shareholders. These disclosures are intended to improve such persons' ability to evaluate and understand relevant cybersecurity risks and incidents and their potential effect on adviser and fund operations. In contrast, as discussed in section II.A.4.f, the notices required under this proposal would provide more specific information to individuals whose

[298] *See* Investment Management Cybersecurity Proposal, *supra* note 55. The Commission has pending proposals to reopen comments for the Investment Management Cybersecurity Proposal, and to address cybersecurity risk with respect to different entities, types of covered information or systems, and products. The Commission encourages commenters to review those proposals to determine whether it might affect their comments on this proposal. *See also* Corporation Finance Cybersecurity Proposal, *supra* note 55; Exchange Act Cybersecurity Proposal and Regulation SCI Proposal, *supra* note 57.

[299] *See* Investment Management Cybersecurity Proposal, *supra* note 55, for a full description of the proposed requirements. The Investment Management Cybersecurity Proposal includes recordkeeping requirements for advisers and funds—proposed amendments to rule 204–2 under the Advisers Act and new rule 38a–2 under the Investment Company Act would require copies of cybersecurity policies and procedures, annual review and written report, documentation related to cybersecurity incidents, including those reported or disclosed, and cybersecurity risk assessments. These recordkeeping requirements center around cybersecurity incidents that jeopardize the confidentiality, integrity, or availability of an adviser or fund's information or information systems, which may include customer information, but also includes other information, such as trading or investment information. In contrast, as discussed in section II.C, the proposed amendments to Regulation S–P require written records documenting compliance with the requirements of the safeguards rule and of the disposal rule.

[300] The Commission proposed the Adviser Outsourcing Proposal in October 2022, which would prohibit registered investment advisers from outsourcing certain services or functions without first meeting minimum due diligence and monitoring requirements. *See* Advisers Outsourcing Proposal, *supra* note 94. Registered investment advisers that would be subject to the Adviser Outsourcing Proposal, if adopted, would also be subject to Regulation S–P, as proposed to be amended. The Adviser Outsourcing Proposal is meant to address service providers that perform covered functions (those necessary for the investment adviser to provide its investment advisory services in compliance with the Federal securities laws, and that, if not performed or performed negligently, would be reasonably likely to cause a material negative impact on the adviser's clients or on the adviser's ability to provide investment advisory services). *See id.* The Commission encourages commenters to review the Adviser Outsourcing Proposal to determine whether it might affect their comments on this proposal.

[301] *See* proposed rule 248.30(b)(4).

[302] *See* Investment Management Cybersecurity Proposal, *supra* note 55, proposed Form ADV–C reporting to the Commission includes both general and specific questions related to the significant cybersecurity incident, such as the nature and scope of the incident as well as whether any disclosure has been made to any clients and/or investors.

sensitive customer information notification was, or is reasonably likely to have been, accessed or used without authorization, so that they can take remedial actions as they deem appropriate.[303] In other words, the Investment Management Cybersecurity Proposal would provide more general information appropriate to the wider audience of current and prospective clients, shareholders, and prospective shareholders, where this proposal would provide more specific information to individual customers about their customer information.

We intend that even if this proposal as well as the Investment Management Cybersecurity are adopted as proposed, covered IM entities would be able to avoid duplicative compliance efforts, including by, for example, developing one set of policies and procedures addressing all of the requirements from these proposals, using similar descriptions in the disclosures regarding the same incident, or providing the required disclosures as a single notice, where appropriate.[304]

We request comment on the application of the proposal and the Investment Management Cybersecurity Proposal, including the following:

100. How would covered IM entities comply with the policies and procedures requirements contemplated in this proposal? Would they do so by having an integrated set of cybersecurity policies and procedures? If not, what costs and burdens would covered IM entities incur? If so, what operational or practical difficulties may arise because of these combined policies and procedures?

101. Should we modify any of the proposed requirements under this proposal for policies and procedures, service provider oversight, and/or notification of certain incidents, in order to minimize potential duplication of similar requirements under the Investment Management Cybersecurity Proposal?

102. What operational or practical difficulties, if any, may arise for covered IM entities that choose to comply with the disclosure requirements contemplated in this proposal and the Investment Management Cybersecurity Proposal by making substantially similar disclosures to market participants and customers? To the extent the proposed disclosure and notification requirements would result in duplication of effort, what revisions would minimize such duplication but also ensure investors and customers receive the information necessary to protect themselves and make investment decisions?

103. Should we require notice to the Commission when notification is provided to individuals under this proposal? If yes, what form should that notification take (for example, a copy of what is provided to affected individuals under this proposal, or something similar to the significant cybersecurity incident reporting that would be required under the Investment Management Cybersecurity Proposal for covered IM entities)?[305] Should the timing of any such notification to the Commission be the same, before or later than notification to the affected individuals?[306]

104. Do commenters believe there are additional areas of potential duplication or similarities between this proposal and the Investment Management Cybersecurity Proposal that we should address in this proposal? If so, please provide specific examples and whether the duplication or similarities should be addressed and if so, how.

H. Existing Staff No-Action Letters and Other Staff Statements

Staff is reviewing certain of its no-action letters and other staff statements addressing Regulation S–P 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 or statement listed relates both to the proposal and another topic, the portion unrelated to the proposal is not being reviewed in connection with any adoption of this proposal.

LETTERS AND STATEMENTS TO BE REVIEWED

Name of letter or statement	Date issued
Staff Responses to Questions about Regulation S–P.	January 23, 2003.
Certain Disclosures of Information to the CFP Board.	March 11, 2011; December 11, 2014.
Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S–P—Privacy Notices and Safeguard Policies.	April 16, 2019.

I. Proposed Compliance Date

We propose to provide a compliance date twelve months after the effective date of any adoption of the proposed amendments in order to give covered institutions sufficient time to develop and adopt appropriate procedures to comply with any of the proposed changes and associated disclosure and reporting requirements, if adopted. The Commission recognizes that many covered institutions would review their policies and procedures at least annually. This compliance date would allow covered institutions to develop and adopt appropriate procedures in alignment with a regularly scheduled review. Based on our experience, we believe the proposed compliance date would provide an appropriate amount of time for covered institutions to comply with the proposed rules, if adopted.

We request comment on the proposed compliance date, and specifically on the following items:

105. Is the proposed compliance date appropriate? If not, why not? Is a longer or shorter period necessary to allow covered institutions to comply with one or more of these particular amendments, if adopted (for example, 18 months if longer, 6 months if shorter)? If so, what would be a recommended compliance date?

106. Should we provide a different compliance date for different types of entities? For example, should we provide a later compliance date for smaller entities, and if so what should this be (for example, 18 or 24 months)? How should we define a ''smaller entities'' for this purpose? Should any such definition be different depending on the type of covered institution and, if so, how?

[303] *See* proposed rule 248.30(b)(4)(iv) (includes information regarding a description of the incident, type of sensitive customer information accessed or used without authorization, and what has been done to protect the sensitive customer information from further unauthorized access or use, as well as contact information sufficient to permit an affected individual to contact the covered institution).

[304] *See infra* section III.D.1.a.

[305] *See supra* note 302.

[306] The Investment Management Cybersecurity Proposal would require advisers to provide information regarding a significant cybersecurity incident in a structured format through a series of check-the-box and fill-in-the-blank questions on new Form ADV–C. *See* Investment Management Cybersecurity Proposal, *supra* note 55, at section II.B.

III. Economic Analysis

A. Introduction

The Commission is mindful of the economic effects, including the costs and benefits, of the proposed rules and amendments. Section 3(f) of the Exchange Act, section 2(c) of the Investment Company Act, and section 202(c) of the Investment Advisers Act provide that when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in or consistent with the public interest, to also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act also requires us to consider the effect that the rules would have on competition, and prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act. The analysis below addresses the likely economic effects of the proposed amendments, including the anticipated and estimated benefits and costs of the amendments and their likely effects on efficiency, competition, and capital formation. The Commission also discusses the potential economic effects of certain alternatives to the approaches taken in this proposal.

The proposed amendments would require every broker-dealer,[307] every investment company, every registered investment adviser, and every transfer agent to notify affected customers [308] of certain data breaches.[309] To that end, the proposed amendments would require these covered institutions to develop, implement, and maintain written policies and procedures that include an incident response program that is reasonably designed to detect, respond to, and recover from unauthorized access or use of customer information, and that includes a customer notification component for cases where sensitive customer information has been, or is reasonably likely to have been, accessed or used without authorization.[310] The proposal would also extend existing rules for safeguarding customer records and information by broadening the scope of covered records to ''customer information'' and extending the covered population to transfer agents,[311] impose various related recordkeeping requirements,[312] and include in the regulation an existing statutory exception to annual privacy notice requirements.[313]

The proposed amendments would affect the aforementioned covered institutions as well as customers who would receive the proposed notices. The proposed amendments would also have indirect effects on third-party service providers that receive, maintain, process or otherwise are permitted access to customer information on behalf of covered institutions: under the proposed amendments, unauthorized use of or access to sensitive customer information via third-party service providers would fall under the proposed customer notification requirement and covered institutions would be required to enter into a written contract with these service providers regarding measures to protect against unauthorized access to or use of customer information and notification to the covered institution in the event of a breach.[314]

We believe that the main economic effects of the proposal would result from the proposed notification and incident response program requirements applicable to all covered institutions.[315] For reasons discussed later in this section, we believe the proposed extension of existing provisions of Regulation S–P to transfer agents would have more limited economic effects.[316] Finally, we anticipate the proposed recordkeeping requirements, and the proposed incorporation of the existing statutory exception to annual privacy notice requirements, to have minimal economic effects as discussed further below.[317]

Broadly speaking, we believe the main economic benefits of the proposed notification and incident response program requirements, as well as the proposed extension of Regulation S–P to all transfer agents, would result from reduced exposure of the broader financial system to cyberattacks. These benefits would result from covered institutions allocating additional resources towards information safeguards and cybersecurity to comply with the proposed new requirements and/or to avoid reputational harm resulting from the mandated notifications.[318] More directly, customers would benefit from reduced risk of their information being compromised, and—insofar as the proposed notices improve customers' ability to take mitigating actions—by allowing customers to mitigate the effects of compromises that occur nonetheless. The main economic costs from these new requirements would be reputational costs borne by firms that would not otherwise have notified customers of a data breach, increased expenditures on safeguards to avoid such reputational costs, and compliance costs related to the development and implementation of required policies and procedures.[319]

Because all states require some form of customer notification of certain data breaches,[320] and many entities are likely to already have response programs in place,[321] we generally anticipate that the economic benefits and costs of the proposed notification requirements will—in the aggregate—be limited. Our proposal would, however, afford many individuals greater protections by, for example, defining ''sensitive customer information'' more broadly than the current definitions used by certain

[307] Notice registered broker-dealers subject to and complying with the financial privacy rules of the CFTC would be deemed to be in compliance with the proposed provision through the substituted compliance provisions of Regulation S–P. *See supra* section II.C.4.

[308] As discussed above, ''customers'' includes not only customers of the aforementioned SEC-registered entities, but also customers of other financial institutions whose information comes into the possession of covered institutions. In addition, with respect to a transfer agent, ''customers'' refers to ''any natural person who is a shareholder securityholder of an issuer for which the transfer agent acts or has acted as a transfer agent.'' *See* proposed rule 248.30(e)(4).

[309] Notification would be required in the event that the sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization, unless such covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that of the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. *See* proposed rule 248.30(b)(4)(i).

[310] *See id.; see also supra* section II.A.

[311] *See* proposed rule 248.30(a) and 248(e)(3).

[312] *See* proposed rule 248.30(d).

[313] *See* proposed rule 248.5(e).

[314] *See infra* section III.D.1.b.

[315] *See infra* section III.D.1.

[316] *See infra* section III.D.2.

[317] *See infra* sections III.D.3 and III.D.4.

[318] While the scope of the safeguards rule and the proposed amendments is not limited to cybersecurity, in the contemporary context, their main economic effects are realized through their effects on cybersecurity. *See infra* note 343.

[319] Throughout this economic analysis, ''compliance costs'' refers to the direct costs that *must* be borne in order to avoid violating the Commission's rules. This includes costs related to the development of policies and procedures required by the regulation, costs related to delivery of the required notices, and the direct costs of any other required action. As used here, ''compliance costs'' excludes costs that are not required, but may nonetheless arise as a consequences of the Commission's rules (*e.g.,* reputation costs resulting from disclosure of data breach, or increased cybersecurity spending aimed at avoiding such reputation costs).

[320] *See infra* section III.C.2.a.

[321] *See infra* section III.C.3.

states;[322] providing for a 30-day notification deadline that is shorter than the timing currently mandated by many states, including in states providing for no deadline or those allowing for various delays; and providing for a more sensitive notification trigger than in most states.[323]

Further, in certain states, state customer notification laws do not apply to entities subject to or in compliance with the GLBA, and our proposal would help ensure customers receive notice of a breach in these circumstances.[324]

For these reasons, the requirements being proposed here would improve customers' knowledge of when their sensitive information has been compromised. Specifically, we expect that the proposed minimum nationwide standard for notifying customers of data breaches, along with the preparation of written policies and procedures for incident response, would result in more customers being notified of data breaches as well as faster notifications for some customers, and that both these effects would improve customers' ability to act to protect their personal information. Moreover, such improved notification would—in many cases—become public and impose additional reputational costs on covered institutions that fail to safeguard customers' sensitive information. We expect that these potential additional reputational costs would increase the disciplining effect on covered institutions, incentivizing them to improve customer information safeguards, reduce their exposure to data breaches, and thereby improve the cyber-resilience of the financial system more broadly.

To the extent that a covered institution does not currently have policies and procedures to safeguard customer information and respond to unauthorized access to or use of customer information, it would bear costs to develop and implement the required policies and procedures for the proposed incident response program. Moreover, transfer agents—who have heretofore not been subject to any of the customer safeguard provisions of Regulation S–P—would face additional compliance costs related to the development of policies and procedures that address administrative, technical, and physical safeguards for the protection of customer information as already required by current Regulation S–P.[325]

As adopting policies and procedures involves fixed costs, doing so is almost certain to impose a proportionately larger compliance cost on smaller covered institutions, which would—in principle—reduce smaller covered institutions' ability to compete with their larger peers (*i.e.,* for whom the fixed costs are spread over more customers).[326] However, given the considerable competitive challenges arising from economies of scale and scope already faced by smaller firms, we do not anticipate that the costs associated with this proposal would significantly alter these challenges. Similarly, although the proposed amendments may lead to improvements to economic efficiency and capital formation, existing state rules are similar in many respects to this proposal and so we do not expect the proposed amendments to have a significant impact on economic efficiency or capital formation vis-à-vis the baseline.

Many of the benefits and costs discussed below are difficult to quantify. Doing so would involve estimating the losses likely to be incurred by a customer in the absence of mitigation measures, the efficacy of mitigation measures implemented with a given delay, and the expected delay before notification can be provided under the proposed rules. In general, data needed to arrive at such estimates are not available to the Commission. Thus, while we have attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature. The Commission seeks comment on all aspects of the economic analysis, including submissions of data that could be used to quantify some of these economic effects.

B. Broad Economic Considerations

In a perfectly competitive market, market forces would lead firms to ''efficiently'' safeguard customers' information: firms that fail to provide the level of safeguards demanded by customers would be driven out of the market by those that do.[327] Among the several assumptions required to obtain this efficient outcome is that of customers having complete and perfect information about the firm's product or service and the processes and service provider relationships by which they are being provided, including customer information safeguards. In the context of covered institutions—firms whose services frequently involve custody of highly-sensitive customer information—this assumption is unrealistic. Customers have little visibility into the internal processes of a firm and its service providers, so it is impossible for them to directly observe whether a firm is employing adequate customer information safeguards.[328] Moreover, firms often lack incentives to disclose when such information is compromised (and likely have substantial incentives to avoid such disclosures), limiting customers' (current or prospective) ability to penalize (*i.e.,* avoid) covered institutions who fail to protect customer information.[329] The resulting information asymmetry prevents market forces from yielding economically efficient outcomes. This market failure serves as the economic rationale for the proposed regulatory intervention.

The information asymmetry about specific information breaches that have occurred, and—more generally—about covered institutions' efforts at avoiding such breaches, can lead to two inefficiencies. First, the information asymmetry prevents individual customers whose information has been compromised from taking timely actions (*e.g.,* increased monitoring of account activity, or placing blocks on credit reports) necessary to mitigate the consequences of such compromises. Second, the information asymmetry can lead covered institutions to generally devote too little effort (*i.e.,* ''underspend'') toward safeguarding customer information, thereby increasing the probability of information being compromised in the first place.[330]

[322] *See supra* section II.A.4.b and *infra* section III.D.1.c.iii.

[323] *See infra* section III.D.1.c.iv.

[324] *See infra* section III.D.1.c.ii.

[325] That is, the existing provisions of Regulation S–P not currently applicable to registered transfer agents. *See* 17 CFR 248.30(a).

[326] *See infra* section III.D.1.a.

[327] In the highly stylized standard model of perfect competition presented in many introductory micro-economic texts, this ''efficient'' safeguarding of customer information would correspond to producing the one homogenous good (*i.e.,* a service of a certain quality) demanded by the representative customer at its marginal cost. *See, e.g.,* David M. Kreps, A Course in Microeconomic Theory, Princeton University Press (1990).

[328] Here, ''adequate safeguards'' can be thought of as the level of safeguards that would be demanded by the representative customer in a world where the level of firms' efforts (and the costs of these efforts) were observable.

[329] The release of information about data breaches can lead to loss of customers, reputational harm, litigation, or regulatory scrutiny. *See, e.g.,* Press release, U.S. Fed. Trade Comm'n, *Equifax to Pay $575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach* (July 22, 2019), *https://www.ftc.gov/news-events/news/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related-2017-data-breach.*

[330] For example, in a recent survey of financial firms, 58% of the respondents self-reported ''underspending'' on cybersecurity. *See* McKinsey &

Continued

In other words, information asymmetry prevents covered institutions that spend more effort on safeguarding customer information from having customers recognize their extra efforts.

The proposed amendments could mitigate these inefficiencies in three ways. First, by ensuring customers receive timely notice when their information is compromised, they would allow customers to take appropriate remedial actions. Second, by revealing when such events occur, they would help customers to draw inferences about a covered institution's efforts toward protecting customer information which could help inform their choice of covered institution,[331] and in so doing influence firms' efforts toward protecting customer information.[332] Third, by imposing a regulatory requirement to develop, implement, and maintain policies and procedures, the proposed amendments might further enhance firms' cybersecurity preparations and would restrict firms' ability to limit efforts in these areas and thereby mitigate the inefficiency from a competitive ''race to the bottom.'' [333]

The effectiveness of the proposed amendments at mitigating these problems would depend on several factors. First, it would depend on the degree to which customer notification provides actionable information to customers that helps mitigate the effects of the compromise of sensitive customer information. Second, it would also depend on the degree to which the prospect of issuing such notices—and the prospect of resulting reputational harm, litigation, and regulatory scrutiny—helps alleviate underspending on safeguarding customer information.[334] Finally, the effectiveness of the proposed amendments would also depend on the extent to which they induce improvements to existing practices (*i.e.,* the extent to which they strengthen customer safeguards and increase notification relative to the baseline).

C. Baseline

The market risks and practices, regulation, and market structure relevant to the affected parties in place today form the baseline for our economic analysis. The parties directly affected by the proposed amendments (''covered institutions'' [335]) include every broker-dealer (3,509 entities),[336] every investment company (13,965 distinct legal entities),[337] every investment adviser (15,129 entities) [338] registered with the Commission, and every transfer agent (402 entities) [339] registered with the Commission or another appropriate regulatory agency. In addition, the proposed amendments would affect current and prospective customers of covered institutions as well as certain service providers to covered institutions.[340]

1. Safeguarding Customer Information—Risks and Practices

Over the last two decades, the widespread adoption of digitization and the migration toward internet-based products and services has radically changed the manner in which firms interact with customers. The financial services industry has been at the forefront of these trends and now represents one the most digitally mature sectors of the economy.[341] This progress came with a cost: increased exposure to cyberattacks that threaten not only the financial firms themselves, but also their customers. Cyber threat intelligence surveys consistently find the financial sector to be among the most attacked industries.[342]

The trend toward digitization has increasingly turned the problem of safeguarding customer records and information into one of cybersecurity.[343] Because financial firms are part of one of the most attacked industries, the problem of cybersecurity is acute, as the customer records and information in their possession can be quite sensitive (*e.g.,* personal identifying information, bank account numbers, financial transactions) and the compromise of which could lead to substantial harm.[344] Not surprisingly, the financial sector is one of the biggest spenders on cybersecurity measures: a recent survey found that non-bank financial firms spent an average of approximately 0.4% of revenues—or $2,348/employee/year—on cybersecurity.[345]

While spending on cybersecurity measures in the financial services industry is considerable, it may nonetheless be inadequate—even in the estimation of financial firms themselves. According to one recent survey, 58% of financial firms self-reported ''underspending'' on cybersecurity measures.[346] And while adoption of cybersecurity best practices has been accelerating overall, some firms continue to lag in their adoption.[347]

Co. and Institute of International Finance, *IIF/McKinsey Cyber Resilience Survey* (Mar. 2020) (''IIF/McKinsey Report''), *https://www.iif.com/portals/0/Files/content/cyber_resilience_survey_3.20.2020_print.pdf.* A total of 27 companies participated in the survey, with 23 having a global footprint. Approximately half of respondents were European or U.S. Globally Systemically Important Banks (G–SIBs). *See also* Investment Management Cybersecurity Proposal *supra* note 55.

[331] In the case of transfer agents such effects would be mediated through firms' choice of transfer agents and therefore less direct. Nonetheless we believe that, all else being equal, firms would prefer to avoid employing the services of transfer agents that allow their investors' information to be compromised.

[332] *See, e.g.,* Richard J. Sullivan & Jesse Leigh Maniff, *Data Breach Notification Laws,* 101 Econ. Rev. 65 (2016) (''Sullivan & Maniff'').

[333] The ''bottom'' in such a race is a level of cybersecurity spending that is too low from an efficiency standpoint.

[334] Although empirical evidence on the effectiveness of notification breach laws is quite limited, extant studies suggest that such laws protect consumers from harm. *See* Sasha Romanosky, Rahul Telang, & Alessandro Acquisti, *Do Data Breach Disclosure Laws Reduce Identity Theft?,* 30 J. Pol'y. Ansys & Mgmt 256 (2011). *See also* Sullivan & Maniff, *supra* note 332.

[335] *See infra* section III.C.3.

[336] Of these, 502 are dually-registered as investment advisers. *See infra* section III.C.3.a.

[337] Many of these distinct legal entities represent different series of a common registrant. Moreover, many of the registrants are themselves part of a larger family of companies. We estimate there are 1,093 such families. *See infra* section III.C.3.c.

[338] *See infra* section III.C.3.b.

[339] *See infra* section III.C.3.d.

[340] *See infra* section III.C.3.e.

[341] *See* Michael Grebe, et al., *Digital Maturity Is Paying Off,* BCG (June 7, 2008), *available at https://www.bcg.com/publications/2018/digital-maturity-is-paying-off.*

[342] *See, e.g.,* IBM, *X-Force Threat Intelligence Index 2022* (Feb. 2022), *available at https://www.ibm.com/security/data-breach/threat-intelligence.*

[343] This is not to say that this is exclusively a problem of cybersecurity. Generally however, the risks associated with purely physical forms of compromise are of a smaller magnitude, as large-scale compromise using physical means is cumbersome. The largest publicly known incidents of compromised information have appeared to involve electronic access to digital records, as opposed to physical access to records or computer hardware. For a partial list of recent data breaches and their causes *see, e.g.,* Michael Hill and Dan Swinhoe, *The 15 Biggest Data Breaches of the 21st Century,* CSO (Nov. 8, 2022), *available at https://www.csoonline.com/article/2130877/the-biggest-data-breaches-of-the-21st-century.html* (last visited Dec. 29, 2022); Drew Todd, *Top 10 Data Breaches of All Time,* SecureWorld (Sept. 14, 2022), *available at https://www.secureworld.io/industry-news/top-10-data-breaches-of-all-time* (last visited Dec. 29, 2022).

[344] *See supra* note 342.

[345] Julie Bernard et al., *Reshaping the Cybersecurity Landscape,* Deloitte Insights (July 24, 2020), *available at https://www2.deloitte.com/us/en/insights/industry/financial-services/cybersecurity-maturity-financial-institutions-cyber-risk.html* (last visited Feb. 13, 2023). These spending totals represent self-reported shares of information technology budgets devoted to cybersecurity. As such they are unlikely to include additional indirect costs such as the cost of employee time spent on compliance with cybersecurity procedures.

[346] *See* IIF/McKinsey Report, *supra* note 330.

[347] *See* EY and Institute of International Finance, *12th Annual EY/IIF Global Bank Risk Management Survey* (2022), *available at https://www.iif.com/portals/0/Files/content/32370132_ey-iif_global_bank_risk_management_survey_2022_final.pdf* (stating 58% of surveyed banks' Chief Risk Officers cite ''inability to manage cybersecurity risk'' as the top strategic risk); *see also* Sage Lazzaro, *Public*

As discussed in more detail below, the Commission does not currently require covered institutions to notify customers (or the Commission) in the event of a data breach, so statistics relating to data breaches at covered institutions are not readily available. However, data compiled from notifications required under various state laws [348] indicates that in 2021 the number of data breaches reported in the U.S. rose sharply to 1,862—a 68% increase over the prior year.[349] Of these, 279 (15%) were reported by firms in the financial services industry. It is estimated that the average total cost of a data breach for a U.S. firm in 2022 was $9.44/million.[350] The bulk of these costs is attributed to detection and escalation (33%), lost business (32%), and post-breach response (27%); customer notification is estimated to account for only a small fraction (7%) of these costs.[351] Thus, for the U.S. financial industry as a whole, this implies aggregate notification costs under the baseline on the order of $200 million, which—given the greater exposure of financial firms to cyber threats—almost surely represent a lower bound.[352]

2. Regulation

Two features of the existing regulatory framework are most relevant to the proposed amendments. First are the regulations already in place that require covered institutions to notify customers in the event that their information is compromised in some way. Second are regulations that affect covered institutions' efforts toward safeguarding customers' information. While the relevance of the former is obvious, the latter is potentially more significant: regulations aimed at increasing firms' efforts toward safeguarding customer information reduce the need for data breach notifications in the first place. In this section, we summarize these two aspects of the regulatory framework.

a. Customer Notification Requirements

All 50 states and the District of Columbia impose some form of data breach notification requirement under state law. These laws vary in detail from state to state, but have certain common features. State laws trigger data breach notification obligations when some type of ''personal information'' of a state's resident is either accessed or acquired in an unauthorized manner, subject to various common exceptions. For the vast majority of states (47), a notification obligation is triggered only when there is unauthorized acquisition, while a handful of states (4) require notification whenever there is unauthorized access.[353]

Generally, states can be said to adopt either a basic or an enhanced definition of personal information. A typical example of a basic definition specifies personal information as the customer name linked to one or more pieces of nonpublic information such as Social Security number, driver's license number (or other state identification number), or financial account number together with any required credentials to permit access to said account.[354] A typical enhanced definition will include additional types of nonpublic information that trigger the notification requirement; examples include: passport number, military identification number, or other unique identification number issued on a government document commonly used to verify the identity of a specific individual; unique biometric data generated from measurements or technical analysis of human body characteristics, such as a fingerprint, retina, or iris image, used to authenticate a specific individual.[355] Enhanced definitions would also trigger notification when a username or email address in combination with a password or security question and answer that would permit access to an online account is compromised.[356] Most states (39) adopt some form of enhanced definition, while a minority (12) adopt a basic definition.

Most states (43) provide an exception to the notification requirement if, following a breach of security, the entity investigates and determines that there is no reasonable likelihood that the individual whose personal information was breached has experienced or will experience certain harms (''no-harm exception'').[357] Although the types of harms vary by state, they most commonly include: ''harm'' generally (12), identity theft or other fraud (10), misuse of personal information (8). Figure 1 plots the frequency of the various types of harms referenced in states' no-harm exceptions.

cloud security 'just barely adequate,' experts say, VentureBeat (July 9, 2021), *available at https://venturebeat.com/business/public-cloud-security-just-barely-adequate-experts-say/* (noting that the majority of surveyed security professionals believe the cloud service providers ''should be doing more on security.'')

[348] *See infra* section II.A.4.

[349] *See* Identity Theft Resource Center, Data Breach Annual Report (Jan. 2022) (''ITRC Data Breach Annual Report''), *available at https://www.idtheftcenter.org/wp-content/uploads/2022/04/ITRC_2021_Data_Breach_Report.pdf.*

[350] An increase of 4% over the prior year; *see* IBM, *Cost of a Data Breach Report 2022* (July 2022) (''IBM Cost of Data Breach Report''), *https://www.ibm.com/downloads/cas/3R8N1DZJ.* While the report does not provide estimates for U.S. financial services firms specifically, it estimates that world-wide, the cost of a data breach for financial services firms averaged $5.97 million, and that average costs for U.S. firms are approximately twice the world-wide average.

[351] *See id.*

[352] The $200 million figure is based on 7% (the customer notification portion) of an average cost of $9.44 million multiplied by 279 data breaches. *See supra* notes 349 and 350.

[353] *See, e.g.,* notification requirements in California (Cal. Civ. Code sec. 1798.82(a)) and Texas (Tex. Bus. & Com. Code sec. 521.002) triggered by the acquisition of certain information by an unauthorized person, as compared to notification requirements in Florida (Fla. Stat. sec. 501.171) and New York (N.Y. Gen. Bus. Law sec. 899–AA) triggered by unauthorized access to personal information. ''States'' in this discussion includes the 50 U.S. states and the District of Columbia, for a total of 51. All state law citations are to the August 2022 versions of state codes.

[354] *See, e.g.,* Kan. Stat. sec. 50–7a01(g) or Minn. Stat. sec. 325E.61(e).

[355] *See, e.g.,* Md. Comm. Code sec. 14–3501, (defining ''personal information'' to include credit card numbers, health information, health insurance information, and biometric data such as retina or fingerprint).

[356] *See, e.g.,* Arizona Code sec. 18–551 (defining ''personal information'' to include an individual's user name or email address, in combination with a password or security question and answer, that allows access to an online account).

[357] *See, e.g.,* Fla. Stat. sec. 501.171(4)(c). A variation on this exception provides for notification only if the investigation reveals a risk of misuse. *See, e.g.,* Utah Code 13–44–202(1). Eight states, including California and Texas, do not have a no-harm exception.

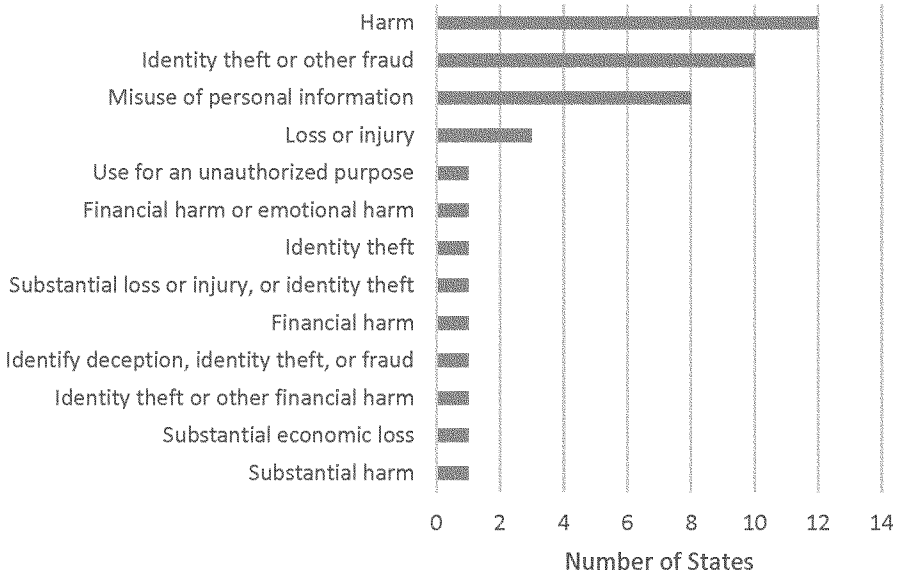

Figure 1: Frequency of types of harms referenced by state statutes with no-harm exceptions to notification requirements. Data source: State law in 2022.

In general, state laws provide a general principle for timing of notification (*e.g.,* delivery shall be made ''without unreasonable delay,'' or ''in the most expedient time possible and without unreasonable delay'').[358] Some states augment the general principle with a specific deadline (*e.g.,* notice must be made ''in the most expedient time possible and without unreasonable delay, but not later than 30 days after the date of determination that the breach occurred'' unless certain exceptions apply.''[359] Figure 2 plots the frequency of different notification deadlines in state laws.

[358] *See, e.g.,* Cal. Civ. Code sec. 1798.82(a) (disclosure to be made ''in the most expedient time possible and without unreasonable delay'' but allowing for needs of law enforcement and measures to determine the scope of the breach and restore the system).

[359] *See, e.g.,* Colo. Reg. Stat. sec. 6–1–716 (notice to be made ''in the most expedient time possible and without unreasonable delay, but not later than thirty days after the date of determination that a security breach occurred, consistent with the legitimate needs of law enforcement and consistent with any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the computerized data system''); Fla. Stat. sec. 501.171(4)(a) (notice to be made ''as expeditiously as practicable and without unreasonable delay . . . but no later than 30 days after the determination of a breach'' unless delayed at the request of law enforcement or waived pursuant to the state's no-harm exception).

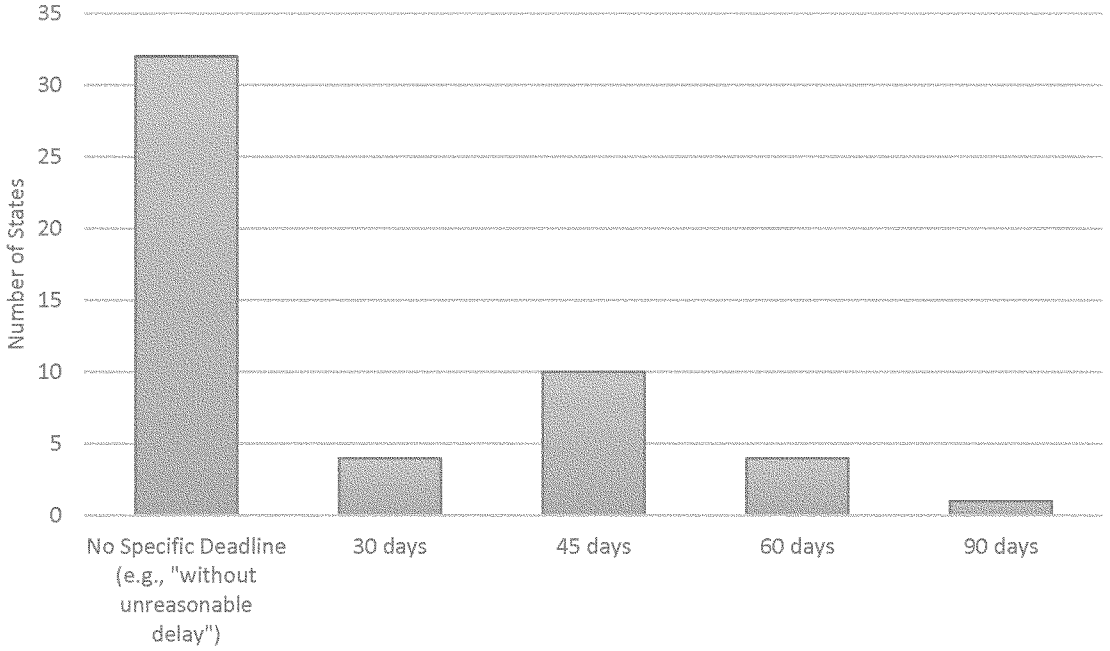

Figure 2: Frequency of notification deadlines in state laws. Data source: State law in 2022.

State laws generally require persons or entities that own or license computerized data that includes private information to notify residents of the state when a data breach results in the compromise of their private information. In addition, state laws generally require persons and entities that do not own or license such computerized data, but that maintain such computerized data for other entities, to notify the affected entity in the event of a data breach (so as to allow that entity to notify affected individuals).[360] Therefore, we understand that all proposed covered institutions are already complying with one or more state notification laws. Variations in these state laws, however, could result in residents of one state receiving notice while residents of another receive no notice, or receive it later, for the same data breach incident.

Covered institutions may use service providers to perform certain business activities and functions, such as trading and order management, information technology functions and cloud computing services. As a result of this outsourcing, service providers may receive, maintain, or process customer information, or be permitted to access it, and therefore a security incident at the service provider could expose information at or belonging to the covered institution. In some cases, these service providers may be required to notify customers directly under state notification laws (*i.e.,* when the service provider owns or licenses the customer data). We anticipate however, that more frequently service providers would fall under provisions of state laws that require persons and entities that maintain computerized data to notify the data owners in the event of a breach.[361] We also understand contracts between covered institutions and service providers could, and may already, call for the service provider to notify the covered institution of a data breach. Thus, we anticipate that most service providers contracting with covered institutions that would be affected by this proposal are already notifying covered institutions of data breaches, pursuant to either contract or state law.[362]

b. Customer Information Safeguards

Regulation S–P currently requires all currently covered institutions to adopt written policies and procedures reasonably designed to: (i) insure the security and confidentiality of customer records and information; (ii) protect against any anticipated threats or hazards to the security or integrity of customer records and information; and (iii) protect against unauthorized access to or use of customer records and information that could result in substantial harm or inconvenience to any customer.[363]

Covered institutions that hold transactional accounts for consumers may also be subject to Regulation S–ID.[364] Such entities must develop and

[360] *See, e.g.,* Cal. Civ. Code sec. 1798.82(b); DC Code 28–3852(b); N.Y. Gen. Bus. Law sec. 899–AA(3); Tex. Bus. & Com. Code sec. 521.053(c). South Dakota does not have such a provision (SDCL sec. 22–40–19 through 22–40–26). In some states, notification from the service provider to the information owner is required only in the case of fraud or misuse. *See, e.g.,* Miss. Code sec. 75–24–29 (requiring notification if the information was or is reasonably believed to have been acquired by an unauthorized person for fraudulent purposes); Colo. Rev. Stat. sec. 6–1–716 (requiring notification if misuse of personal information about a Colorado resident occurred or is likely to occur).

[361] Many service providers may not own the data and may not have knowledge as to which customers are potentially affected by a data breach (*e.g.,* database, email, or server hosting providers). In such cases, it would generally not be possible for service providers to notify affected customers directly.

[362] Several state laws provide that a covered institution may contract with the service provider such that the service provider directly notifies affected individuals of a data breach. We do not have information on the frequency of such arrangements. *See, e.g.,* Fla. Stat. sec. 501.171(6)(b); Ala. Code sec. 8–38–8.

[363] *See* Reg. S–P Release, *supra* note 2; *see also* Disposal Rule Adopting Release, *supra* note 32 (requiring written policies and procedures under Regulation S–P). *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)], at n.22 (''Compliance Program Release'') (stating expectation that policies and procedures would address safeguards for the privacy protection of client records and information and noting the applicability of Regulation S–P).

[364] Regulation S–ID applies to ''financial institutions'' or ''creditors'' that offer or maintain ''covered accounts.'' Entities that are likely to qualify as financial institutions or creditors and maintain covered accounts include most registered brokers, dealers, and investment companies, and some registered investment advisers. *See* Reg. S–P Release, *supra* note 2; *see also* Identity Theft Red Flag Rules, Investment Advisers Act Release No.

Continued

implement a written identity theft program that includes policies and procedures to identify relevant types of identity theft red flags, detect the occurrence of those red flags, and respond appropriately to the detected red flags.[365] As some compromise of customer information is generally a prerequisite for identity theft, it is reasonable to expect that some of the policies and procedures implemented to effect compliance with Regulation S–ID incorporate red flags related to the potential compromise of customer information.[366]

Some covered institutions may also be subject to other regulators' rules implicating customer information safeguards. Transfer agents supervised by one of the banking agencies, would be subject to the Banking Agencies' Incident Response Guidance.[367] The Banking Agencies' guidelines require covered financial institutions to develop a response program covering assessment, notification to relevant regulators and law enforcement, incident containment, and customer notice.[368] The guidelines require customer notification if misuse of sensitive customer information ''has occurred or is reasonably possible.'' [369] They also require notices to occur ''as soon as possible,'' but permit delays if ''an appropriate law enforcement agency determines that notification will interfere with a criminal investigation and provides the institution with a written request for the delay.'' [370] Under the guidelines, ''sensitive customer information'' means ''a customer's name, address, or telephone number, in conjunction with the customer's Social Security number, driver's license number, account number, credit or debit card number, or a personal identification number or password that would permit access to the customer's account.'' [371] In addition ''any combination of components of customer information that would allow someone to log onto or access the customer's account, such as user name and password or password and account number'' is also considered sensitive customer information under the guidelines.[372] The guidelines also state that the OCC Information Security Guidance directs every financial institution to require its service providers by contract to implement appropriate measures designed to protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.[373]

In addition, certain ATSs are subject to obligations regarding their systems that relate to securities market functions under Regulation SCI aimed at enhancing the capacity, integrity, resiliency, availability, and security of those systems.[374]

We also understand that advisers to private funds may be subject to the Federal Trade Commission's recently amended Standards for Safeguarding Customer Information (''FTC Safeguards Rule'') that contains a number of modifications to the existing rule with respect to data security requirements to protect customer financial information.[375] The FTC Safeguards Rule generally requires financial institutions to develop, implement, and maintain a comprehensive information security program that consists of the administrative, technical, and physical safeguards the financial institution uses to access, collect, distribute, process, protect, store, use, transmit, dispose of, or otherwise handle customer information.[376] The rule also requires financial institutions to design and implement a comprehensive information security program with various elements, including incident response. In addition, it requires financial institutions to take reasonable steps to select and retain service providers capable of maintaining appropriate safeguards for customer information and require those service providers by contract to implement and maintain such safeguards.[377]

A variety of guidance is available to institutions seeking to address information security risk, particularly through the development of policies and procedures. These include the NIST and CISA voluntary standards [378] discussed elsewhere in this release, both of which include assessment, containment, and notification elements similar to this proposal. We do not have extensive data spanning all types of covered institutions on their use of these or similar guidelines or on their development of written policies and procedures to address incident response. However, past Commission examination sweeps of broker-dealers and investment advisers suggest that such practices are widespread.[379] Thus, we believe that institutions seeking to develop written policies and procedures likely would have encountered these and similar standards and may have included the critical elements of assessment and containment, as well as notification; we request public comment on this assumption.

c. Annual Notice Delivery Requirement

Under the baseline,[380] a broker-dealer, investment company, or registered investment adviser must generally provide an initial privacy notice to its customers not later than when the institution establishes the customer relationship and annually after that for as long as the customer relationship continues.[381] If an institution chooses to share nonpublic personal information with a nonaffiliated third party other than as disclosed in an initial privacy notice, the institution must generally send a revised privacy notice to its customers.[382]

3582 (Apr. 10, 2013) [78 FR 23637 (Apr. 19, 2013)] (''Identity Theft Release'').

[365] In addition, affected entities must also periodically update their identity theft programs. *See* Reg. S–P Release, *supra* note 2. Other rules also require updates to policies and procedures at regular intervals: *see, e.g.,* Rule 38a–1 under the Investment Company Act; FINRA Rule 3120 (Supervisory Control System); and FINRA Rule 3130 (Annual Certification of Compliance and Supervisory Processes).

[366] In a 2017 Risk Alert, the SEC Office of Compliance Inspections and Examinations noted that in a sampling of registrants, nearly all broker-dealers and most advisers had specific cybersecurity and Regulation S–ID policies and procedures. *See* EXAMS Risk Report, Observations from Cybersecurity Examinations (Aug. 7, 2017), *available at https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf. See also* Identity Theft Release, *supra* note 364.

[367] *See* Banking Agencies' Incident Response Guidance, *supra* note 47.

[368] *See id.* at Supplement A, section II.A.

[369] *See id.* at Supplement A, section III.A.

[370] *See id.* at Supplement A, section III.A.

[371] *See id.* at Supplement A, section III.A.1.

[372] *See id.* at Supplement A, section III.A.1.

[373] *See id.* at Supplement A, section I.C.

[374] *See* Rule 1001 of Regulation SCI. *See supra* note 57.

[375] Issuers that are excluded from the definition of investment company—such as private funds that are able to rely on section 3(c)(1) or 3(c)(7) of the Investment Company Act—would not be subject to Regulation S–P. However, registered investment advisers are covered institutions for purposes of this proposal.

[376] 16 CFR 314.2(c). The FTC Safeguards Rule does not contain a notification requirement.

[377] 16 CFR 314.4(d).

[378] *See* NIST Computer Security Incident Handling Guide and CISA Cybersecurity Incident Response Playbook *supra* note 81.

[379] *See* OCIE, SEC, *Cybersecurity Examination Sweep Summary* (Feb. 3, 2015), *available at https://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf* (written policies and procedures, for both the broker-dealers (82%) and the advisers (51%), discuss mitigating the effects of a cybersecurity incident and/or outline the plan to recover from such an incident. Similarly, most of the broker-dealers (88%) and many of the advisers (53%) reference published cybersecurity risk management standards).

[380] For the purposes of the economic analysis, the baseline does not include the exception to the annual notice delivery requirement provided by the FAST Act. This statutory exception was self-effectuating and became effective on Dec. 4, 2015. *See supra* note 221 and accompanying text.

[381] 17 CFR 248.4 and 248.5.

[382] 17 CFR 248.8. Regulation S–P provides certain exceptions to the requirement for a revised privacy notice, including if the institution is sharing as

The types of information required to be included in the initial, annual, and revised privacy notices are identical. Each privacy notice must describe the categories of information the institution shares and the categories of affiliates and non-affiliates with which it shares nonpublic personal information.[383] The privacy notices also must describe the type of information the institution collects, how it protects the confidentiality and security of nonpublic personal information, a description of any opt out right, and certain disclosures the institution makes under the FCRA.[384]

3. Market Structure

The amendments being proposed here would affect four categories of covered institutions: broker-dealers other than notice-registered broker-dealers, registered investment advisers, investment companies, and transfer agents registered with the Commission or another appropriate regulatory agency. These institutions compete in several distinct markets and offer a wide range of services, including: effecting customers' securities transactions, providing liquidity, pooling investments, transferring ownership in securities, advising on financial matters, managing portfolios, and consulting to pension funds. Many of the larger covered institutions belong to more than one category (*e.g.,* a dually-registered broker-dealer/investment adviser), and thus operate in multiple markets. In the rest of this section we first outline the market for each class of covered institution and then consider service providers.

a. Broker-Dealers

Registered broker-dealers include both brokers (persons engaged in the business of effecting transactions in securities for the account of others) [385] as well as dealers (persons engaged in the business of buying and selling securities for their own accounts).[386] Most brokers and dealers maintain customer relationships, and are thus likely to come into the possession of sensitive customer information.[387] In the market for broker-dealer services, a relatively small set of large- and medium-sized broker-dealers dominate while thousands of smaller broker-dealers compete in niche or regional segments of the market.[388] Broker-dealers provide a variety of services related to the securities business, including (1) managing orders for customers and routing them to various trading venues; (2) providing advice to customers that is in connection with and reasonably related to their primary business of effecting securities transactions; (3) holding customers' funds and securities; (4) handling clearance and settlement of trades; (5) intermediating between customers and carrying/clearing brokers; (6) dealing in corporate debt and equities, government bonds, and municipal bonds, among other securities; (7) privately placing securities; and (8) effecting transactions in mutual funds that involve transferring funds directly to the issuer. Some broker-dealers may specialize in just one narrowly defined service, while others may provide a wide variety of services.

Based on an analysis of FOCUS filings from year-end 2021, there were 3,509 registered broker-dealers. Of these, 502 were dually-registered as investment advisers. There were over 72 million customer accounts reported by carrying brokers.[389] However, the majority of broker-dealers are not ''carrying broker-dealers'' and therefore do not report the numbers of customer accounts.[390] Therefore, we expect that this figure of 72 million understates the total number of customer accounts because many of the accounts at carrying broker dealers have corresponding accounts with non-carrying brokers. Both carrying and non-carrying broker-dealers potentially possess sensitive customer information for the accounts that they maintain.[391] Because non-carrying broker-dealers do not report on the numbers of customer accounts, it is not possible to ascertain with any degree of confidence the distribution of customer accounts across the broader broker-dealer population.

b. Investment Advisers

Registered investment advisers provide a variety of services to their clients, including: financial planning advice, portfolio management, pension consulting, selecting other advisers, publication of periodicals and newsletters, security rating and pricing, market timing, and conducting educational seminars.[392] Although advisers engaged in any of these activities are likely to possess sensitive customer information, the degree of sensitivity will vary widely across advisers. An adviser that offers advice only on personalized investment advice may not hold much customer information beyond address, payment details, and the customer's overall financial condition. On the other hand, an adviser that performs portfolio management services will possess account numbers, tax identification numbers, access credentials to brokerage accounts, and other highly sensitive information.

Based on Form ADV filings received up to June 1, 2022, there were 15,129 SEC-registered investment advisers with a total of 51 million individual clients [393] and $128 trillion in assets under management.[394] Practically all (97%) of these advisers reported providing portfolio management services to their clients.[395] Over half (56%) reported having custody [396] of clients' cash or securities either directly or through a related person with client funds in custody totaling $46 trillion.[397]

permitted under rules 248.13, 248.14, and 248.15 or to a new nonaffiliated third party that was adequately disclosed in the prior privacy notice.

[383] *See* 17 CFR 248.6(a)(2)–(5) and 248.6(a)(9).

[384] *See* 17 CFR 248.6(a)(1) (information collection); 248.6(a)(8) (protecting nonpublic personal information), 248.6(a)(6) (opt out rights); 248.6(a)(7) (disclosures the institution makes under section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)), notices regarding the ability to opt out of disclosures of information among affiliates).

[385] *See* 15 U.S.C. 78c(a)(4).

[386] *See* 15 U.S.C. 78c(a)(5).

[387] Such information would include the customers' names, tax numbers, telephone numbers, broker, brokerage account numbers, etc.

[388] *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, Release No. 34–86031 (June 5, 2019) [84 FR 33318 (July 12, 2019)], at 33406.

[389] Form X–17A–5 Schedule I, Item I8080 (as of July 1, 2022).

[390] *See* General Instructions to Form CUSTODY (as of Sept. 30, 2022).

[391] This information includes name, address, age, and tax identification or Social Security number. *See* FINRA Rule 4512.

[392] *See* Form ADV.

[393] Form ADV, Items 5D(a–b) (as of June 1 2022).

[394] Broadly, regulatory assets under management is the current value of assets in securities portfolios for which the adviser provides continuous and regular supervisory or management services. *See* Form ADV, Part 1A Instruction 5.b.

[395] Form ADV, Items 5G(2–5) (as of June 1 2022).

[396] Here, ''custody'' means ''holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them.'' An adviser also has ''custody'' if ''a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services [the adviser] provide[s] to clients.'' *See* 17 CFR 275.206(4)–2(d)(2).

[397] Form ADV, Items 9A and 9B (as of June 1 2022).

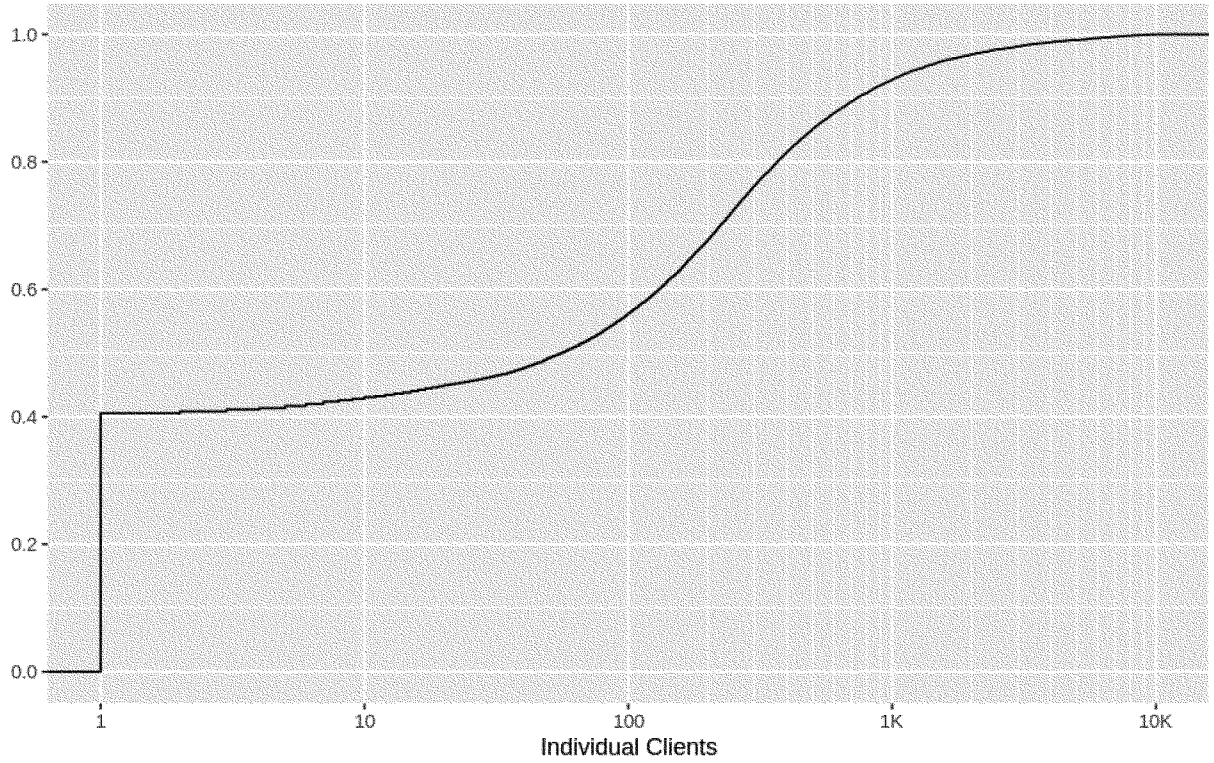

Figure 3: Cumulative distribution of the number of clients across investment advisers. Data source: Form ADV, Items 5D(a-b) (as of June 1, 2022).

Figure 3 plots the cumulative distribution of the number of individual clients handled by SEC-registered investment advisers. The distribution is highly skewed: thirteen advisers each have more than one million clients while 95% of advisers have fewer than 2,000 clients. Many such advisers are quite small, with half reporting fewer than 62 clients.[398]

Similarly, most SEC-registered investment advisers are limited geographically. SEC-registered investment advisers must generally make a ''notice filing'' with a state in which they have a place of business or six or more clients.[399] Figure 4 plots the frequency distribution of the number the number of such filings. Based on notice filings, half of SEC-registered investment advisers operate in fewer than four states, and 38% operate in only one state.[400]

[398] Form ADV, Item 5.A (as of June 1, 2022).

[399] *See* General Instructions to Form ADV (as of June 1, 2022).

[400] Form ADV, Item 2.C (as of June 1 2022). This includes 1,867 advisers who do not make any notice filings.

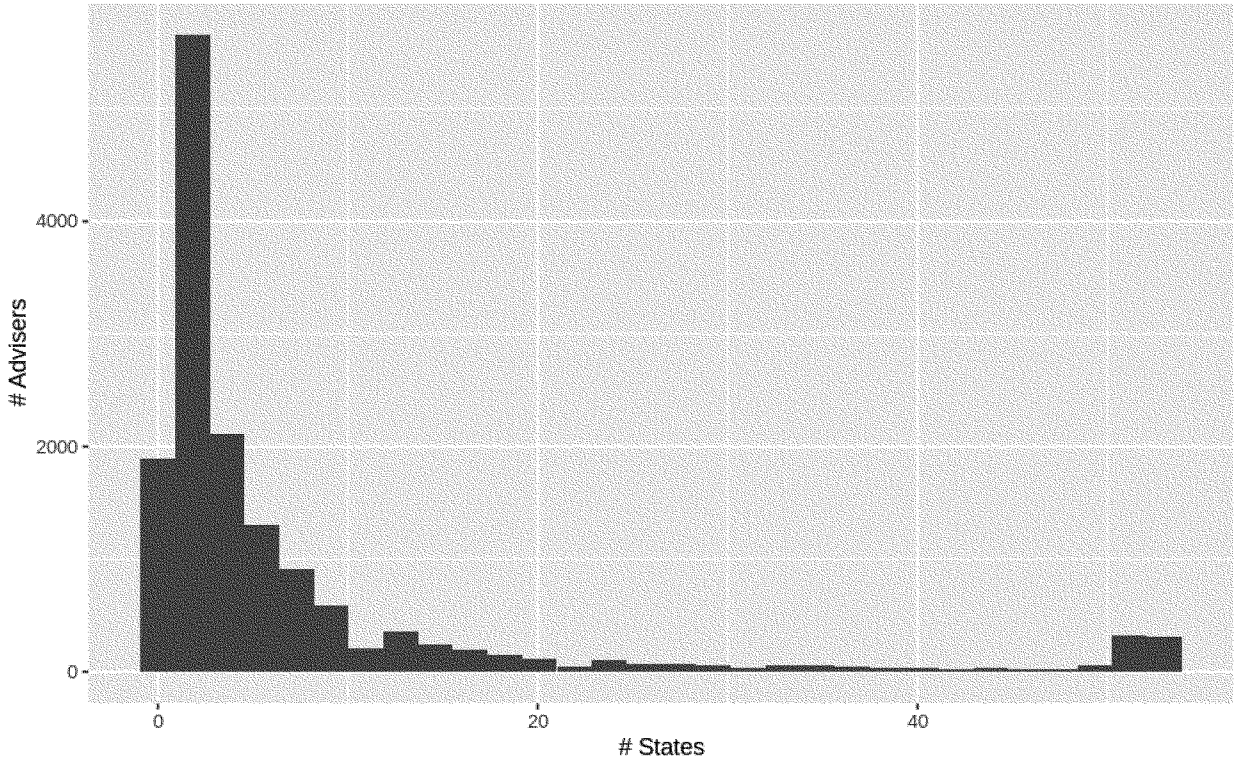

Figure 4: Number of state notice filings by SEC-registered investment advisers. Data source: Form ADV, Item 2.C (as of June 1, 2022).

c. Investment Companies

Investment companies are companies that issue securities and are primarily engaged in the business of investing in securities. Investment companies invest money they receive from investors on a collective basis, and each investor shares in the profits and losses in proportion to that investor's interest in the investment company. Investment companies that would be subject to the proposed rules include registered open-end and closed-end funds, business development companies (''BDCs''), Unit Investment Trusts (''UITs''), and employee securities' companies. Because they are not operating companies, investment companies do not have ''customers'' as such, and thus are unlikely to possess significant amounts of nonpublic ''customer'' information in the conventional sense. They may, however, have access to nonpublic information about their investors.

Table 1 summarizes the investment company universe that would be subject to the proposed rules. In total, as of the end of 2021, there were 13,965 investment companies, including 12,420 open-end management investment companies, 681 closed-end managed investment companies, 662 UITs, 103 BDCs, and 43 employees' securities companies. Many of the investment companies that would be subject to the proposed rules are part of a ''family'' of investment companies.[401] Such families often share infrastructure for operations (*e.g.,* accounting, auditing, custody, legal) and potentially marketing and distribution. We believe that many of the compliance costs and other economic costs discussed in the following sections would likely be borne at the family level.[402] We estimate that there were up to 1,144 distinct operational entities (families and unaffiliated investment companies) in the investment company universe.

TABLE 1—INVESTMENT COMPANIES SUBJECT TO PROPOSED RULE AMENDMENTS, SUMMARY STATISTICS

[For each type of investment company, this table presents estimates of the number of investment companies and investment company families. Data sources: 2021 N–CEN filings,[a] Division of Investment Management Business Development Company Report (2022).[b]]

Inv. Co. type	# Inv. Co.	# Families [c]	# Unaffiliated [d]	# Entities [e]
Open-End [f]	12,420	426	106	532
Closed-End [g]	681	89	142	231
UIT [h]	662	51	216	267
BDC [i]	103			103
ESC [j]	43			43
Other [k]	56	12	12	24

[401] As used here, ''family'' refers to a set of funds reporting the same family investment company name (Form N–CEN Item B.5), or filing under the same registrant name (Form N–CEN Item B.1.A).

[402] For example, each investment company in a family is likely to share common policies and procedures.

TABLE 1—INVESTMENT COMPANIES SUBJECT TO PROPOSED RULE AMENDMENTS, SUMMARY STATISTICS—Continued

[For each type of investment company, this table presents estimates of the number of investment companies and investment company families. Data sources: 2021 N–CEN filings,[a] Division of Investment Management Business Development Company Report (2022).[b]]

Inv. Co. type	# Inv. Co.	# Families [c]	# Unaffiliated [d]	# Entities [e]
Total [l]	13,965	578	476	1,144

[a] Year 2021 Form N–CEN filings (as of Nov 8, 2022).
[b] SEC, Business Development Company Report (updated June 2022), available at *https://www.sec.gov/open/datasets-bdc.html.*
[c] Number of families calculated from affiliation reported by registrants on Item B.5 of Form N–CEN.
[d] Number of registrants reporting no family affiliation.
[e] Number of distinct entities, *i.e.,* the sum of distinct families (# Families) and unaffiliated registrants (# Unaffiliated).
[f] Form N–1A filers; includes all open-end funds, including ETFs registered on Form N–1A.
[g] Form N–2 filers not classified as BDCs.
[h] Form N–3, N–4, N–6, N–8B–2, and S–6 filers.
[i] BDCs listed in the Business Development Company Report (note b) which have made a filing in 2022 (as of Aug. 9 2022).
[j] Form 40–APP filers [not classified as BDCs].
[k] Includes N–3 and S–6 filers.
[l] Cells do not sum to totals as investment company families may span multiple investment company types.

d. Transfer Agents

Transfer agents maintain records of security ownership and are responsible for processing changes of ownership (''transfers''), communicating information from the firm to its security-holders (*e.g.,* sending annual reports), replacing lost stock certificates, etc. However, in practice most U.S.-registered securities are held in ''street name,'' where the ultimate ownership information is not maintained by the transfer agent, but rather in a hierarchal ledger. In this structure, securities owned by individuals are not registered in the name of the individual with the transfer agent. Rather the individual's broker maintains the records of the individual's ownership claim on securities. Brokers, in turn, have claims on securities held by a single nominee owner [403] who maintains records of the claims of the various brokers. This arrangement makes securities lending feasible and facilitates rapid transfers. In such cases, the transfer agent is not aware of the ultimate owner of the securities and therefore does not hold sensitive information belonging to those owners.

Despite the prevalence of securities held in street name, a large number of individuals nonetheless hold securities directly through the transfer agent. Securities held directly may be held either in the form of a physical stock certificate or in book-entry form through the Direct Registration System (''DRS''). In either case, the transfer agent would need to maintain sensitive information about the individuals who own the securities. For example, to handle a request for replacement certificate, the transfer agent would need to confirm the identity of the individual making such a request and to maintain a record of such confirmation. Similarly, to effect DRS transfers a transfer agent would need to provide a customer's identification information in the message to DRS.

In 2022, there were 335 transfer agents registered with the Commission, with an additional 67 registered with the Banking Agencies.[404] On average, each transfer agent reported 1.2 million individual accounts, with the largest reporting 56 million.[405] Figure 5 plots the cumulative distribution of the number of individual accounts reported by transfer agents registered with the Commission. Approximately one third of SEC-registered transfer agents reported no individual accounts,[406] and half reported fewer than ten thousand individual accounts.

[403] In the U.S., this is generally Cede & Co, a partnership organized by the Depository Trust & Clearing Corporation.

[404] Form TA–1 (as of June 20, 2022).

[405] Form TA–2 Items 5(a) (as of June 20, 2022).This analysis is limited to the 151 transfer agents that filed form TA–2.

[406] Some registered transfer agents outsource many functions—including tracking the ownership of securities in individual accounts—to other transfer agents (''service companies''). *See* Form TA–1 Item 6 (as of June 20, 2022).

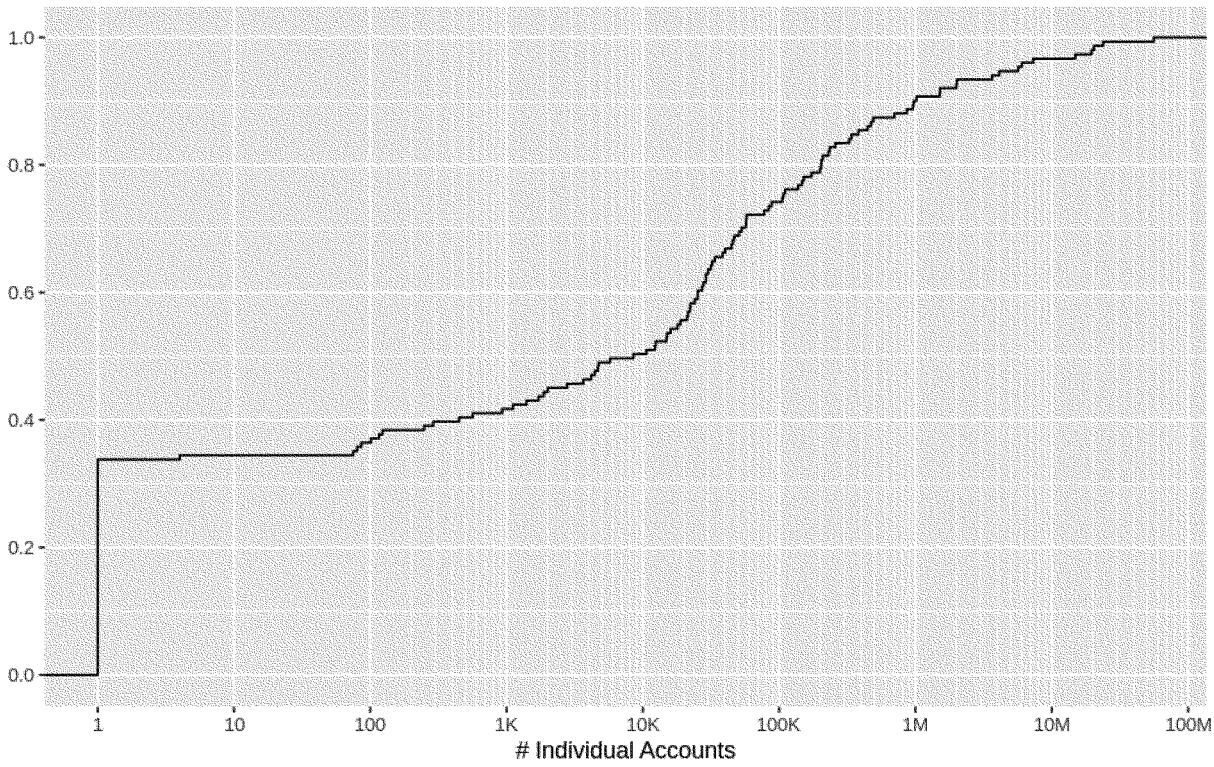

Figure 5: Cumulative distribution of the number of individual accounts (logarithmic scale) across SEC registered transfer agents. Data source: Form TA-2, Items 5(a) (as of June 20, 2022).

e. Service Providers

The proposed policies and procedures provisions would require covered institutions, pursuant to a written contract between the covered institution and its service providers, to require the service providers to take appropriate measures that are designed to protect against unauthorized access to or use of customer information.[407] These contracting requirements on a covered institution would affect a third party service provider that ''receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to [the] covered institution.'' [408]

Covered institutions' relationships with a wide range of service providers would be affected. Specialized service providers with offerings geared toward outsourcing of covered institutions' core functions would generally fall under the proposed contracting requirements. Those offering of customer relationship management, customer billing, portfolio management, customer portals (*e.g.,* customer trading platforms), customer acquisition, tax document preparation, proxy voting, and regulatory compliance (*e.g.,* AML/KYC) would likely fall under the proposed contracting requirements. In addition, various less-specialized service providers could potentially fall under these requirements. Service providers offering Software-as-a-Service (SaaS) solutions for email, file storage, and similar general-purpose services could potentially be in a position to receive, maintain, or processes customer information. Similarly, providers of Infrastructure-as-a-Service (IaaS), Platform-as-a-Service (PaaS), as well as those offering more ''traditional'' consulting services (*e.g.,* IT contractors) would in many cases be ''otherwise [ ] permitted access to customer information'' and could fall under the contracting provisions.

Due to data limitations, we are unable to quantify or characterize in much detail the structure of these various service provider markets.[409] However, it has long been recognized that the financial services industry is increasingly relying on service providers through various forms of outsourcing.[410]

D. Benefits and Costs of the Proposed Rule Amendments

The proposed amendments can be divided into four main components. First, they would create a requirement for covered institutions to adopt incident response programs, including notification to customers in the event sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization. Second, they would broaden the scope of information covered by the safeguards rule and the disposal rule [411] and extend the application of the safeguards rule to transfer agents. Third, they would require covered institutions to maintain and retain records related to the foregoing. Fourth, they would include in regulation an existing statutory exemption for annual privacy

[407] *See infra* section III.D.1.b.

[408] Proposed rule 248.30(e)(10).

[409] As noted above, potential service providers include a wide range of firms fulfilling a variety of functions. The internal organization of covered entities, including their reliance on service providers, is not generally publicly observable. Although certain regulatory filings shed a limited light on the use of third-party service providers (*e.g.,* transfer agents' reliance on third parties for certain functions), we are unaware of any data sources that provide detail on the reliance of covered institutions on third-party service providers.

[410] *See* Bank for International Settlements, *Outsourcing in Financial Services* (Feb. 15, 2005), *available at https://www.bis.org/publ/joint12.htm.*

[411] 17 CFR 248.30(a) and 17 CFR 248.30(b), respectively.

notices. We discuss costs and benefits of each provision in turn.

1. Response Program

The proposed amendments would require covered institutions to ''develop, implement, and maintain written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer information'' [412] which must include a response program ''designed to detect, respond to, and recover from unauthorized access to or use of customer information, including customer notification procedures.'' [413] Under the proposal, covered institutions' response programs would be required to address incident assessment, containment, as well as customer notification.[414]

The question of how best to structure the response to a cyber-incident has received considerable attention from firms, IT consultancies, government agencies, standards bodies, and industry groups, resulting in numerous reports with recommendations and summaries of best practices.[415] While the emphasis of these reports varies, certain key components are common across many cybersecurity incident response programs. For example, NIST's Computer Security Incident Handling Guide identifies four main phases to cyber incident handling: (1) preparation; (2) detection and analysis; (3) containment, eradication, and recovery; and (4) post-incident activity.[416] The assessment, containment, and notification prongs of the proposed policies and procedures requirement correspond to the latter three phases of the NIST recommendations. Similar analogues are found in other reports, recommendations, and other regulators' guidelines.[417] Thus, the proposed procedures of the incident response program are substantially consistent with industry best practices and these other regulatory documents that seek to develop effective policies and procedures in this area.

In addition to helping ensure that customers are notified when their data is breached, the proposed requirements for policies and procedures to address assessment and containment of incidents are likely to have various other benefits. Having reasonably-designed strategies for incident assessment and containment ex ante could reduce the frequency and scale of breaches through more effective intervention and improved managerial awareness. Any such improvements to covered institutions' processes would benefit their customers (*i.e.* by reducing harms to customers resulting from data breaches), as well as the covered institutions themselves (*i.e.* by reducing the expected costs of handling data breaches).

In the remainder of this section, we first consider the benefits and costs associated with requiring covered institutions to develop, implement, and maintain written policies and procedures for a response program generally. We then consider costs and benefits of the proposed service provider provisions. We conclude this section with an analysis of the proposed notification requirements vis-à-vis the notification requirements already in force under the various existing state laws.

a. Written Policies and Procedures

Written policies and procedures are a practical prerequisite for organizations to implement standard operating procedures, which have long been recognized as necessary to improving outcomes in critical environments.[418] While we are not aware of any studies that assess the efficacy of written policies and procedures specifically in the context of financial regulation, we expect that requiring written policies and procedures for the proposed response program would improve its effectiveness in a number of ways. Although data breach incidents are increasingly common,[419] they are nonetheless a relatively rare event for any given covered institution. As the process for handling them is unlikely to be routine for a covered institution' staff, written policies and procedures can help ensure that the covered institution's personnel know what corrective actions to take and when. Moreover, written policies and procedures can help ensure that the incident is handled in an optimal manner. Finally, establishing incident response procedures ex ante can facilitate discussion among the covered institution's staff and expose flaws in the incident response procedures before they are used in a real response.

As noted in section III.C , all states and the District of Columbia generally require businesses to notify their customers when certain customer information is compromised, but they do not typically require the adoption of written policies and procedures for the handling of such incidents.[420] However, despite the lack of explicit statutory requirements, covered institutions—especially those with a national presence—may have developed and implemented written policies and procedures for a response program that incorporates various standard elements, including the ones being proposed here: assessment, containment, and notification.[421] Given the numerous and distinct state data breach laws, it would be difficult for larger covered institutions operating in multiple states to comply effectively with existing state laws without having some written policies and procedures in place. As such covered institutions are generally larger, they are more likely to have compliance staff dedicated to designing and implementing regulatory policies and procedures, which could include policies and procedures regarding incident response. Moreover, to the extent covered institutions that have already developed written policies and procedures for incident response have based such policies and procedures on common cyber incident response frameworks (*e.g.,* NIST Computer Security Incident Handling Guide, CISA Cybersecurity Incident Response Playbook),[422] generally accepted industry best practices, or other applicable regulatory guidelines,[423] these large covered institutions' written policies and procedures are likely to

[412] Proposed rule 248.30(b)(1).

[413] Proposed rule 248.30(b)(3).

[414] Proposed rule 248.30(b)(3).

[415] *See supra* section III.C.1.

[416] *See* NIST Computer Security Incident Handling Guide, *supra* note 81.

[417] *See* text accompanying note 367.

[418] Other Commission regulations, such as the Investment Company Act and Investment Advisers Act compliance rules, require policies and procedures. 17 CFR 270.38a–1(a)(1), 275.206(4)–7(a). The utility of written policies and procedures is recognized outside the financial sector as well; for example, standardized written procedures have been increasingly embraced in the field of medicine. *See e.g.,* Robert L. Helmreich, *Error Management as Organizational Strategy, In Proceedings of the IATA Human Factors Seminar, Vol. 1.* Citeseer (1998); *see also* Alex, Joseph Chaparro Keebler, Elizabeth Lazzara & Anastasia Diamond, *Checklists: A Review of Their Origins, Benefits, and Current Uses as a Cognitive Aid in Medicine, Ergonomics in Design:* 2019 Q. Hum. Fac. App. 27 (2019): 106480461881918.

[419] *See* ITRC Data Breach Annual Report, *supra* note 349 (noting that in 2021, there were more data compromises reported in the United States than in any year since the first state data breach notice law became effective in 2003).

[420] *See e.g.,* Cal. Civil Code sec. 1798.82 and N.Y. Gen. Bus. Law. sec. 899–AA.

[421] Various industry guidebooks, frameworks, and government recommendations share many common elements, including the ones being proposed here. *See e.g.* NIST Computer Security Incident Handling Guide, *supra* note 81; *see also* CISA Incident Response Playbook, *supra* note 75.

[422] *See supra* notes 75 and 81.

[423] For example, the Banking Agencies' Guidance states that covered institutions that are subsidiaries of U.S. bank holdings companies should develop response programs that include assessment, containment, and notification elements. *See supra* discussion of Banking Agencies' Incident Response Guidance in text accompanying note 367.

include the proposed elements of assessment, containment, and notification, and to be substantially consistent with the proposed rule's requirements.

Thus, we do not anticipate that the proposed requirement for written policies and procedures would result in substantial new benefits from its application to large covered institutions, those with a national presence, or those already subject to comparable Federal regulations.[424] For the same reasons, it is unlikely to impose significant new costs for these institutions. Here, we expect the main cost associated with the proposed requirement to be the cost of reviewing existing policies and procedures to verify that they satisfy the new requirement. We further expect that these costs—although not significant—would ultimately be passed on to customers of these institutions.[425]

We expect that the proposed written policies and procedures requirement would have more substantial benefits and costs for smaller covered institutions without a national presence, such as small registered investment advisers and broker-dealers who cater to a clientele based on geography, as compared to larger covered institutions. For smaller covered institutions the potential reputational cost of a cybersecurity breach is likely to be relatively small,[426] while the cost of developing and implementing written policies and procedures for a response program is proportionately large.[427] Moreover, these smaller covered institutions could potentially comply effectively with the relevant state data breach notification laws without adopting written policies and procedures to deal with customer notification: they may only need to consider—on an ad hoc basis—the notification requirements of the small number of states in which their customers reside.

Thus, we expect that for such covered institutions, the proposed amendments would likely impose additional compliance costs related to amending their existing written policies and procedures for safeguarding customer information.[428] While these smaller covered institutions could potentially pass some of these costs on to customers in the form of higher fees, their ability to do so may be limited due to the presence of larger competitors with more customers.[429] In addition, covered institutions that improve their customer notification procedures in response to the proposed amendments could suffer reputational costs resulting from the additional notifications.[430]

Although the relevant baseline for the analysis of this proposal incorporates only regulations currently in place, we note that several concurrent Commission proposals would impose broader policies and procedures requirements relating to cybersecurity and data protection on some covered institutions.[431] Insofar as these related proposals are adopted, the response program being proposed here would represent a refinement of elements addressing incident response and recovery found in the concurrent proposals.[432] Thus, we anticipate that costs of developing the response programs being proposed here could largely be subsumed in the costs of developing policies and procedures for these concurrent proposals (if adopted).

The benefits ensuing from smaller, more geographically limited covered institutions incorporating incident response programs to their written policies and procedures can be expected to arise from improved efficacy in notifying affected customers and—more generally—from improvements in the manner in which such incidents are handled with aforementioned attendant benefits to customers and to the covered institutions themselves.[433]

Lacking data on the improvements to efficacy—whether it be efficacy of customer notification, incident assessment, or incident containment—that would result from widespread adoption of written response programs, we cannot quantify the economic benefits of the proposed requirements. Similarly, quantifying the indirect economic costs such as reputational cost of any potential increased efficacy in customer notification is not feasible. However, as noted earlier, the effects of these requirements are likely to be small for covered institutions with a national presence who—we understand—are likely to already have such programs in place. For such institutions, we expect direct compliance costs to be largely limited to reviews of existing policies and procedures.[434] Smaller, more geographically limited covered institutions—which are less likely to have written policies and procedures to address incident response—we expect would be more likely to bear the full costs associated with adopting and implementing such procedures.[435]

The proposed requirements could potentially provide great benefit in a specific incident, for example in the case of a data breach at an institution that does not currently have written policies and procedures and was unprepared to promptly respond in keeping with law, and best practice. Such an institution would also bear the highest cost in complying with the proposal. In the aggregate, however, considering the proposed amendments in the context of the baseline, these benefits and costs are likely to be limited. As we have noted above, all states have previously enacted data breach notification laws with substantially similar aims and, therefore, we think it likely that many institutions have written policies and procedures to support compliance with these laws. In addition, we anticipate that larger covered institutions with a national presence—who account for the bulk of covered institutions' customers—have already developed written incident response programs consistent with the proposed requirements in most respects.[436] Thus, the benefits and costs of requiring written incident response programs would largely be limited to smaller covered institutions without a national

[424] The nature of the transfer agent and registered investment company business largely precludes geographic catering and that these entities will all have a ''national presence.''

[425] Costs incurred by larger covered institutions as a result of the proposed amendments will generally be passed on to their customers in the form of higher fees. However, smaller covered institutions—which are likely to face higher average costs—may not be able to do so. *See infra* section III.E.

[426] Smaller firms generally have a lower franchise value (the present value of the future profits that a firm is expected to earn as a going concern) and lower brand equity (the value of potential customers' perceptions of the firm). Thus, the costs of potential reputational harm are typically lower than at larger firms.

[427] *See supra* discussion in section III.A following note 317.

[428] As required under existing Regulation S–P, 17 CFR 248.30.

[429] *See supra* section III.C.3.

[430] *See supra* section III.B; *see also infra* section III.D.1.c.

[431] *See* Investment Management Cybersecurity Proposal, *supra* note 55, Exchange Act Cybersecurity Proposal and Regulation SCI Proposal, *supra* note 57. *See also supra* section II.G.

[432] For example, the response program proposed here provides further specificity to the ''Cybersecurity Incident Response and Recovery'' element of the policies and procedure required under the Investment Management Cybersecurity Proposal. *See* Investment Management Cybersecurity Proposal, *supra* note 55, at section II.A.1.e.

[433] *See supra* text accompanying notes 415–418.

[434] We expect these reviews to be generally smaller than the costs of adopting and implementing said procedures as discussed in section IV.

[435] Administrative costs associated with developing and implementing policies and procedures are estimated to be $11,375. *See infra* section IV.

[436] *See supra* discussion in this section.

presence—institutions whose policies affect relatively few customers.

b. Service Provider Provisions

The proposed amendments would require that a covered institution's incident response program include written policies and procedures that cover activity by service providers.[437] Specifically, these policies and procedures would require covered institutions, pursuant to a written contract between the covered institution and its service providers, to require the service providers to take appropriate measures that are designed to protect against unauthorized access to or use of customer information, including notification to the covered institution in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider to enable the covered institution to implement its response program. Under the proposed amendments, ''service provider'' is defined broadly, as ''any person or entity that is a third party and receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a covered institution.''[438] Thus, the proposed requirement could affect contracts with a broad range of entities, including potentially email providers, customer relationship management systems, cloud applications, and other technology vendors.

As modern business processes increasingly rely on third-party service providers, ensuring consistency in regulatory requirements increasingly requires consideration of the functions performed by service providers, and how these functions interact with the regulatory regime. Ignoring such aspects would create opportunities for regulatory arbitrage through outsourcing of functions to unregulated service providers. Thus, the proposed requirement would function to strengthen the benefits of the proposal by helping ensure that the proposed requirements have similar effects regardless of how a covered institution chooses to implement its business processes (*i.e.,* whether those processes are implemented in-house or outsourced).

For service providers that provide specialized services aimed at covered institutions, the proposed requirement would create additional market pressure to enhance service offerings so as to facilitate covered institutions' compliance with the proposed requirements.[439] These service providers would have increased market pressure to adapt their services to facilitate covered institutions' compliance with the proposed amendments. This would entail costs for the service providers, including the actual cost of adapting business processes to accommodate the requirements, as well as costs related to renegotiating service agreements with covered institutions to include the required contractual provisions. It is difficult for us to quantify these costs, as we have no data on the number of specialized service providers used by covered institutions and on the ease with which they could adapt business processes to satisfy the new contractual provisions. That said, we preliminarily believe that these costs are justified and would not represent an undue cost as both the specialized service providers and the covered institutions contracting with them are adapted to operating in a highly-regulated industry, and would be accustomed to adapting their business processes to meet regulatory requirements. We further expect that such costs would largely be passed on to covered institutions and ultimately their customers.[440]

With respect to more generic service providers (*e.g.,* email, customer-relationship management), the situation could be quite different. For these providers, covered institutions are likely to represent a small fraction of their customer base. These generic service providers may be unwilling to adapt their business processes to the regulatory requirements of a small subset of their customers. Under the proposed requirement, some covered institutions could find that some of their existing generic service providers would be unwilling to take the steps necessary to facilitate covered institutions' compliance with the proposed amendments. In such cases, the covered institutions would need to switch service providers and bear the associated switching costs, while the service providers would suffer loss of customers.[441] Although these costs would be offset by benefits arising from enhanced efficacy of the regulation,[442] they would be particularly acute for smaller covered institutions which lack bargaining power with generic service providers and would in many cases be forced to switch providers.

Moreover, in some cases generic service providers may have the business processes in place to facilitate covered institutions' compliance, but may be unwilling to enter into suitable written contracts. This situation is likely to arise with large, best-of-breed generic service providers with large market share, and could lead to perverse outcomes where the aims of the proposed amendments are undermined.[443] For example, large, established server hosting providers could be particularly unwilling to make contractual accommodations.[444] At the same time, these hosting providers would have the greatest economic incentive—and means—to reduce generic vulnerabilities within their control.[445] Thus, if a covered institution is forced to switch away from a large, established hosting provider unwilling to amend its contractual terms, it is likely to end up relying on a smaller, less established hosting provider that—while more amenable to specific contractual language—may be less capable of addressing the generic vulnerabilities within its control.[446] Given the increasing reliance of firms on such generic service providers,[447] switching could generate substantial costs and bring with it reduced ability to protect customer information if such generic service providers are either unwilling to contractually agree to certain provisions or unable to address the vulnerabilities within their control.

[437] Proposed rule 248.30(b)(5)(i).

[438] Proposed rule 248.30(e)(10).

[439] A service provider involved in any business-critical function likely ''receives, maintains, processes, or otherwise is permitted access to customer information''. *See* proposed rule 248.30(e)(10).

[440] *See supra* note 425.

[441] These costs include the direct costs associated with reviewing and renegotiating existing agreements as well as indirect costs arising from service providers requiring additional compensation for providing the required contractual guarantees.

[442] From the perspective of current or potential customers, the implications of customer information safeguard failures are similar whether the failure occurs at a covered institution, or at one of its third-party service providers.

[443] For example, it is unlikely that a small investment adviser would be able to effect any changes in its contracts with large providers of generic services.

[444] For such service providers, the profits earned from covered institutions may not be sufficient to justify creating a separate contractual regime. Moreover, actually adapting business processes—processes that apply to many different types of customers—to satisfy the contractual terms applicable to only a small subset of customers is likely to be cost prohibitive and impracticable.

[445] While a hosting provider can address ''generic'' vulnerabilities that apply to all customers (*e.g.,* vulnerabilities in the physical and virtual access controls to the servers), it may not be able to mitigate vulnerabilities ''specific'' to a given customer (*e.g.,* security flaws in applications deployed by customers).

[446] Smaller, ''upstart'' service providers may be more willing to provide unrealistic contractual assurances as the risk to their (more limited) reputations is lower.

[447] *See supra* section III.C.3.e.

Finally, even in cases where service providers are willing to adapt processes and contractual terms to meet covered institutions requirements, the task of renegotiating service agreements could—in itself—impose substantial contracting costs on the parties. Contracting costs are likely to be most acute for larger covered institutions, which may have hundreds of contracts that would require renegotiation. These additional costs would likely be passed on to customers in the form of higher fees.

c. Notification Requirements

The proposed requirements would provide for a strong minimum standard for data breach notification, applicable to the sensitive customer information of all customers of covered institutions (including customers of other financial institutions whose information has been provided to a covered institution) [448] regardless of their state of residence. The ''strength'' of a data breach notification standard is a function of its various provisions and how these provisions interact to provide customers with thorough, timely, and accurate information about when their information has been compromised. Customers receiving notices that are more thorough, timely, and accurate have a better chance of taking effective remedial actions, such as placing holds on credit reports, changing passwords, and monitoring account activity. These customers would also be better able to abandon institutions that have allowed their information to be compromised. Similarly, non-customers who learn of a data breach, for example from individuals notified as a result of the minimum standard, could use this information to avoid covered institutions that allow compromises to occur.

As discussed in section III.C.2.a all 50 states and the District of Columbia already have data breach laws generally applicable to compromises of their residents' information. Thus, the benefits of the proposed minimum standard for notification to customers (vis-à-vis the baseline) would vary depending on each customer's state of residence, with the greatest benefits accruing to customers that reside in states with ''weaker'' data breach laws.

Unfortunately, with the data available, it is not practicable to decompose the marginal contributions of the various state law provisions to the overall ''strength'' of state data breach laws. Consequently, it is not possible for us to quantify the benefits of the proposed minimum standard to customers residing in the various states. Thus, in considering the benefits of the proposed notification requirement, we limit consideration to the ''strength'' of individual provisions of the proposal vis-à-vis the corresponding provisions under state laws, and consider the number of customers that could potentially benefit from each.

Similarly—albeit to a somewhat lesser extent—the costs to covered institutions will also vary depending on the geographical distribution of each covered institution's customers. Generally, the costs associated with this proposal will be greater for covered institutions whose customers reside in states with weaker data breach laws than for those whose customers reside in states with stronger data breach laws. In particular, smaller covered institutions whose customers are concentrated in states with weak state data breach laws are likely to face proportionately higher costs.

In the rest of this section, we consider key provisions of the proposed notification requirements, their potential benefits to customers (vis-à-vis existing state notification laws), and their costs.

i. Effect With Respect to Customers of Other Financial Institutions

The scope of customer information subject to protection under the proposed amendments extends to ''all customer information in the possession of a covered institutions, and all consumer information that a covered institution maintains or otherwise possesses for a business purpose, as applicable, regardless of whether such information pertains to individuals with whom the covered institution has a customer relationship, or pertains to the customers of other financial institutions and has been provided to the covered institution.'' [449]

This aspect of the proposal would generally extend the benefits of the proposed amendments, and in particular of the proposed notification requirements,[450] to a wide range of individuals such as prospective customers, account beneficiaries, recipients of wire transfers, or any other individual whose customer information a covered institution comes to possess, so long as the individuals are customers of a financial institution.

We do not anticipate that extending the scope of information covered by the proposed amendments to include these additional individuals would have a significant effect on costs faced by covered institutions resulting from a data breach.[451] We further anticipate that costs of preventative measures taken by covered institutions to protect customers in response to the proposed amendments would generally be effective at protecting these additional individuals.[452] However, we acknowledge that in certain instances, this may not be the case. For example, information about prospective customers used for sales or marketing purposes may be housed in separate systems from the covered institution's ''core'' customer account management systems and require additional efforts to secure. That said, given that the distinction between customers and other individuals is generally not relevant under existing state notification laws—which apply to information pertaining to residents of a given state—we expect that most covered institutions will have already undertaken to protect and provide notifications of data breaches to these additional individuals.

ii. Effect With Respect to GLBA Safe Harbors

A number of state data breach laws provide exceptions to notification for entities subject to and in compliance with the GLBA. These ''GLBA Safe Harbors'' may result in customers not receiving any data breach notification from registered investment advisers, broker dealers, investment companies, or transfer agents. The proposal would help ensure customers receive notice of breach in cases where they may not currently because notice is not required under state law.

Based on an analysis of state laws, we found that 11 states provide a GLBA Safe Harbor.[453] Together, these states account for 15% of the U.S. population, or approximately 8 million customers who may potentially benefit from this provision.[454] While we do not have data

[448] *See* proposed rule 248.30(a); *see also infra* section III.D.1.c.i.

[449] Proposed rule 248.30(a).

[450] As described in more detail in the following subsections.

[451] These costs would include additional reputational harm and litigation as well as increased notice delivery costs.

[452] For example, measures aimed at strengthening information safeguards such as improved user access control.

[453] States with GLBA Safe Harbors include Arizona, Iowa, Kentucky, Minnesota, Missouri, Nevada, New Mexico, Oregon, South Carolina, Tennessee, and Utah.

[454] Estimates of the numbers of potential customers based on state population adjusted by the percentage of households reporting direct stock ownership (15.2%). *See* U.S. Census Bureau, *Apportionment Report* (2020), *available at https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.xlsx; see also* Federal Reserve Board, *Survey*

Continued

on the exact geographical distribution of customers across all covered institutions, we are able to identify registered investment advisers whose customers reside exclusively in GLBA Safe Harbor states.[455] We estimate that there are 215 such advisers, representing 1.4% of the adviser population.[456] These advisers represent up to 11,000 clients, and tend to be small, with a median regulatory assets under management of $223 million. We expect that a similar percentage of broker-dealers would be found to be operating exclusively in GLBA Safe Harbor states.

Changing the effect of the GLBA Safe Harbors is not likely to impose significant direct compliance costs on most covered institutions. For the reasons outlined above, most covered institutions have customers from states without a GLBA Safe Harbor and we therefore expect they have existing procedures for notifying customers under state law. However, covered institutions whose customer base is limited to these GLBA Safe Harbor states may not have implemented any procedures to notify customers in the event of a data breach. These covered institutions would face proportionately higher costs than entities with some notification procedures already in place.

iii. Accelerating Timing of Customer Notification

Under the proposed amendments, a covered institution would be required to provide notice to customers in the event of a data breach as soon as practicable, but not later than 30 days after becoming aware that a data breach has occurred. As discussed in section III.C.2.a, existing state laws vary in terms of notification timing. Most states (32) do not include a specific deadline, but rather require that the notice be given in an expedient manner and/or that it be provided without unreasonable delay; these states account for 61% of the U.S. population with approximately 31 million potential customers residing in these states.[457] Four states have a 30-day deadline; we estimate that 5 million customers reside in these states. The remaining 15 states provide for longer notification deadlines; we estimate that 14 million customers reside in these states. For the 14 million customers residing in these 15 states, the proposed 30-day deadline would tighten the notification timeframes by between 15 to 60 days.[458] In addition, the 30-day deadline we are proposing is likely to tighten notification timeframes for approximately 31 million customers residing in states with no specific deadline; however, the aggregate effects on these 31 million customers may be limited insofar as the relevant state laws are not generally interpreted as allowing delays in notification greater than 30 days.[459] Finally, because the proposal would not provide for broad exceptions to the 30-day notification requirement,[460] in many cases it would tighten notification timeframes even for the 5 million customers residing in states with a 30-day deadline.[461]

Tighter notification deadlines should increase customers' ability to take effective measures to counter threats resulting from their sensitive information being compromised. Such measures may include placing holds on credit reports or engaging in more active monitoring of account and credit report activity. In practice, however, when it takes a long time to discover a data breach, a relatively short delay between discovery and customer notification may have little impact on customers' ability to take effective countermeasures.[462]

Based on data from the Washington Attorney General's Office,[463] in 2021 it took an average of 170 days (standard deviation: 209 days) from the time a breach occurred to its discovery. This suggests that time to discovery is likely to prevent issuance of timely customer notices in most cases.[464] However, as plotted in Figure 6, while some firms take many months—even years—to discover a data breach, others do so in a matter of days: 15% of firms were able to detect a breach within 2 weeks, and 20% were able to do so within 30 days. Thus, while the proposed 30-day notification deadline may not substantially improve the timeliness of customer notices in many cases, in some cases it could.

of Consumer Finances (2019), *available at https://www.federalreserve.gov/econres/scfindex.htm.*

[455] Based on Form ADV, Item 2.C; *see also supra* note 399.

[456] *See id.*

[457] *See supra* Figure 2.

[458] State deadlines are either 30, 45, 60, or 90 days.

[459] The timing language in state laws without specific language varies, but generally suggests that notices must be prompt. For example, California requires that such notice be given ''in the most expedient time possible and without unreasonable delay;'' *see* Cal. Civil Code sec. 1798.82.

[460] *See supra* note 359.

[461] For example, in Washington the median notification delay in 2021 was 37 days, even though the state statute requires notice be given ''without unreasonable delay, and no more than thirty calendar days after the breach was discovered, unless the delay is at the request of law enforcement as provided in subsection (3) of this section, or the delay is due to any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system'' RCW 19.255.010(8).

[462] In other words, the utility of a notice is likely to exhibit decay. For example, if a breach is discovered immediately, the utility of receiving a notification within 1 day is considerably greater than the utility of receiving a notification in 30 days. However, if a breach is discovered only after 200 days, the difference in expected utility from receiving a notification on day 201 vs day 231 is smaller: with each passing day some opportunities to prevent the compromised information from being exploited are lost (*e.g.,* unauthorized wire transfer), with each passing day opportunities to discover the compromise grow (*e.g.,* noticing an unauthorized transaction), and with each passing day the compromised information becomes less valuable (*e.g.,* passwords, account numbers, addresses, etc., change over time).

[463] Washington State Office of the Attorney General, *Data Breach Notifications, available at https://data.wa.gov/Consumer-Protection/Data-Breach-Notifications-Affecting-Washington-Res/sb4j-ca4h* (last visited Mar. 7, 2023). We rely on data from Washington State as it provides the most detail on the life cycle of incidents.

[464] With respect to the time to discovery of a data breach, we believe that data from Washington State is fairly representative of the broader U.S. population. Similarly, data from California regarding breach notices sent to more than 500 California residents indicates that the average time from discovery to notification in 2021 was 197 days. State of California Department of Justice, Office of the Attorney General, *Search Data Security Breaches* (2023), *available at https://oag.ca.gov/privacy/databreach/list* (last visited Feb. 22, 2023). According to IBM, in 2021 it took an average of 212 days to identify a data breach. *See* IBM Cost of Data Breach Report, *supra* note 350.

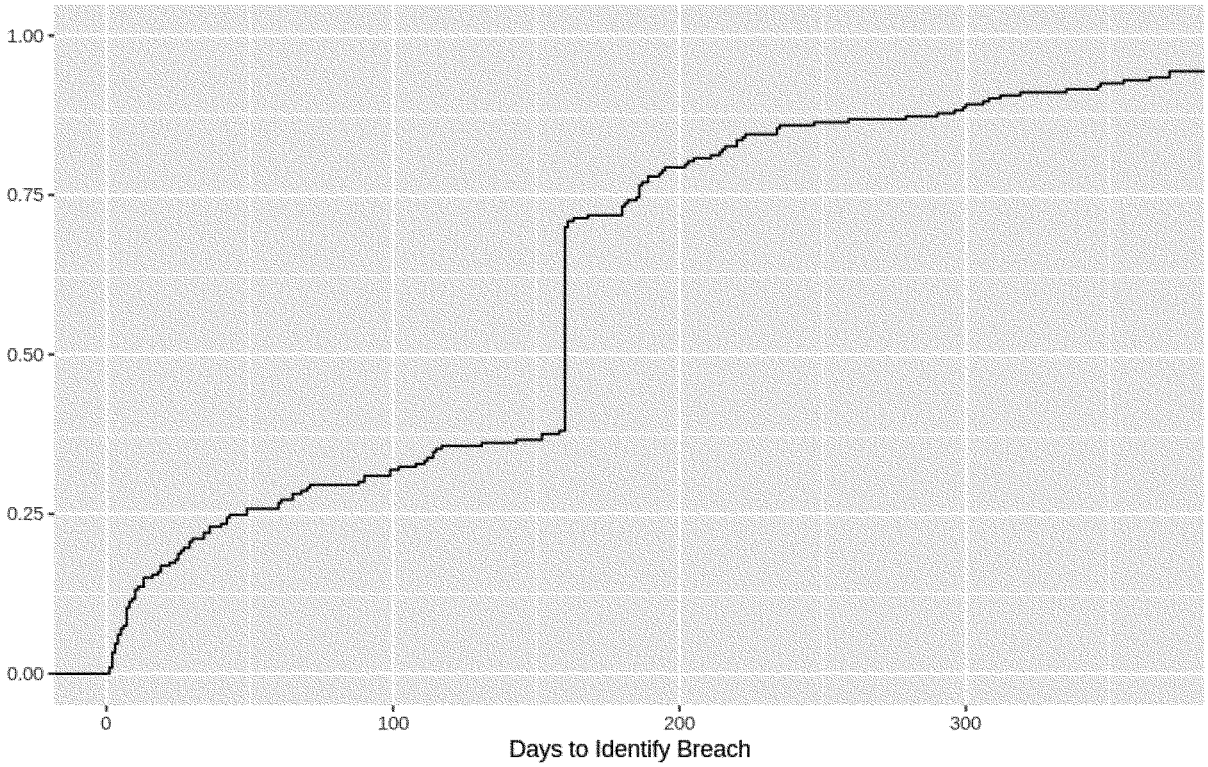

Figure 6: Cumulative distribution of the number of days between a breach and its discovery based on breaches in 2021 affecting residents of Washington State. For clarity, the plot is truncated at 500 days. The maximum number of days to discovery is 2,039 days. The discontinuity at 160 days is due to a ransomware attack that affected 68 entities. Data Source: Washington State Office of the Attorney General, *supra* note 463.

While we do not preliminarily believe that the proposed 30-day deadline to customer notifications would impose significant direct costs relative to a longer deadline (or relative to having no fixed deadline), the shorter deadline could potentially lead to indirect costs arising from the reporting deadline potentially interfering with incident containment efforts. Based on data from the Washington Attorney General's Office for 2021, ''containment'' of data breaches generally occurs quickly—4.4 days on average.[465] However, according to IBM's study for 2021, it takes an average of 75 days to ''contain'' a data breach.[466] The discrepancy suggests that there exists some ambiguity in the interpretation of ''containment,'' raising the possibility that the 30-day notification deadline could require customer notification to occur before some aspects of incident containment have been completed and potentially interfering with efforts to do so.[467]

In some circumstances, requiring customers to be notified within 30 days may hinder law enforcement investigation of an incident by potentially making an attacker aware of the attack's detection. While the proposal would allow the covered institution to delay notification in specific circumstances related to national security, most law enforcement investigations would not rise to this level.[468] Thus, the proposed 30-day customer notification requirement could impose costs on the public insofar as it interferes with law enforcement investigations that do not raise national security concerns and, thus, decreases recoveries or impedes deterrence.

iv. Broader Scope of Information Triggering Notification

In the proposal, ''sensitive customer information'' is defined more broadly than in most state statutes,[469] yielding a customer notification trigger that is broader in scope than the various state law notification triggers included under the baseline.[470] The broader scope of information triggering the notice requirements would cover more data breaches impacting customers than the notice requirements under the baseline. This increased sensitivity could benefit customers who would be made aware of more cases where their information has been compromised. At the same time, the increased sensitivity could lead to false alarms—cases where the ''sensitive customer information'' divulged does not ultimately harm the customer. Such false alarms could be problematic if they reduce customers' sensitivity to data breach notices. In addition, the proposed scope will also likely imply additional costs for covered institutions, which may need to adapt their processes for safeguarding information

[465] In the data provided by the Washington Attorney General, ''containment'' (data field *DaysToContainBreach*) is defined as ''the total number of days it takes a notifying entity to end the exposure of consumer data, after discovering the breach.'' *See supra* note 463.

[466] In the IBM study, ''containment'' refers to ''the time it takes for an organization to resolve a situation once it has been detected and ultimately restore service.'' *See* IBM Cost of Data Breach Report, *supra* note 350.

[467] For example, the notice may prompt additional attacks aimed at taking advantage of vulnerabilities that cannot be adequately addressed in a 30 day timeframe.

[468] *See* proposed rule 248.30(b)(4)(iii).

[469] *See* proposed rule 248.30(e)(9).

[470] *See supra* section III.C.2.a.

to encompass a broader set of customer information, and may need to issue additional notices.[471]

In the proposal, ''sensitive customer information'' is defined as ''any component of customer information alone or in conjunction with any other information, the compromise of which could create a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information.'' [472] The proposed definition's basis in ''any component of customer information'' creates a broader scope than under state notification laws. In addition to identification numbers, PINs, and passwords, many other pieces of nonpublic information have the potential to satisfy this standard. For example, many financial institutions have processes for establishing identity that require the user to provide a number of pieces of information that—on their own—are not especially sensitive (*e.g.,* mother's maiden name, name of a first pet, make and model of first car), but which—together—could allow access to a customer's account. The compromise of some subset of such information would thus potentially require a covered institution to notify customers under the proposed amendments.

The definitions of information triggering notice requirements under state laws are generally much more circumscribed, and can be said to fall into one of two types: basic and enhanced.[473] Basic definitions are used by 12 states, which account for 20% of the U.S. population. In these states, only the compromise of a customer's name together with one or more enumerated pieces of information triggers the notice requirement. Typically, the enumerated information is limited to Social Security number, a driver's license number, or a financial account number combined with an access code. For the estimated 10 million customers residing in these states, a covered institution's compromise of the customer's account login and password would not necessarily result in a notice, nor would a compromise of his credit card number and PIN.[474] Such compromises could nonetheless lead to substantial harm and inconvenience.

Thus, the proposed amendments would significantly enhance the notification requirements applicable to these customers.

States adopting enhanced definitions for information triggering notice requirements extend the basic definition to include username/password and username/security question combinations. They may also include additional enumerated items whose compromise (when linked with the customer's name) can trigger the notice requirement (*e.g.,* biometric data, tax identification number, and passport number). For the estimated 40 million customers residing in the states with enhanced definitions, the benefits from the proposed amendment will be somewhat more limited. However, even for these customers, the proposal would tighten the effective notification requirement. There are many pieces of information not covered by the enhanced definitions the compromise of which could potentially lead to substantial harm or inconvenience. For example, under California law, the compromise of information such as a customer's email address in combination with a security question and answer would only trigger the notice requirement if that information would—in itself—permit access to an online account; moreover, the compromise of information such as a customer's name, combined with her transaction history, account balance, or other information not specifically enumerated would not trigger the notice requirement under California law.[475]

The broader scope of information triggering a notice requirement under the proposed amendments would benefit customers. As noted earlier, many pieces of information not covered under state data breach laws could, when compromised, cause substantial harm or inconvenience. Under the proposed amendments, data breaches involving such information could require customer notification in cases where state law does not, and thus potentially increase customers' ability to take actions to mitigate the effects of such breaches. At the same time, there is some risk that the broader minimum standard will lead to notifications resulting from data compromises that—while troubling—are ultimately less likely to cause substantial harm or inconvenience.[476] A large number of such notices could undermine the effectiveness of the notice regime.

The broader minimum standard for notification is likely to result in higher compliance costs for covered institutions. In particular, it is possible the covered institutions have developed processes and systems designed to provide enhanced information safeguards for the specific types of information enumerated in the various state laws. For example, it is likely that IT systems deployed by financial institutions only retain information such as passwords or answers to security questions in hashed form, reducing the potential for such information to be compromised. Similarly, it is likely that such systems limit access to information such as Social Security numbers to a limited set of employees.

It may be costly for covered institutions to upgrade these systems to expand the scope of enhanced information safeguards. In some cases, it may be impractical to expand the scope of such systems. For example, while it may be feasible for covered institutions to strictly limit access to Social Security numbers, passwords, or answers to secret questions, it may not be feasible to apply such limits to account numbers, transaction histories, account balances, related accounts, or other potentially sensitive customer information. In these cases, the proposed minimum standard may not have a significant prophylactic effect, and may lead to an increase in reputation and litigation costs for covered institutions resulting from more frequent breach notifications as well as increased administrative costs related to sending out additional notice.[477] In addition, because the proposed notice trigger is based on a determination that there is a reasonably likely risk of substantial harm or inconvenience, it could increase costs related to incident evaluation, legal consultation, and litigation risk. This subjectivity could reduce consistency in the propensity of covered institutions to provide notice to customers, reducing the utility of such notices in customer's inferences about covered institutions' safeguarding efforts.

v. Notification Trigger

Under the proposal, the access or use without authorization of an individual's sensitive customer information (or the reasonable likelihood thereof) triggers the customer notice requirement unless the covered institution is able to determine that sensitive customer

[471] Estimates of administrative costs related to notice issuance are discussed in section IV.

[472] *See* proposed rule 248.30(e)(9).

[473] *See supra* section III.C.2.a.

[474] *See supra* text accompanying note 354.

[475] Cal. Civ. Code sec. 1798.82.

[476] This may be the case even though the proposal includes an exception from notification when the covered institution determines, after investigation, that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience. For example, the covered institution could decide to forgo investigations and always report, or could investigate but not reach a conclusion that satisfied the terms of the exception.

[477] *See supra* note 471.

information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.[478] Moreover, if the covered institution is unable to determine which customers are affected by a data breach, a notice to all potentially affected customers would be required.[479] The resulting presumptions for notification are important because although it is usually possible to determine what information could have been compromised in a data breach, it is often not possible to determine what information was compromised[480] or to estimate the potential for such information to be used in a way that is likely to cause harm. Because of this, it may not be feasible to establish the likelihood of sensitive customer information being accessed or used in a way that creates a risk of substantial harm or inconvenience. Consequently, in the absence of the presumption for notification, it may be possible for covered institutions to avoid notifying customers in cases where it is unclear whether customer information was accessed or used in this way. Currently, 21 states' notification laws do not include a presumption for notification.

We do not have data with which to estimate reliably the effect of this presumption on the propensity of covered institutions to issue customer notifications. However, we expect that for the estimated 15 million customers residing in states without the presumption of notification, some notifications that would be required under the proposed amendments are not currently occurring. Thus, we anticipate that the proposed amendments will improve these customers ability to take actions to mitigate the effects of data breaches.

The increased sensitivity of the notification trigger resulting from the presumption for notification would result in additional costs for covered institutions, who would bear higher reputational costs as well as some additional direct compliance costs (*e.g.,* mailing notices, responding to customer questions, etc.) due to more breaches requiring customer notification. We are unable to quantify these additional costs.

2. Extend Scope of Customer Safeguards To Transfer Agents

The proposed amendments would bring transfer agents within the scope of the safeguards rule.[481] In addition to the costs and benefits arising from the proposed response program discussed separately in section III.D.1 this would create an additional obligation on transfer agents to develop, implement, and maintain written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer information more generally.[482]

As discussed in sections II.C.3 and III.C.3.d, in the U.S., transfer agents provide the infrastructure for tracking ownership of securities. Maintaining such ownership records necessarily entails holding or accessing non-public information about a large swath of the U.S. investing public. Given the highly-concentrated nature of the transfer agent market,[483] a general failure of customer information safeguards at a transfer agent could negatively impact large numbers of customers.[484] In general, transfer agents with written policies and procedures to safeguard this information would be at reduced risk of experiencing such safeguard failures.[485] Further, because the core of the transfer agent business is maintaining customer records, and transfer agents are likely to handle large numbers of customers, transfer agents are likely to have written policies and procedures in place to address safeguarding of customer information.[486] In addition, transfer agents are currently subject to the notification requirements in state law, which would require customer notification in many of the same cases as under the proposed amendments.[487] Thus, we do not expect substantial costs or benefits to arise from extending the scope of the safeguards rule to transfer agents in the aggregate. We anticipate that most transfer agents have policies and procedures in place already, and that the compliance costs of the proposal would thus be limited to the review of those existing policies and procedures for consistency with the safeguards rule. We discuss these costs in section IV.[488]

3. Recordkeeping

Under the new recordkeeping requirements, covered institutions would be required to make and maintain written records documenting compliance with the requirements of the safeguards rule and of the disposal rule.[489] A covered institution would be required to make and maintain written records documenting its compliance with, among other things: its written policies and procedures required under the proposed rules, including those relating to its service providers and its consumer information and customer information disposal practices; its assessments of the nature and scope of any incidents involving unauthorized access to or use of customer information; any notifications of such incidents received from service providers; steps taken to contain and control such incidents; and, where applicable, any investigations into the facts and circumstances of an incident involving sensitive customer information, and the basis for determining that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.[490]

These proposed recordkeeping requirements would help facilitate the Commission's inspection and enforcement capabilities. As a result, the Commission would be better able to detect deficiencies in a covered institution's response program so that such deficiencies could be remedied. Insofar as correcting deficiencies results in material improvement in the response capabilities of covered institutions and mitigates potential harm resulting from the lack of an adequate response program, the proposed amendments would benefit customers through channels described in section III.D.1.

We do not expect the proposed recordkeeping requirements to impose substantial compliance costs. As covered institutions are currently subject to similar recordkeeping requirements applicable to other required policies and procedures, we do not anticipate covered institutions will need to invest in new recordkeeping staff, systems, or procedures to satisfy the new recordkeeping requirements.[491]

[478] Proposed rule 248.30(b)(4)(i).

[479] Proposed rule 248.30(b)(4)(ii).

[480] Many covered institutions, especially smaller investment advisers and broker-dealers, are unlikely to have elaborate software for logging and auditing data access. For such entities, it may be impossible to determine what specific information was exfiltrated during a data breach.

[481] *See infra* note 173 and accompanying text.

[482] Proposed rule 248.30(b).

[483] *See supra* section III.C.3.

[484] Half of the registered transfer agents maintain records for more than 10,000 individual accounts. *See supra* Figure 5.

[485] *See supra* section III.D.1.a for a discussion of the benefits of written policies and procedures generally.

[486] *See supra* text accompanying notes 420–424.

[487] *See supra* section III.D.1.c.

[488] *See supra* note 435.

[489] *See* proposed rule 248.30(d).

[490] *See* the various provisions of proposed rule 248.30(b) and 248.30(c)(2).

[491] *See, e.g.,* 17 CFR 240.17a–3; 17 CFR 275.204–2; 17 CFR 270.31a–1; and 17 CFR 240.17Ad–7. Where permitted, entities may choose to use third-party providers in meeting their recordkeeping

Continued

The incremental administrative costs arising from maintaining additional records related to these provisions using existing systems are covered in the Paperwork Reduction Act analysis in section IV and estimated to be $381/year.

4. Exception From Annual Notice Delivery Requirement

The proposed amendments would incorporate into the regulation an existing statutory exception to the requirement that a broker-dealer, investment company, or registered investment adviser deliver an annual privacy notice to its customers.[492] An institution may only rely on the exception if it has not changed its policies and practices with regard to disclosing nonpublic personal information from those it most recently provided to the customer via privacy notice.[493] Reliance on the exception is further limited to cases where the institution provides information to a third party to perform services for, or functions on behalf of, the institution [494] in accordance with one of a number of existing exemptions that contain notice provisions.[495]

The effect of the exception would be to eliminate the requirement to send the same privacy policy notice to customers on multiple occasions. As such notices would provide no new information, we do not believe that receiving multiple copies of such notices provides any significant benefit to customers. Moreover, we expect that widespread reliance on the proposed exception is more likely to benefit customers, by providing clearer signals of when privacy policies have changed.[496] At the same time, reliance on the exception would reduce costs for covered entities. However, we expect these cost savings to be limited to the administrative burdens discussed in section IV.

Because the exception became effective when the statute was enacted, we believe that the aforementioned benefits have already been realized. Consequently, we do not believe that its inclusion would have any economic effects relative to the current status quo.[497]

E. Effects on Efficiency, Competition, and Capital Formation

As discussed in the foregoing sections, market imperfections could lead to underinvestment in customer information safeguards, and to information asymmetry about cybersecurity incidents.[498] Various elements of the proposed amendments aim to mitigate the inefficiency resulting from these imperfections by imposing mandates for policies and procedures. Specifically, the proposal would require covered entities to include a response program for incidents involving unauthorized access to or use of customer information, which would address assessment and containment of such incidents, and could thereby reduce potential underinvestment in these areas, and thereby improve customer information safeguards.[499] In addition, by requiring notification to customers about certain safeguard failures, the proposal could reduce the aforementioned information asymmetry.

While the proposed amendments have the potential to mitigate these inefficiencies, the scale of the overall effect is likely to be limited due to the presence of state notification laws, and existing security practices, as well as existing regulations.[500] Moreover, insofar as the proposed amendments alter covered institutions' practices, the improvement—in terms of the effectiveness of covered institutions' response to incidents, customers' ability to respond to breaches of their sensitive customer information, and in reduced information asymmetry about covered institutions' efforts to safeguard this information—is generally impracticable to quantify due to data limitations discussed previously.[501] The proposed provisions would not have first order effects on channels typically associated with capital formation (*e.g.,* taxation policy, financial innovation, capital controls, investor disclosure, market integrity, intellectual property, rule-of-law, and diversification). Thus, the proposed amendments are unlikely to lead to significant effects on capital formation.

Because the proposed amendments are likely to impose proportionately larger costs on smaller and more geographically-limited covered institutions, this may affect their competitiveness vis-à-vis their larger peers. Such covered institutions—which may be less likely to have written policies and procedures for incident response programs already in place—would face disproportionately higher costs resulting from the proposed amendments.[502] Thus, the proposed amendments could tilt the competitive playing field in favor of larger covered institutions. On the other hand, if clients and investors believe that the proposed amendments effectively induce the appropriate level of effort, smaller covered institutions would likely reap disproportionately large benefits from these improved perceptions.[503]

With respect to competition among covered institutions' service providers, the overall effect of the proposed amendments is similarly ambiguous. The standardized terms of service used by some service providers may already contain appropriate measures designed to protect against unauthorized access to or use of customer information. If they do not, however, it is likely that some service providers would decline to negotiate contractual terms with respect to customer information safeguards, effectively causing these service providers to cease offering services to affected covered institutions.[504] This would reduce competition. On the other hand, service providers with fewer customer information safeguards (*i.e.,* those unwilling to provide said assurances) would be unable to undercut service providers with greater information safeguards. This would improve the competitive position of this latter group.

Finally, we anticipate that neither the proposed recordkeeping provisions,[505] nor the proposed exception from annual privacy notice delivery requirements [506]

obligations under the proposed rule, *see supra* note 217.

[492] *See supra* note 220.

[493] *See* proposed rule 248.5(e)(1)(ii).

[494] *See id; see also* 15 U.S.C. 6802(b)(2) (providing the statutory basis to this exception).

[495] *See* proposed rule 248.5(e)(1)(i). These existing exemptions address a number of cases, such as information sharing necessary to perform transactions on behalf of the customer, information sharing directed by the customer, reporting to credit reporting agencies, information sharing resulting from business combination transactions (mergers, sales, etc.). *See* 15 U.S.C. 6802(e) (providing the statutory basis to these additional criteria).

[496] In other words, reducing the number of privacy notices with no new content allows customers to devote more attention to parsing notices that do contain new content.

[497] We distinguish here between the theoretical ''baseline'' in which the self-effectuating provisions of the statute have not come into effect and the current ''status quo'' (in which they have). *See supra* note 221 and accompanying text.

[498] *See supra* section III.B.

[499] *See supra* section III.D (discussing benefits and costs of response program requirement).

[500] *See supra* sections III.C.1 and III.C.2.

[501] *See, e.g., supra* sections III.A., III.D.1.a. and III.D.1.c.

[502] The development of policies and procedures entails a fixed cost component that imposes a proportionately larger burden on smaller firms. We expect smaller investment advisers and broker dealers would be most affected. *See supra* sections III.C.3.a and III.C.3.b.

[503] Given the aforementioned disproportionately large costs faced by smaller institutions, it is reasonable for potential customers to suspect that smaller entities would be more inclined to avoid such costs than their larger peers; such suspicions would be mitigated by a regulatory requirement.

[504] *See supra* section III.C.3.e.

[505] Proposed rule 248.30(d).

[506] Proposed rule 248.5.

will have a notable impact on efficiency, competition, or capital formation due to their limited economic effects.[507] As discussed elsewhere in this proposal, we do not expect the proposed recordkeeping requirements to impose material compliance costs, and we expect the economic effects of the proposed exception to be limited.

F. Reasonable Alternatives Considered

In formulating our proposal, we have considered various reasonable alternatives. These alternatives are discussed below.

1. Reasonable Assurances From Service Providers

Rather than requiring policies and procedures that require covered institutions to enter into a written contract with each service provider requiring that it take appropriate measures designed to protect against unauthorized access to or use of customer information,[508] the Commission considered requiring covered institutions to obtain ''reasonable assurances'' from service providers instead. This would be a lower threshold than the proposed provision requiring a written contract, and as such would be less costly to reach but also less protective.

Under this alternative we would use the proposal's definition of ''service provider,'' which is ''any person or entity that is a third party and receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a covered institution.'' [509] Thus, similar to the proposal, this alternative could affect a broad range of service providers including, potentially: email providers, customer relationship management systems, cloud applications, and other technology vendors. Depending on the states where they operate, these service providers may already be subject to state laws applicable to businesses that ''maintain'' computerized data containing private information.[510] Additionally, it is likely that any service provider that offers a service involving the maintenance of customer information to U.S. financial firms generally, or to any specific financial firm with a national presence, has processes in place to ensure compliance with these state laws; we request public comment on this assumption.

For service providers that provide specialized services aimed at covered institutions, this alternative would, like the proposal, create market pressure to enhance service offerings so as to provide the requisite assurances and facilitate covered institutions' compliance with the proposed requirements.[511] These service providers would have little choice other than to adapt their services to provide the required assurances, which would result in additional costs for the service providers related to adapting business processes to accommodate the requirements. In general, we expect these costs would be limited in scale in the same ways the costs of the proposal are limited in scale: specialized service providers are adapted to operating in a highly-regulated industry, and are likely to have policies and procedures in place to facilitate compliance with state data breach laws. And, as with the proposal, we generally anticipate that such costs would largely be passed on to covered institutions and ultimately their customers. As compared to the proposal's requirement for written contracts, we expect that ''reasonable assurances'' would require fewer changes to business processes and, accordingly, lower costs. Assuming the covered institution did not use written contracts to document the ''reasonable assurances,'' however, this alternative would also be less protective than the proposed requirement for contractual language. As compared to ''reasonable assurances,'' a written contract is clearer, more easily enforced as between the covered institution and the service provider, and more likely to ensure customer notification in the event of a data breach.

With respect to more generic service providers (*e.g.,* email, or customer-relationship management), the situation could be quite different. For these providers, covered institutions are likely to represent a small fraction of their customer base. As under the proposed service provider provisions, generic service providers may again be unwilling to adapt their business processes to the regulatory requirements of a small subset of their customers under this alternative.[512] Some generic service providers may be unwilling to make the assurances needed, although we anticipate that they would be generally more willing to make assurances than to provide contractual guarantees.[513] If the covered institution could not obtain the reasonable assurances required under this alternative, the covered institution would need to switch service providers and bear the associated switching costs, while the service providers would suffer loss of customers. Although the costs of obtaining reasonable assurances would likely be lower than under the proposed service provider provisions, and the need to switch providers less frequent, these costs could nonetheless be particularly acute for smaller covered institutions who lack bargaining power with generic service providers. And, as outlined above, this alternative would be less protective than contractual language.

2. Lower Threshold for Customer Notice

The Commission considered lowering the threshold for customer notice, such as one based on the ''possible misuse'' of sensitive customer information (rather than the proposed threshold requiring notice when sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization), or even requiring notification of any breach without exception. A lower threshold would increase the number of notices customers receive. Although more frequent notices could potentially reveal incidents that warrant customers' attention and thereby potentially increase the benefits accruing to customers from the notice requirement discussed in section III.D.1.c, they would also increase the number of false alarms. As discussed in section III.D.1.c.iv, such false alarms could be problematic if they reduce customers' ability to discern which notices require action.

Although a lower threshold could impose some additional compliance costs on covered institutions (due to additional notices being sent), we would not anticipate the additional direct compliance costs to be significant.[514] Of more economic significance to covered institutions would be the resulting reputational effects.[515] However, the direction of these effects is ambiguous. On the one hand, increased notices resulting from a lower threshold can be expected to lead to additional

[507] *See supra* sections III.D.3 and III.D.4.

[508] *See supra* section III.D.1.b.

[509] Proposed rule 248.30(e)(10).

[510] *See, e.g.,* Cal. Civil Code sec. 1798.82(b), N.Y. Gen. Bus. Law sec. 899–AA(3).

[511] A service provider involved in any business-critical function likely ''receives, maintains, processes, or otherwise is permitted access to customer information''. *See* proposed rule 248.30(e)(10).

[512] *See supra* section III.D.1.b (discussing the proposed requirement for covered institutions to enter into written contracts with their service providers).

[513] *See id.* Additionally, the service provider's standard terms and conditions might in some situations provide reasonable assurances adequate to meet the requirement.

[514] The direct compliance costs of notices are discussed in section IV.

[515] *See supra* section III.B.

reputation costs for firms required to issue more of such notices. On the other hand, lower thresholds could inundate customers with notices, such that notices are no longer notable, likely leading the negative reputation effects associated with such notices to be reduced.

3. Encryption Safe Harbor

The Commission considered including a safe harbor to the notification requirement for breaches in which only cipher text was compromised. Assuming that such an alternative safe harbor would be sufficiently circumscribed to prevent its application to insecure encryption algorithms, or to secure algorithms used in a manner as to render them insecure, we believe that the economic effects of its inclusion would be largely indistinguishable from the proposal. This is because, as proposed, notification is triggered by the ''reasonable likelihood'' that sensitive customer information was accessed or used without authorization.[516] Given the computational complexity involved in cracking the cipher texts of modern encryption algorithms generally viewed as secure, the compromise of cipher text produced by such algorithms in accordance with secure procedures [517] would generally not give rise to ''a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information.'' [518] It would thus not constitute ''sensitive customer information,'' meaning that the threshold for providing notice would not be met and thereby rendering an explicit encryption safe harbor superfluous in such cases. In certain other cases, however, an express safe harbor may not be as protective as the proposal's minimum nationwide standard for determining whether the compromise of customer information could create ''a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information.'' [519] It may also become outdated as technologies and security practices evolve. Thus, while an explicit (and appropriately circumscribed) safe harbor could provide some procedural efficiencies from streamlined application, it could also be misapplied.

4. Longer Customer Notification Deadlines

The Commission considered incorporating longer customer notification deadlines, such as 60 or 90 days, as well as providing no fixed customer notification deadline. Although longer notification deadlines would provide more time for covered institutions to rebut the presumption in favor of notification discussed in section II.A.4.a, we expect that longer investigations would, in general, correlate with more serious or complicated incidents and would therefore be unlikely to end in a determination that sensitive customer information has not been and is not reasonably likely to be used in a manner that would result in substantial harm or inconvenience. We therefore do not believe that longer notification deadlines would ultimately lead to significantly fewer required notifications. Compliance costs conditional on notices being required (*i.e.,* the actual furnishing of notices to customers) would be largely unchanged under alternative notice deadlines. That said, costs related to incident assessment would likely be somewhat lower due to the reduced urgency of determining the scope of an incident and a reduced likelihood that notifications would need to be made before an incident has been contained.[520] Arguably, longer notification deadlines may increase reputation costs borne by covered institutions that choose to take advantage of the longer deadlines. Overall, however, we do not expect that longer notification deadlines would lead to costs for covered institutions that differ significantly from the costs of the proposed 30-day deadline.

Providing for longer notifications deadlines would likely reduce the promptness with which some covered institutions issue notifications to customers, potentially reducing their customers' ability to take effective mitigating actions. In particular, as discussed in section III.D.1.c.iii, some breaches are discovered very quickly. For customers whose sensitive customer information is compromised in such breaches, a longer notification deadline could significantly reduce the timeliness—and value—of the notice.[521] On the other hand, where a public announcement could hinder containment efforts, a longer notification timeframe could yield benefits to the broader public (and/or to the affected investors).[522]

5. Broader Law Enforcement Exception From Notification Requirements

The Commission considered providing for a broader exception to the 30-day notification deadline, for example by extending its applicability to cases where any appropriate law enforcement agency requests the delay, and not limiting the length of the delay. This alternative law enforcement exception would more closely align with the law enforcement exceptions adopted by the Banking Agencies [523] and many states.[524]

The principal function of a law enforcement exception would be to allow a law enforcement or national security agency to keep cybercriminals unaware of their detection. Observing a cyberattack that is in progress can allow investigators to take actions that can assist in revealing the attacker's location, identity, or methods.[525] Notifying affected customers has the potential to alert attackers that their intrusion has been detected, hindering these efforts.[526] Thus, a broader law enforcement exception could generally be expected to enhance law enforcement's efficacy in cybercrime investigations, which would potentially benefit affected customers through damage mitigation and benefit the general public through improved deterrence and increased recoveries,

[516] Proposed rule 248.30(b)(3)(iii).

[517] Here, ''secure procedures'' refers to the secure implementation of encryption algorithms and encompasses proper key generation and management, timely patching, user access controls, etc.

[518] Proposed rule 248.30(e)(9); *see also supra* note 112 and accompanying text.

[519] *See* proposed rule 248.30(e)(9). The August 2022 breach of the LastPass cloud-based password manager provides an illustrative example. In this data breach a large database of website credentials belonging to LastPass' customers was exfiltrated. The customer credentials in this database were encrypted using a secure algorithm and the encryption keys could not have been exfiltrated in the breach, so an encryption safe harbor could be expected to apply in such a case. Nonetheless, customers whose encrypted passwords were divulged in the breach became potential targets for brute force attacks (*i.e.,* attempts to decrypt the passwords by guessing a customer's master password) and to phishing attacks (*i.e.,* attempts to induce an affected customer to divulge the master password). *See* Karim Toubba, *Notice of Recent Security Incident,* LastPass (Dec. 22, 2022), *available at https://blog.lastpass.com/2022/12/notice-of-recent-security-incident/; see also* Craig Clough, *LastPass Security Breach Drained Bitcoin Wallet, User Says,* Portfolio Media (Jan. 4, 2023), *available at https://www.law360.com/articles/1562534/lastpass-security-breach-drained-bitcoin-wallet-user-says.*

[520] *See supra* section III.D.1.c.iii.

[521] *See supra* note 462 and accompanying text.

[522] *See supra* section II.A.4.e

[523] *See* Banking Agencies' Incident Response Guidance, *supra* note 47.

[524] *See, e.g.,* RCW 19.255.010(8); Fla. Stat. sec. 501.171(4)(b).

[525] *Cybersecurity Advisory: Technical Approaches to Uncovering and Remediating Malicious Activity,* Cybersecurity & Infrastructure Sec. Agency (Sept. 24, 2020), *available at https://www.cisa.gov/news-events/cybersecurity-advisories/aa20-245a* (explaining how and why investigators may ''avoid tipping off the adversary that their presence in the network has been discovered'').

[526] *Id.*

and by enhancing law enforcement's knowledge of attackers' methods.

That said, use of the exception would necessarily delay notice to customers affected by a cyber-attack, reducing the value to customers of such notices.[527] Incidents where law enforcement would like to delay customer notifications are likely to involve numerous customers, who—without timely notice—may be unable to take timely mitigating actions that could prevent additional harm.[528] Law enforcement investigations can also take time to resolve and, even when successful, their benefits to affected customers (*e.g.,* recovery of criminals' ill-gotten gains) may be limited.

Information about cybercrime investigations is often confidential. The Commission does not have data on the prevalence of covert cybercrime investigations, their success or lack of success, their deterrent effect if any, or the impact of customer notification on investigations. Thus, we are unable to quantify the costs and benefits of this alternative. We invite public comment on these topics.

G. Request for Comment on Economic Analysis

To assist the Commission in better assessing the economic effects of the proposal, we request comment on the following questions:

107. What additional qualitative or quantitative information should be considered as part of the baseline for the economic analysis of the proposals?

108. Are the effects on competition, efficiency, and capital formation arising from the proposed amendments accurately characterized? If not, why not?

109. Are the economic effects of the alternatives accurately characterized? If not, why not?

110. Are the costs and benefits of the proposals accurately characterized? If not, why not? What, if any, other costs or benefits should be taken into account? Please provide data that could help us quantify any of the aforementioned costs and benefits that we have been unable to quantify.

111. Do institutions that would be covered by this proposal already comply with one or more state data breach notification requirements? If so, how similar or different are the compliance obligations under the state data breach notification laws and our proposal?

112. Do existing contracts between covered institutions and service providers address notification in the event of a data breach? If so, in what circumstances does the service provider notify either the covered institution or the customer whose data was compromised?

113. Do you believe the Commission has accurately characterized the cost of service providers adapting business practices to accommodate the proposed requirements? Please state why or why not, in as much detail as possible.

114. Do policies and procedures implemented to comply with Regulation S–ID incorporate red flags related to potential compromise of customer information?

115. Have potentially covered institutions developed and implemented written policies and procedures for response to data breach incidents?

a. If so, please indicate whether these policies and procedures are written to comply with state data breach notification laws, international law, contracts, and/or other law or guidance.

b. If so, please indicate which elements (*e.g.,* detection, assessment, containment, lessons learned, notification) such policies contain.

c. Please indicate what kind of institution (*e.g.,* broker, transfer agent, etc.) your experience reflects.

116. Have service providers to potentially covered institutions developed and implemented written policies and procedures for response to data breach incidents?

a. If so, please indicate whether these policies and procedures are written to comply with state data breach notification laws, international law, contracts, and/or other law or guidance.

b. If so, please indicate which elements (*e.g.,* detection, assessment, containment, lessons learned, notification) such policies contain.

c. Please indicate what kind of service provider your experience reflects.

117. Do you believe that written policies and procedures to safeguard information lead to reduced risk of safeguard failures? Please share your experience or the basis for your belief.

118. Do you believe that safeguarding the customer information of customers of other financial institutions, or notifying these individuals in the event their sensitive customer information is compromised would entail additional costs?

a. If so, please indicate the nature and scale of the costs.

b. If so, please characterize the population of individuals whose sensitive customer information would entail these significant additional costs.

119. Do you believe a broader law enforcement exception would provide benefits?

a. If so, please indicate the nature and scale of these benefits.

b. If so, to the extent possible, please provide data or case studies that could help establish the scale of these benefits.

120. Do you believe that use of a broader law enforcement exception would entail significant costs to individuals whose sensitive customer information is compromised?

a. If so, please indicate the nature and scale of these costs.

b. If so, to the extent possible, please provide data or case studies that could help establish the scale of these costs.

IV. Paperwork Reduction Act

A. Introduction

Certain provisions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[529] We are submitting the proposed collection of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[530] The safeguards rule and the disposal rule we propose to amend would have an effect on the currently approved existing collection of information under OMB Control No. 3235–0610, the title of which is, ''Rule 248.30, Procedures to safeguard customer records and information; disposal of consumer report information.'' [531]

[527] *See supra* note 462 and accompanying text.

[528] *See supra section* III.D.1.c.iii.

[529] 44 U.S.C. 3501 through 3521.

[530] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[531] The paperwork burden imposed by Regulation S–P's notice and opt-out requirements, 17 CFR 248.1 to 248.18, is currently approved under a separate OMB control number, OMB Control No. 3235–0537. The proposed amendments would implement a statutory exception that has been in effect since late 2015. We do not believe that the proposed amendment to implement the statutory exception makes any substantive modifications to this existing collection of information requirement or imposes any new substantive recordkeeping or information collection requirements within the meaning of the PRA. Similarly, we do not believe that the proposed amendments to: (i) Investment Company Act rules 31a–1(b) (OMB control number 3235–0178) and 31a–2(a) (OMB control number 3235–0179) for investment companies that are registered under the Investment Company Act, (ii) Investment Advisers Act rule 204–2 (OMB control number 3235–0278) for investment advisers, (iii) Exchange Act rule 17a–4 (OMB control number 3235–0279) for broker-dealers, and (iv) Exchange Act rule 17Ad–7 (OMB control number 3235–0291) for transfer agents, makes any modifications to this existing collection of information requirement or imposes any new recordkeeping or information collection requirements. Accordingly, we believe that the current burden and cost estimates for the existing collection of information requirements remain appropriate, and we believe that the proposed amendments should not impose substantive new burdens on the overall population of respondents or affect the current overall burden estimates for this collection of information. We are, therefore, not revising any burden and cost estimates in connection with these amendments.

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 proposed requirement to adopt policies and procedures constitutes a collection of information requirement under the PRA. The collection of information associated with the proposed amendments would be mandatory, and responses provided to the Commission in the context of its examination and oversight program concerning the proposed amendments would be kept confidential subject to the provisions of applicable law. A description of the proposed amendments, including the need for the information and its use, as well as a description of the types of respondents, can be found in section II above, and a discussion of the expected economic effects of the proposed amendments can be found in section III above.

B. Amendments to the Safeguards Rule and Disposal Rule

As discussed above, the proposed amendments to the safeguards rule would require covered institutions to develop, implement, and maintain written policies and procedures that include incident response programs reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information, including customer notification procedures. The response program must include procedures to assess the nature and scope of any incident involving unauthorized access to or use of customer information; take appropriate steps to contain and control the incident; and provide notice to each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization (unless the covered institution makes certain determinations as specified in the proposed rule).

The proposed amendments to the disposal rule would require covered institutions that maintain or otherwise possess customer information or consumer information for a business purpose to adopt and implement written policies and procedures that address proper disposal of such information, which would include taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

Finally, the proposed amendments would require covered institutions to make and maintain written records documenting compliance with the requirements of the safeguards rule and the disposal rule. Under the proposed rules, the time periods for preserving records would vary by covered institution to be consistent with existing recordkeeping rules.[532]

Based on FOCUS Filing and Form BD–N data, as of December 2021, there were 3,401 brokers or dealers other than notice-registered brokers or dealers. Based on Investment Adviser Registration Depository data, as of June 2022, there were 15,129 investment advisers registered with the Commission. As of December 2021, there were 13,965 investment companies.[533] Based on Form TA–1, as of December, 2021, there were 335 transfer agents registered with the Commission and 67 transfer agents registered with the Banking Agencies.

Table 2 below summarizes our PRA initial and ongoing annual burden estimates associated with the proposed amendments to the safeguards rule and the disposal rule.

TABLE 2—PROPOSED AMENDMENTS TO SAFEGUARDS RULE AND DISPOSAL RULE—PRA

	Internal initial burden hours	Internal annual burden hours [1]	Wage rate [2]	Internal time cost	Annual external cost burden
PROPOSED ESTIMATES					
Adopting and implementing policies and procedures.	60	25 hours [3]	$455 (blended rate for compliance attorney and assistant general counsel).	$11,375 (equal to the internal annual burden × the wage rate).	$2,655 [4]
Preparation and distribution of notices.	9	8 hours [5]	$300 (blended rate for senior compliance examiner and compliance manager).	$2,400 (equal to the internal annual burden × the wage rate).	$2,018 [6]
Recordkeeping	1	1 hour	$381 (blended rate for compliance attorney and senior programmer).	$381	$0
Total new annual burden per covered institution.		34 hours (equal to the sum of the above three boxes).		$14,156 (equal to the sum of the above three boxes).	$4,673 (equal to the sum of the above two boxes)
Number of covered institutions		× 32,897 covered institutions [7].		× 32,897 covered institutions.	16,449 [8]
Total new annual aggregate burden		1,118,498 hours		$465,689,932	$76,866,177
TOTAL ESTIMATED BURDENS INCLUDING AMENDMENTS					
Current aggregate annual burden estimates.		+ 47,565 hours			+ $0
Revised aggregate annual burden estimates.		1,166,063 hours			$76,866,177

Notes:
[1] Includes initial burden estimates annualized over a 3-year period.
[2] The Commission's estimates of the relevant wage rates are based on the SIFMA Wage Report. The estimated figures are modified by firm size, employee benefits, overhead, and adjusted to account for the effects of inflation.

[532] The proposed amendments would also broaden the scope of information covered by the safeguards rule and the disposal rule (to include *all* customer information in the possession of a covered institution, and all consumer information that a covered institution maintains or otherwise possesses for a business purpose) and extend the application of the safeguards provisions to transfer agents registered with the Commission or another appropriate regulatory agency. These amendments do not contain collections of information beyond those related to the incident response program analyzed above.

[533] Data on investment companies registered with the Commission comes from Form N–CEN filings; data on BDCs comes from Forms 10–K and 10–Q; and data on employees' securities companies comes from Form 40–APP. *See supra* Table 1.

[3] Includes initial burden estimates annualized over a three-year period, plus 5 hours of ongoing annual burden hours. The estimate of 2560 hours is based on the following calculation: ((60 initial hours/3) + 5 hours of additional ongoing burden hours) = 25 hours.

[4] This estimated burden is based on the estimated wage rate of $531/hour, for 5 hours, for outside legal services. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, takes into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[5] Includes initial burden estimate annualized over a three-year period, plus 5 hours of ongoing annual burden hours. The estimate of 8 hours in based on the following calculation: ((9 initial hours/3 years) + 5 hours of additional ongoing burden hours) = 8 hours.

[6] This estimated burden is based on the estimated wage rate of $531/hour, for 3 hours, for outside legal services and $85/hour, for 5 hours, for a senior general clerk.

[7] Total number of covered institutions is calculated as follows: 3,401 broker-dealers other than notice-registered broker-dealers + 15,129 investment advisers registered with the Commission + 13,965 investment companies + 335 transfer agents registered with the Commission + 67 transfer agents registered with the Banking Agencies = 32,897 covered institutions.

[8] We estimate that 50% of covered institutions will use outside legal services for these collections of information. This estimate takes into account that covered institutions may elect to use outside legal services (along with in-house counsel), based on factors such as budget and the covered institution's standard practices for using outside legal services, as well as personnel availability and expertise.

C. Request for Comment

We request comment on whether these estimates are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the OMB Desk Officer for the Securities and Exchange Commission, *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov,* and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–05–23. 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 No. S7–05–23, 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 Act Analysis

The Regulatory Flexibility Act [534] (''RFA'') requires an agency, when issuing a rulemaking proposal, to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (''IRFA'') that describes the impact of the proposed rule on small entities, unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[535] This IRFA has been prepared in accordance with the RFA. It relates to the proposed new rules and amendments described in sections II through IV above.

A. Reason for and Objectives of the Proposed Action

The objectives of the proposed amendments are to: (i) establish a Federal minimum standard for providing notification to all customers of a covered institution affected by a data breach (regardless of state residency) and providing consistent disclosure of important information to help affected customers respond to a data breach; (ii) require covered institutions to develop, implement, and maintain written policies and procedures for an incident response program that is reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information; (iii) enhance the protection of customers' nonpublic personal information by aligning the information protected under the safeguards rule and the disposal rule by applying the protections of both rules to ''customer information,'' while also broadening the group of customers whose information is protected under both rules; and (iv) bring all transfer agents within the scope of the safeguards rule and the disposal rule. The proposed amendments also would update applicable recordkeeping requirements and conform Regulation S–P's annual privacy notice delivery provisions to the terms of a statutory exception. The proposed amendments are intended to:

A. Prevent and mitigate the unauthorized access to or use of customer information;

B. Improve covered institutions' preparedness to respond to data breaches involving customer information, and the effectiveness of their response programs to such data breaches when they do occur;

C. Ensure that firms consistently monitor their systems to identify, contain, and control data breach incidents involving customer information quickly;

D. Help affected individuals through the adoption of a minimum standard for notification in response to unauthorized access or use of sensitive customer information that leverages some of the more protective state law practices already in existence;

E. Expand the coverage of the safeguards rule to provide for greater protection of customer information that is maintained by transfer agents;

F. Extend the protections of Regulation S–P to cover customer information that covered institutions receive from another financial institution in the process of conducting business;

G. Create more consistent standards across the safeguards rule and the disposal rule for the handling of the same types of nonpublic personal information; and

H. Require that a covered institution's response program include policies and procedures that require a covered institution, by contract, to require that its service providers take appropriate measures that are designed to protect against unauthorized access to or use of customer information.

B. Legal Basis

We are proposing the new rules and rule amendments described above under the authority set forth in sections 17, 17A, 23, and 36 of the Exchange Act [15 U.S.C. 78q, 78q–1, 78w, and 78mm], sections 31 and 38 of the Investment Company Act [15 U.S.C. 80a–30 and

[534] *See* 5 U.S.C. 601 *et seq.*

[535] *See* 5 U.S.C. 603(a); 5 U.S.C. 605(b).

80a–37], sections 204, 204A and 211 of the Investment Advisers Act [15 U.S.C. 80b–4, 80b–4a and 80b–11], section 628(a) of the FCRA [15 U.S.C. 1681w(a)], and sections 501, 504, 505, and 525 of the GLBA [15 U.S.C. 6801, 6804, 6805 and 6825].

C. Small Entities Subject to Proposed Rule Amendments

The proposed amendments to Regulation S–P would affect brokers, dealers, registered investment advisers, investment companies, and transfer agents, including entities that are considered to be a small business or small organization (collectively, ''small entity'') for purposes of the RFA. For purposes of the RFA, under the Exchange Act a broker or dealer is a small entity if it: (i) had total capital of less than $500,000 on the date in its prior fiscal year as of which its audited financial statements were prepared or, if not required to file audited financial statements, on the last business day of its prior fiscal year; and (ii) is not affiliated with any person that is not a small entity.[536] A transfer agent is a small entity if it: (i) received less than 500 items for transfer and less than 500 items for processing during the preceding six months; (ii) transferred items only of issuers that are small entities; (iii) maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts or was the named transfer agent for less than 1,000 shareholder accounts at all times during the preceding fiscal year; and (iv) is not affiliated with any person that is not a small entity.[537] Under the Investment Company Act, investment companies are considered small entities if they, together with other funds in the same group of related funds, have net assets of $50 million or less as of the end of its most recent fiscal year.[538] Under the Investment Advisers Act, a small entity is an investment adviser that: (i) manages less than $25 million in assets; (ii) has total assets of less than $5 million on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that manages $25 million or more in assets, or any person that has had total assets of $5 million or more on the last day of the most recent fiscal year.[539]

Based on Commission filings, we estimate that approximately 764 broker-dealers,[540] 158 transfer agents,[541] 85 investment companies,[542] and 522 registered investment advisers[543] may be considered small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments to Regulation S–P would require covered institutions to develop incident response programs for unauthorized access to or use of customer information, as well as imposing a customer notification obligation in instances where sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization. The proposed amendments also would include new mandatory recordkeeping requirements and language conforming Regulation S–P's annual privacy notice delivery provisions to the terms of a statutory exception.

Under the proposed amendments, covered institutions would have to develop, implement, and maintain, within their written policies and procedures designed to comply with Regulation S–P, a program that is reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information, including customer notification procedures. Such policies and procedures would also need to require that covered institutions, pursuant to a written contract between the covered institution and its service providers, require the service providers to take appropriate measures designed to protect against unauthorized access to or use of customer information, including by notifying the covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security that results in unauthorized access to a customer information system maintained by the service provider, in order to enable the covered institution to implement its response program. If an incident were to occur, unless a covered institution has determined, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience, the covered institution must provide a clear and conspicuous notice to each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization. As part of its incident response program, a covered institution may also enter into a written agreement with its service provider to have the service provider notify affected individuals on its behalf.

In addition, covered institutions would be required to make and maintain specified written records designed to evidence compliance with these requirements. Such records would be required to be maintained starting from when the record was made, or from when the covered institution terminated the use of the written policy or procedure, for the time periods stated in the amended recordkeeping regulations for each type of covered institution.[544]

Some covered institutions, including covered institutions that are small entities, would incur increased costs involved in reviewing and revising their current safeguarding policies and procedures to comply with these obligations, including their cybersecurity policies and procedures. Initially, this would require covered institutions to develop as part of their written policies and procedures under the safeguards rule, a program reasonably designed to detect, respond to, and recover from any unauthorized access to or use of customer information, including customer notification procedures, in a manner that provides clarity for firm personnel. Further, in developing these policies and procedures, covered institutions would need to include policies and procedures requiring the covered institution, pursuant to a written contract, to require its service providers to take appropriate measures that are

[536] 17 CFR 240.0–10.

[537] *Id.*

[538] 17 CFR 270.0–10.

[539] 17 CFR 275.0–7.

[540] Estimate based on FOCUS Report data collected by the Commission as of September 30, 2022.

[541] Estimate based on the number of transfer agents that reported a value of fewer than 1,000 for items 4(a) and 5(a) on Form TA–2 for the 2021 annual reporting period (which, was required to be filed by March 31, 2022).

[542] Based on Commission staff approximation that as of June 2022, approximately 43 open-end funds (including 11 exchange-traded funds), 31 closed-end funds, and 11 business development companies are small entities. *See* Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, Securities Act Release No. 11125 (Oct. 26, 2022) [87 FR 72758–01 (Nov. 25, 2022)].

[543] Estimate based on IARD data as of June 30, 2022.

[544] Specifically, the proposal would amend (i) Investment Company Act rules 31a–1(b) and 31a–2(a) for investment companies that are registered under the Investment Company Act, (ii) proposed rule 248.30(d) under Regulation S–P for unregistered investment companies, (iii) Investment Advisers Act rule 204–2 for investment advisers, (iv) Exchange Act rule 17a–4 for broker-dealers, and (v) Exchange Act rule 17Ad–7 for transfer agents.

designed to protect against unauthorized access to or use of customer information, including notifying the covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider, in order to enable the covered institution to implement its response program. However, as the Commission recognizes the number and varying characteristics (*e.g.,* size, business, and sophistication) of covered institutions, these proposed amendments would help covered institutions to tailor these policies and procedures and related incident response program based on the individual facts and circumstances of the firm, and provide flexibility in addressing the general elements of the response program requirements based on the size and complexity of the covered institution and the nature and scope of its activities.

In addition, the Commission acknowledges that the proposed rule would impose greater costs on those transfer agents that are registered with another appropriate regulatory agency, if they are not currently subject to Regulation S–P, as well as those transfer agents registered with the Commission who are not currently subject to the safeguards rule. As discussed above, such costs would include the development and implementation of necessary policies and procedures, the ongoing costs of required recordkeeping and maintenance requirements, and, where necessary, the costs to comply with the customer notification requirements of the proposed rule. Such costs would also include the same minimal costs for employee training or establishing clear procedures for consumer report information disposal that are imposed on all covered institutions. To the extent that such costs are being applied to a transfer agent for the first time as a result of new obligations being imposed, the proposed rule would incur higher present costs on those transfer agents than those covered institutions that are already subject to the safeguards rule and the disposal rule.

To comply with these amendments on an ongoing basis, covered institutions would need to respond appropriately to incidents that entail the unauthorized access to or use of customer information. This would entail carrying out the established response program procedures to (i) assess the nature and scope of any incident involving unauthorized access to or use of customer information and identify the customer information systems and types of customer information that may have been accessed or used without authorization; (ii) take appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information; and (iii) notify each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization, unless the covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.

Where the covered institution determines notice is required, the covered institution would need to provide a clear and conspicuous notice to each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization. This notice would need to be transmitted by a means designed to ensure that each affected individual can reasonably be expected to receive actual notice in writing. Further, the covered institution would need to satisfy the specified content requirements of that notice,[545] the preparation of which would incur some incremental additional costs on covered institutions.

Finally, covered institutions would also face costs in complying with the new recordkeeping requirements imposed by these amendments that are incrementally more than those costs covered institutions already incur from their existing regulatory recordkeeping obligations, in light of their already existing record retention systems. However, the Commission has proposed such record maintenance provisions to align with those most frequently employed as to each covered institution subject to this rulemaking, partially in an effort to minimize these costs to firms.

Overall, incremental costs would be associated with the proposed amendments to Regulation S–P.[546] Some proportion of large or small institutions would be likely to experience some increase in costs to comply with the proposed amendments if they are adopted.

More specifically, we estimate that many covered institutions would incur one-time costs related to reviewing and revising their current safeguarding policies and procedures to comply with these obligations, including their cybersecurity policies and procedures. Additionally, some covered institutions, including transfer agents, may incur costs associated with establishing such policies and procedures as these amendments require if those covered institutions do not already have such policies and procedures. We also estimate that the ongoing, long-term costs associated with the proposed amendments could include costs of responding appropriately to incidents that entail the unauthorized access to or use of customer information.

We encourage written comments regarding this analysis. We solicit comments as to whether the proposed amendments could have an effect that we have not considered. We also request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact. In addition, we

[545] *See* proposed rule 248.30(b)(4)(iv). In particular, the covered institution would need to: (i) describe in general terms the incident and the type of sensitive customer information that was or is reasonably believed to have been accessed or used without authorization; (ii) describe what has been done to protect the sensitive customer information from further unauthorized access or use; (iii) include, if the information is reasonably possible to determine at the time the notice is provided, any of the following: the date of the incident, the estimated date of the incident, or the date range within which the incident occurred; (iv) include contact information sufficient to permit an affected individual to contact the covered institution to inquire about the incident, including the following: a telephone number (which should be a toll-free number if available), an email address or equivalent method or means, a postal address, and the name of a specific office to contact for further information and assistance; (v) if the individual has an account with the covered institution, recommend that the customer review account statements and immediately report any suspicious activity to the covered institution; (vi) explain what a fraud alert is and how an individual may place a fraud alert in the individual's credit reports to put the individual's creditors on notice that the individual may be a victim of fraud, including identity theft; (vii) recommend that the individual periodically obtain credit reports from each nationwide credit reporting company and have information relating to fraudulent transactions deleted; (viii) explain how the individual may obtain a credit report free of charge; and (ix) include information about the availability of online guidance from the Federal Trade Commission and *usa.gov* regarding steps an individual can take to protect against identity theft, a statement encouraging the individual to report any incidents of identity theft to the Federal Trade Commission, and include the Federal Trade Commission's website address where individuals may obtain government information about identity theft and report suspected incidents of identity theft.

[546] Covered institutions are currently subject to similar recordkeeping requirements applicable to other required policies and procedures. Therefore, covered institutions will generally not need to invest in new recordkeeping staff, systems, or procedures to satisfy the new recordkeeping requirements; *see supra* note 491 and accompanying text.

solicit comments regarding our proposal to amend Regulation S–P's annual privacy notice delivery provisions to conform to the terms of a statutory exception.

E. Duplicative, Overlapping, or Conflicting Federal Rules

As discussed above, the proposed amendments would impose requirements that covered institutions develop response programs for unauthorized access to or use of customer information in the form of written policies and procedures designed to detect, respond to, and recover from unauthorized access to or use of customer information, including customer notification procedures. Covered institutions are subject to requirements elsewhere under the Federal securities laws and rules of the self-regulatory organizations that require them to adopt written policies and procedures that may relate to some similar issues.[547] The proposed amendments to Regulation S–P, however, would not require covered institutions to maintain duplicate copies of records covered by the rule, and an institution's incident response program for unauthorized access to or use of customer information would not have to be maintained in a single location. We preliminarily believe, therefore, that any duplication of regulatory requirements would be limited and would not impose significant additional costs on covered institutions including small entities.[548] With the exception of the Banking Agencies' Incident Response Guidance and their requirements for safeguarding customer information and disposing of consumer financial report information as they apply to transfer agents that are registered with another appropriate regulatory agency, we believe there are no other Federal rules that duplicate, overlap, or conflict with the proposed reporting requirements.

In the case of transfer agents that are registered with another appropriate regulatory agency, the proposed rule might be considered duplicative of or overlapping with the Banking Agencies' Incident Response Guidance. Specifically, the proposed rule might be considered to overlap or conflict with the Banking Agencies' Incident Response Guidance regarding the safeguarding of customer information, disposal of consumer financial report information, and as to procedures for customer notification in connection with an incident response program.

In general, however, the similarities between the proposed reporting requirements and existing reporting requirements under rules of the Banking Agencies and the FTC are the result of our statutory mandate to set standards for safeguarding customer records and information that are consistent and comparable with the corresponding standards set by the other agencies.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

1. establishing different compliance or reporting standards that take into account the resources available to small entities;

2. the clarification, consolidation, or simplification of the reporting and compliance requirements under the rule for small entities;

3. use of performance rather than design standards; and

4. exempting small entities from coverage of the rule, or any part of the rule.

With regard to the first alternative, we have proposed amendments to Regulation S–P that would continue to permit institutions substantial flexibility to design safeguarding policies and procedures appropriate for their size and complexity, the nature and scope of their activities, and the sensitivity of the personal information at issue. We nevertheless believe it necessary to propose to require that covered institutions, regardless of their size, adopt a response program for incidents of unauthorized access to or use of customer information, which would include customer notification procedures.[549] The proposed amendments to Regulation S–P arise from our concern with the increasing number of information security breaches that have come to light in recent years, particularly those involving institutions regulated by the Commission. Establishing different compliance or reporting requirements for small entities could lead to less favorable protections for these entities' customers and compromise the effectiveness of the proposed amendments.

With regard to the second alternative, the proposed amendments should, by their operation, simplify reporting and compliance requirements for small entities. Small covered institutions are likely to maintain personal information on fewer individuals than large covered institutions, and they are likely to have relatively simple personal information systems. The proposed amendments would not prescribe specific steps a covered institution must take in response to a data breach, but instead would give the institution flexibility to tailor its policies and procedures to its individual facts and circumstances. The proposed amendments therefore are intended to give covered institutions the flexibility to address the general elements in the response program based on the size and complexity of the institution and the nature and scope of its activities. Accordingly, the requirements of the proposed amendment already would be simplified for small entities. In addition, the requirements of the proposed amendments could not be further simplified, or clarified or consolidated, without compromising the investor protection objectives the proposed amendments are designed to achieve.

With regard to the third alternative, the proposed amendments are design based. Rather than specifying the types of policies and procedures that an institution would be required to include in its response program, the proposed amendments would require a response program that is reasonably designed to detect, respond to, and recover from both unauthorized access to and unauthorized use of customer information. With respect to the specific requirements regarding notifications in the event of a data breach, we have proposed that institutions provide only the information that seems most relevant for an affected customer to know in order to assess adequately the potential damage that could result from the breach and to develop an appropriate response.

[547] *See, e.g.,* 15 U.S.C. 80b–4a (requiring each adviser registered with the Commission to have written policies and procedures reasonably designed to prevent misuse of material non-public information by the adviser or persons associated with the adviser); 17 CFR 270.38a–1(a)(1) (requiring investment companies to adopt compliance policies and procedures); 275.206(4)–7(a) (requiring investment advisers to adopt compliance policies and procedures); Regulation S–ID, 17 CFR part 248, subpart C, (requiring financial institutions subject to the Commission's jurisdiction with covered accounts to develop and implement a written identity theft prevention program that is designed to detect, prevent, and mitigate identity theft in connection with covered accounts, which must include, among other things, policies and procedures to respond appropriately to any red flags that are detected pursuant to the program); and FINRA Rule 3110 (requiring each broker-dealer to establish and maintain written procedures to supervise the types of business it is engaged in and to supervise the activities of registered representatives and associated persons, which could include registered investment advisers).

[548] *See supra* section II.G.

[549] *See* proposed rule 248.30(b)(3).

Finally, with regard to alternative four, we preliminarily believe that an exemption for small entities would not be appropriate. Small entities are as vulnerable as large ones to the types of data security breach incidents we are trying to address. In this regard, the specific elements we have proposed must be considered and incorporated into the policies and procedures of all covered institutions, regardless of their size, to mitigate the potential for fraud or other substantial harm or inconvenience to investors. Exempting small entities from coverage of the proposed amendments or any part of the proposed amendments could compromise the effectiveness of the proposed amendments and harm investors by lowering standards for safeguarding investor information maintained by small covered institutions. Excluding small entities from requirements that would be applicable to larger covered institutions also could create competitive disparities between large and small entities, for example by undermining investor confidence in the security of information maintained by small covered institutions.

We request comment on whether it is feasible or necessary for small entities to have special requirements or timetables for, or exemptions from, compliance with the proposed amendments. In particular, could any of the proposed amendments be altered in order to ease the regulatory burden on small entities, without sacrificing the effectiveness of the proposed amendments?

G. Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

121. The number of small entities that may be affected by the proposed rules and amendments;

122. The existence or nature of the potential impact of the proposed rules and amendments on small entities discussed in the analysis;

123. How the proposed amendments could further lower the burden on small entities; and

124. How to quantify the impact of the proposed rules and amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules and amendments are adopted, and will be placed in the same public file as comments on the proposed rules and amendments themselves.

VI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''), the Commission 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:

A. An annual effect on the economy of $100 million or more;

B. A major increase in costs or prices for consumers or individual industries; or

C. Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Statutory Authority

The Commission is proposing to amend Regulation S–P pursuant to authority set forth in sections 17, 17A, 23, and 36 of the Exchange Act [15 U.S.C. 78q, 78q–1, 78w, and 78mm], sections 31 and 38 of the Investment Company Act [15 U.S.C. 80a–30 and 80a–37], sections 204, 204A and 211 of the Investment Advisers Act [15 U.S.C. 80b–4, 80b–4a and 80b–11], section 628(a) of the FCRA [15 U.S.C. 1681w(a)], and sections 501, 504, 505, and 525 of the GLBA [15 U.S.C. 6801, 6804, 6805 and 6825].

List of Subjects

17 CFR Parts 240, 270, and 275

Reporting and recordkeeping requirements; Securities.

17 CFR Part 248

Brokers, Consumer protection, Dealers, Investment advisers, Investment companies, Privacy, Reporting and recordkeeping requirements, Securities, Transfer agents.

Text of Proposed Amendments

For the reasons set out in the preamble, the Securities and Exchange Commission proposes to amend 17 CFR chapter II as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78j–4, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.17a–14 is also issued under Public Law 111–203, sec. 913, 124 Stat. 1376 (2010);

* * * * *

Section 240.17Ad–7 is also issued under 15 U.S.C. 78b, 78q, and 78q–1.;

* * * * *

■ 2. Amend § 240.17a–4 by adding paragraphs (e)(13) and (e)(14) to read as follows:

§ 240.17a–4 Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(e) * * *

(13) Reserved.

(14)(i) The written policies and procedures required to be adopted and implemented pursuant to § 248.30(b)(1) until three years after the termination of the use of the policies and procedures;

(ii) The written documentation of any detected unauthorized access to or use of customer information, as well as any response to, and recovery from such unauthorized access to or use of customer information required by § 248.30(b)(3) for three years from the date when the records were made;

(iii) The written documentation of any investigation and determination made regarding whether notification is required pursuant to § 248.30(b)(4), including the basis for any determination made, as well as a copy of any notice transmitted following such determination, for three years from the date when the records were made;

(iv) The written policies and procedures required to be adopted and implemented pursuant to § 248.30(b)(5)(i) until three years after the termination of the use of the policies and procedures;

(v) The written documentation of any contract or agreement entered into pursuant to § 248.30(b)(5) until three years after the termination of such contract or agreement; and

(vi) The written policies and procedures required to be adopted and implemented pursuant to § 248.30(c)(2) until three years after the termination of the use of the policies and procedures;

* * * * *

■ 3. Amend § 240.17Ad–7 by revising the section heading and adding paragraphs (j) and (k) to read as follows:

§ 240.17ad–7 (Rule 17Ad–7) Record retention.

* * * * *

(j) [Reserved].

(k) Every registered transfer agent shall maintain in an easily accessible place:

(1) The written policies and procedures required to be adopted and implemented pursuant to § 248.30(b)(1) for no less than three years after the termination of the use of the policies and procedures;

(2) The written documentation of any detected unauthorized access to or use of customer information, as well as any response to, and recovery from such unauthorized access to or use of customer information required by § 248.30(b)(3) for no less than three years from the date when the records were made;

(3) The written documentation of any investigation and determination made regarding whether notification is required pursuant to § 248.30(b)(4), including the basis for any determination made, as well as a copy of any notice transmitted following such determination, for no less than three years from the date when the records were made;

(4) The written policies and procedures required to be adopted and implemented pursuant to § 248.30(b)(5)(i) until three years after the termination of the use of the policies and procedures;

(5) The written documentation of any contract or agreement entered into pursuant to § 248.30(b)(5) until three years after the termination of such contract or agreement; and

(6) The written policies and procedures required to be adopted and implemented pursuant to § 248.30(c)(2) for no less than three years after the termination of the use of the policies and procedures.

PART 248—REGULATIONS S–P, S–AM, AND S–ID

■ 4. The authority citation for part 248 continues to read, in part, as follows:

Authority: 15 U.S.C. 78q, 78q–1, 78*o*–4, 78*o*–5, 78w, 78mm, 80a–30, 80a–37, 80b–4, 80b–11, 1681m(e), 1681s(b), 1681s–3 and note, 1681w(a)(1), 6801–6809, and 6825; Pub. L. 111–203, secs. 1088(a)(8), (a)(10), and sec. 1088(b), 124 Stat. 1376 (2010).

* * * * *

■ 5. Amend § 248.2 by revising paragraph (c) to read as follows:

§ 248.2 Model privacy form: rule of construction.

* * * * *

(c) *Substituted compliance with CFTC financial privacy rules by futures commission merchants and introducing brokers.* Except with respect to § 248.30(c), any futures commission merchant or introducing broker (as those terms are defined in the Commodity Exchange Act (7 U.S.C. 1, *et seq.*)) registered by notice with the Commission for the purpose of conducting business in security futures products pursuant to section 15(b)(11)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)(A)) that is subject to and in compliance with the financial privacy rules of the Commodity Futures Trading Commission (17 CFR part 160) will be deemed to be in compliance with this part.

■ 6. Amend § 248.5 by revising the first sentence of paragraph (a)(1), and adding paragraph (e).

The revision and addition read as follows:

§ 248.5 Annual privacy notice to customers required.

(a)(1) *General rule.* Except as provided by paragraph (e) of this section, you must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the continuation of the customer relationship. *Annually* means at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the customer on a consistent basis.

* * * * *

(e) *Exception to annual privacy notice requirement.* (1) *When exception available.* You are not required to deliver an annual privacy notice if you:

(i) Provide nonpublic personal information to nonaffiliated third parties only in accordance with §§ 248.13, 248.14, or 248.15; and

(ii) Have not changed your policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed to the customer under § 248.6(a)(2) through (5) and (9) in the most recent privacy notice provided pursuant to this part.

(2) *Delivery of annual privacy notice after financial institution no longer meets the requirements for exception.* If you have been excepted from delivering an annual privacy notice pursuant to paragraph (e)(1) of this section and change your policies or practices in such a way that you no longer meet the requirements for that exception, you must comply with paragraph (e)(2)(i) or (e)(2)(ii) of this section, as applicable.

(i) *Changes preceded by a revised privacy notic*e. If you no longer meet the requirements of paragraph (e)(1) of this section because you change your policies or practices in such a way that § 248.8 requires you to provide a revised privacy notice, you must provide an annual privacy notice in accordance with the timing requirement in paragraph (a) of this section, treating the revised privacy notice as an initial privacy notice.

(ii) *Changes not preceded by a revised privacy notice.* If you no longer meet the requirements of paragraph (e)(1) of this section because you change your policies or practices in such a way that § 248.8 does not require you to provide a revised privacy notice, you must provide an annual privacy notice within 100 days of the change in your policies or practices that causes you to no longer meet the requirement of paragraph (e)(1) of this section.

(iii) *Examples.*

(A) You change your policies and practices in such a way that you no longer meet the requirements of paragraph (e)(1) of this section effective April 1 of year 1. Assuming you define the 12-consecutive-month period pursuant to paragraph (a) of this section as a calendar year, if you were required to provide a revised privacy notice under § 248.8 and you provided that notice on March 1 of year 1, you must provide an annual privacy notice by December 31 of year 2. If you were not required to provide a revised privacy notice under § 248.8, you must provide an annual privacy notice by July 9 of year 1.

(B) You change your policies and practices in such a way that you no longer meet the requirements of paragraph (e)(1) of this section, and so provide an annual notice to your customers. After providing the annual notice to your customers, you once again meet the requirements of paragraph (e)(1) of this section for an exception to the annual notice requirement. You do not need to provide additional annual notice to your customers until such time as you no longer meet the requirements of paragraph (e)(1) of this section.

■ 7. Amend § 248.17 by, in paragraph (b), replacing the words ''Federal Trade Commission'' with ''Consumer Financial Protection Bureau''; and replacing the words ''Federal Trade Commission's'' with ''Consumer Financial Protection Bureau's.''

■ 8. Revise § 248.30 to read as follows:

§ 248.30 Procedures to safeguard customer information, including response programs for unauthorized access to customer information and customer notice; disposal of customer information and consumer information.

(a) *Scope of information covered by this section.* The provisions of this section apply to all customer information in the possession of a covered institution, and all consumer information that a covered institution maintains or otherwise possesses for a business purpose, as applicable, regardless of whether such information pertains to individuals with whom the covered institution has a customer relationship, or pertains to the customers of other financial institutions and has been provided to the covered institution.

(b) *Policies and procedures to safeguard customer information.*

(1) *General requirements.* Every covered institution must develop, implement, and maintain written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer information.

(2) *Objectives.* These written policies and procedures must be reasonably designed to:

(i) Ensure the security and confidentiality of customer information;

(ii) Protect against any anticipated threats or hazards to the security or integrity of customer information; and

(iii) Protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.

(3) *Response programs for unauthorized access to or use of customer information.* Written policies and procedures in paragraph (b)(1) of this section must include a program reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information, including customer notification procedures. This response program must include procedures for the covered institution to:

(i) Assess the nature and scope of any incident involving unauthorized access to or use of customer information and identify the customer information systems and types of customer information that may have been accessed or used without authorization;

(ii) Take appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information; and

(iii) Notify each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization in accordance with paragraph (b)(4) of this section unless the covered institution determines, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.

(4) *Notifying affected individuals of unauthorized access or use.* (i) *Notification obligation.* Unless a covered institution has determined, after a reasonable investigation of the facts and circumstances of the incident of unauthorized access to or use of sensitive customer information, that sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience, the covered institution must provide a clear and conspicuous notice to each affected individual whose sensitive customer information was, or is reasonably likely to have been, accessed or used without authorization. The notice must be transmitted by a means designed to ensure that each affected individual can reasonably be expected to receive actual notice in writing.

(ii) *Affected individuals.* If an incident of unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred, but the covered institution is unable to identify which specific individuals' sensitive customer information has been accessed or used without authorization, the covered institution must provide notice to all individuals whose sensitive customer information resides in the customer information system that was, or was reasonably likely to have been, accessed or used without authorization.

(iii) *Timing.* A covered institution must provide the notice as soon as practicable, but not later than 30 days, after becoming aware that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred unless the Attorney General of the United States informs the covered institution, in writing, that the notice required under this rule poses a substantial risk to national security, in which case the covered institution may delay such a notice for a time period specified by the Attorney General of the United States, but not for longer than 15 days. The notice may be delayed for an additional period of up to 15 days if the Attorney General of the United States determines that the notice continues to pose a substantial risk to national security.

(iv) *Notice contents.* The notice must:

(A) Describe in general terms the incident and the type of sensitive customer information that was or is reasonably believed to have been accessed or used without authorization;

(B) Describe what has been done to protect the sensitive customer information from further unauthorized access or use;

(C) Include, if the information is reasonably possible to determine at the time the notice is provided, any of the following: the date of the incident, the estimated date of the incident, or the date range within which the incident occurred;

(D) Include contact information sufficient to permit an affected individual to contact the covered institution to inquire about the incident, including the following: a telephone number (which should be a toll-free number if available), an email address or equivalent method or means, a postal address, and the name of a specific office to contact for further information and assistance;

(E) If the individual has an account with the covered institution, recommend that the customer review account statements and immediately report any suspicious activity to the covered institution;

(F) Explain what a fraud alert is and how an individual may place a fraud alert in the individual's credit reports to put the individual's creditors on notice that the individual may be a victim of fraud, including identity theft;

(G) Recommend that the individual periodically obtain credit reports from each nationwide credit reporting company and have information relating to fraudulent transactions deleted;

(H) Explain how the individual may obtain a credit report free of charge; and

(I) Include information about the availability of online guidance from the Federal Trade Commission and usa.gov regarding steps an individual can take to protect against identity theft, a statement encouraging the individual to report any incidents of identity theft to the Federal Trade Commission, and include the Federal Trade Commission's website address where individuals may obtain government information about identity theft and report suspected incidents of identity theft.

(5) *Service providers.* (i) A covered institution's response program prepared in accordance with paragraph (b)(3) of this section must include written policies and procedures requiring the institution, pursuant to a written contract between the covered institution and its service providers, to require the service providers to take appropriate measures that are designed to protect against unauthorized access to or use of customer information, including notification to the covered institution as soon as possible, but no later than 48 hours after becoming aware of a breach, in the event of any breach in security resulting in unauthorized access to a customer information system maintained by the service provider to enable the covered institution to implement its response program.

(ii) As part of its incident response program, a covered institution may enter into a written agreement with its service provider to notify affected individuals on its behalf in accordance with paragraph (b)(4) of this section.

(c) *Disposal of consumer information and customer information.* (1) *Standard.* Every covered institution, other than notice-registered broker-dealers, that maintains or otherwise possesses customer information or consumer information for a business purpose must properly dispose of the information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

(2) *Written policies, procedures, and records.* Every covered institution, other than notice-registered broker-dealers, must adopt and implement written policies and procedures that address the proper disposal of consumer information and customer information according to the standard identified in paragraph (c)(1) of this section.

(3) *Relation to other laws.* Nothing in this paragraph (c) shall be construed:

(i) To require any covered institution to maintain or destroy any record pertaining to an individual that is not imposed under other law; or

(ii) To alter or affect any requirement imposed under any other provision of law to maintain or destroy records.

(d) *Recordkeeping.* (1) Every covered institution that is an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a), but is not registered under section 8 thereof (15 U.S.C. 80a-8), must make and maintain written records documenting its compliance with the requirements of paragraphs (b) and (c)(2) of this section.

(2) In the case of covered institutions described in paragraph (d)(1) of this section, the records required under paragraphs (b) and (c)(2) of this section, apart from any policies and procedures thereunder, must be preserved for a time period not less than six years, the first two years in an easily accessible place. In the case of policies and procedures required under paragraphs (b) and (c)(2) of this section, covered institutions described in paragraph (d)(1) of this section must maintain a copy of such policies and procedures in effect, or that at any time within the past six years were in effect, in an easily accessible place.

(e) *Definitions.* As used in this section, unless the context otherwise requires:

(1) *Consumer information* means any record about an individual, whether in paper, electronic or other form, that is a consumer report or is derived from a consumer report. Consumer information also means a compilation of such records. Consumer information does not include information that does not identify individuals, such as aggregate information or blind data.

(2) *Consumer report* has the same meaning as in section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)).

(3) *Covered institution* means any broker or dealer, any investment company, and any investment adviser or transfer agent registered with the Commission or another appropriate regulatory agency (''ARA'') as defined in section 3(a)(34)(B) of the Securities Exchange Act of 1934.

(4)(i) *Customer* has the same meaning as in § 248.3(j) unless the covered institution is a transfer agent registered with the Commission or another ARA.

(ii) With respect to a transfer agent registered with the Commission or another ARA, *customer* means any natural person who is a securityholder of an issuer for which the transfer agent acts or has acted as a transfer agent.

(5)(i) *Customer information* for any covered institution other than a transfer agent registered with the Commission or another ARA means any record containing nonpublic personal information as defined in § 248.3(t) about a customer of a financial institution, whether in paper, electronic or other form, that is handled or maintained by the covered institution or on its behalf.

(ii) With respect to a transfer agent registered with the Commission or another ARA, *customer information* means any record containing nonpublic personal information as defined in § 248.3(t) identified with any natural person, who is a securityholder of an issuer for which the transfer agent acts or has acted as transfer agent, that is handled or maintained by the transfer agent or on its behalf.

(6) *Customer information systems* means the information resources owned or used by a covered institution, including physical or virtual infrastructure controlled by such information resources, or components thereof, organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of customer information to maintain or support the covered institution's operations.

(7) *Disposal* means:

(i) The discarding or abandonment of consumer information or customer information; or

(ii) The sale, donation, or transfer of any medium, including computer equipment, on which consumer information or customer information is stored.

(8) *Notice-registered broker-dealer* means a broker or dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(9)(i) *Sensitive customer information* means any component of customer information alone or in conjunction with any other information, the compromise of which could create a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information.

(ii) Examples of sensitive customer information include:

(A) Customer information uniquely identified with an individual that has a reasonably likely use as a means of authenticating the individual's identity, including

(*1*) A Social Security number, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(*2*) A biometric record;

(*3*) A unique electronic identification number, address, or routing code;

(*4*) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)); or

(B) Customer information identifying an individual or the individual's account, including the individual's account number, name or online user name, in combination with authenticating information such as information described in paragraph (e)(9)(ii)(A) of this section, or in combination with similar information that could be used to gain access to the customer's account such as an access code, a credit card expiration date, a

partial Social Security number, a security code, a security question and answer identified with the individual or the individual's account, or the individual's date of birth, place of birth, or mother's maiden name.

(10) *Service provider* means any person or entity that is a third party and receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a covered institution.

(11) *Substantial harm or inconvenience* means personal injury, or financial loss, expenditure of effort or loss of time that is more than trivial, including theft, fraud, harassment, physical harm, impersonation, intimidation, damaged reputation, impaired eligibility for credit, or the misuse of information identified with an individual to obtain a financial product or service, or to access, log into, effect a transaction in, or otherwise misuse the individual's account.

(12) *Transfer agent* has the same meaning as in section 3(a)(25) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(25)).

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 9. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 10. Amend § 270.31a–1 by adding paragraph (b)(13) to read as follows:

§ 270.31a–1 Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.

* * * * *

(b) * * *

(13) Any written records documenting compliance with the requirements set forth in 248.30(b) and (c)(2).

* * * * *

■ 11. Amend § 270.31a–2 by:

■ a. In paragraph (a)(7), removing the period at the end of paragraph and adding ''; and'' in its place; and

■ b. Adding paragraph (a)(8) to read as follows:

§ 270.31a–2 Records to be preserved by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.

* * * * *

(a) * * *

(8) Preserve for a period not less than six years, the first two years in an easily accessible place, the records required by 270.31a–1(b)(13) apart from any policies and procedures thereunder and, in the case of policies and procedures required under 270.31a–1(b)(13), preserve a copy of such policies and procedures in effect, or that at any time within the past six years were in effect, in an easily accessible place.

* * * * *

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 12. The authority citation for part 275 continues to read, in part, as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.204–2 is also issued under 15 U.S.C. 80b–6.

* * * * *

■ 13. Amend § 275.204–2 by adding paragraph (a)(20) to read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

* * * * *

(a) * * *

(20) A copy of the written records documenting compliance with the requirements set forth in § 248.30(b) and (c)(2).

* * * * *

By the Commission.

Dated: March 15, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–05774 Filed 4–5–23; 8:45 am]

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Part III

Environmental Protection Agency

California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption; Notice of Decision; Notice

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2022–0330, EPA–HQ–OAR–2022–0331; FRL–9900–02–OAR]

California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision.

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) requests for waivers of Clean Air Act (CAA) preemption for the following California regulations: the Heavy-Duty Vehicle and Engine Emission Warranty Regulations and Maintenance Provisions, the Advanced Clean Trucks Regulation, the Zero Emission Airport Shuttle Regulation, and the Zero-Emission Power Train Certification Regulation. EPA is issuing these decisions under the authority of CAA section 209.

DATES: Petitions for review must be filed by June 5, 2023.

ADDRESSES: EPA has established dockets for these requests under Docket ID EPA–HQ–OAR–2022–0330 and EPA–HQ–OAR–2022–0331. All documents relied upon in making these decisions, including those submitted to EPA by CARB, are contained in the public dockets. Publicly available docket materials are available electronically through *www.regulations.gov.* After opening the *www.regulations.gov* website, enter EPA–HQ–OAR–2022–0330 or EPA–HQ–OAR–2022–0331 in the ''Enter Keyword or ID'' fill-in box to view documents in the record. Although a part of the official docket, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute is not included in the public dockets. EPA's Office of Transportation and Air Quality (OTAQ) maintains a web page that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver and authorization **Federal Register** notices, some of which are cited in this notice; the page can be accessed at *https://www.epa.gov/state-and-localtransportation/vehicle-emissionscalifornia-waivers-and-authorizations.*

FOR FURTHER INFORMATION CONTACT: David Dickinson, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave NW. Telephone: (202) 343–9256. Email: *Dickinson.David@epa.gov;* or Kayla Steinberg, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW. Telephone: (202) 564–7658. Email: *Steinberg.Kayla@epa.gov.*

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I. Executive Summary

Today, as Administrator of the EPA, I am granting two separate requests for waivers of Clean Air Act (CAA) preemption regarding four California Air Resources Board (CARB) regulations for heavy-duty (''HD'') onroad vehicles and engines. CARB made these requests in two separate letters to EPA in October 2021 and December 2021, as described below. EPA is not taking action on CARB's January 2022 request concerning CARB's Omnibus Low NO_X regulation.[1] EPA will announce its decision regarding the Omnibus Low NO_X Regulation waiver request in the future, by separate notice in the **Federal Register**.

First, by letter dated October 22, 2021, CARB notified EPA that it had finalized amendments to its emission standards and associated test procedures for heavy-duty diesel vehicles and engines.[2] These ''2018 HD Warranty Amendments,'' adopted by the CARB Board on June 28, 2018, extend the emissions warranty periods for 2022 and subsequent model year onroad heavy-duty diesel engines and for 2022 and subsequent model year diesel vehicles with a gross vehicle weight rating exceeding 14,000 pounds powered by such engines.[3] In its letter to the Administrator, CARB requested that EPA determine the 2018 HD Warranty Amendments to be within the

[1] Omnibus Low NO_X Waiver Request, Docket No. EPA–HQ–OAR–2022–0332–0012; Omnibus Low NO_X Waiver Support Document, Docket No. EPA–HQ–OAR–2022–0332–0009.

[2] 2018 HD Warranty Amendments Waiver Request, Docket No. EPA–HQ–OAR–2022–0330–0007; 2018 HD Warranty Amendments Waiver Support Document, Docket No. EPA–HQ–OAR–2022–0330–0004.

[3] The 2018 HD Warranty Amendments are comprised of amendments to title 13, California Code of Regulations, sections 1956.8, 2035, 2036, and 2040.

scope of a waiver the Administrator previously granted for California's emission standards and associated test procedures for 2007 and subsequent model year heavy-duty diesel vehicles and engines or, alternatively, that EPA grant California a new waiver of preemption for the amendments. By today's decision EPA finds that 2018 HD Warranty Amendments meet the criteria for a new waiver under section 209(b) of the Clean Air Act (CAA), 42 U.S.C. 7543(b).

Second, CARB's December 20, 2021, letter to the Administrator notified EPA that the CARB Board had finalized Advanced Clean Trucks (ACT), Zero Emission Airport Shuttle Bus (ZEAS), and Zero Emission Powertrain (ZEP) Certification Regulations.[4] The ACT Regulation, adopted by the CARB Board on January 26, 2021, requires that manufacturers produce and sell increasing percentages of medium- and heavy-duty zero-emission vehicles (ZEVs) and near zero-emission vehicles (NZEVs) in California. These quantities of vehicles are based on increasingly higher percentages of manufacturers' annual sales of onroad heavy-duty vehicles, beginning in the 2024 model year. The ZEAS Regulation, adopted by the CARB Board on June 27, 2019, establishes steadily increasing zero-emission airport shuttle fleet composition requirements for airport shuttle fleet owners who service the thirteen largest California airports. The ZEP Certification Regulation, adopted by the CARB Board on June 27, 2019, establishes certification requirements and optional emission standards for 2021 and subsequent model year medium- and heavy-duty ZEVs and the zero-emission powertrains installed in such vehicles.[5] CARB requested that EPA grant a new waiver for each of these regulations. By today's decision EPA finds that each of these three regulations meets the criteria for a new waiver under section 209(b).

The legal framework for these decisions stems from the waiver provision first adopted by Congress in 1967, and later amended in 1977 (and amended again, as explained below, in 1990 when preemption of nonroad engine and vehicle emissions standards was addressed). In sections 209(a) and 209(b) of the Clean Air Act, Congress established that there would be only two programs for control of emissions from new motor vehicles—EPA emission standards adopted under the Clean Air Act, and California emission standards adopted under state law. Congress accomplished this by preempting all State and local governments from adopting or attempting to enforce emission standards for new motor vehicles, while at the same time providing that California could receive a waiver of preemption for its emission standards and accompanying enforcement procedures. Other states can only adopt standards that are identical to California's standards. This statutory scheme struck an important balance that protected manufacturers from multiple and different state emission standards, while preserving California's pivotal role as a laboratory for innovation in the control of emissions from new motor vehicles. Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards and the development of new emission control technologies.

Further, Congress intentionally structured this waiver provision to restrict and limit EPA's ability to deny a waiver. The provision was designed to ensure California's broad discretion to determine the best means to protect the health and welfare of its citizens. Section 209(b) specifies that EPA must grant California a waiver if California determines that its standards are, in the aggregate, at least as protective of the public health and welfare as applicable Federal standards. EPA may deny a waiver only if it makes at least one of three findings specified under the Clean Air Act. The findings that permit EPA to deny a waiver (also referred to as the three waiver prongs) are: first, a finding that California's determination that its standards are, in the aggregate, at least as protective as applicable Federal standards is arbitrary and capricious (section 209(b)(1)(A), or the first waiver prong); second, a finding that California has no need for such standards to meet compelling and extraordinary conditions (section 209(b)(1)(B), or the second waiver prong); or third, a finding that California's standards and accompanying enforcement procedures are inconsistent with section 202(a) of the Clean Air Act (section 209(b)(1)(C), or the third waiver prong).

Therefore, EPA's role upon receiving a request for waiver of preemption from California is narrow and limited to determining whether it is appropriate to make any of the three findings specified by the Clean Air Act. If the Agency cannot make at least one of the three findings, then the waiver must be granted.[6] The courts have emphasized the narrowness of EPA's review. In *MEMA II* the Court of Appeals for the District of Columbia Circuit stated that ''[S]ection 209(b) sets forth the only waiver standards with which California must comply.''[7] EPA and the Court of Appeals for the District of Columbia Circuit have consistently interpreted section 209(b) as placing the burden on the opponents of a waiver to demonstrate that one of the criteria for a denial has been met.[8]

If California acts to amend a previously waived standard or accompanying enforcement procedure, the amendment may be considered within the scope of a previously granted waiver provided that it does not undermine California's determination that its standards in the aggregate are as protective of public health and welfare as applicable Federal standards, does not affect the regulation's consistency with section 202(a) of the Clean Air Act, and raises no new issues affecting EPA's previous waiver decisions.[9]

In 1990, Congress also established that there would be only two programs for control of emissions from most nonroad vehicles and engines—EPA emission standards adopted under the Clean Air Act, and California emission standards adopted under state law.

In section 209(e)(1) of the Act, Congress preempted all states, or political subdivisions thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain types of new nonroad engines or vehicles.[10] For all other nonroad engines, states, with the exception of California, are generally preempted from adopting and enforcing standards and

[4] ACT/ZEAS/ZEP Waiver Request, Docket No. EPA–HQ–OAR–2022–0331–0004; ACT/ZEAS/ZEP Waiver Support Document, Docket No. EPA–HQ–OAR–2022–0331–0003.

[5] The ACT Regulation is at title 13, California Code of Regulation, sections 1963, and 1963.1 through 1963.5. The ZEAS Regulation is at title 17, California Code of Regulation, sections 95690.1, 95690.2, 95690.3, 95690.4, 95690.5, 95690.6, 95690.7, and 95690.8. The ZEP Certification Regulation is at title 13, California Code of Regulation, sections section 1956.8 and title 17, section 95663.

[6] *Motor and Equipment Manufacturers' Association* v. *EPA (MEMA II),* 142 F.3d 449, 462–63 (D.C. Cir. 1998).

[7] *Id.* (''If EPA concludes that California's standards pass this test, it is obligated to approve California's waiver application.'').

[8] *Motor and Equipment Manufacturers' Association* v. *EPA (MEMA I),* 627 F.2d 1095, 1121 (D.C. Cir. 1979).

[9] 45 FR 54130 (Aug. 14, 1980); 46 FR 36742 (July 15, 1981); 75 FR 44948, 444951 (July 30, 2010).

[10] States are expressly preempted from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines which are used in construction equipment or vehicles or used in farm equipment or vehicles, and which are smaller than 175 horsepower. Such express preemption under section 209(e)(1) of the Act also applies to new locomotives or new engines used in locomotives. CAA section 209(e)(1), 42 U.S.C. 7543(e)(1)(A).

other requirements relating to the control of emissions.[11]

On June 13, 2022, EPA issued three notices of opportunity for hearing and comment for the California regulations at issue here: the first notice covered the Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; the second notice covered the Advanced Clean Trucks Regulation, the Zero Emission Airport Shuttle Regulation, and the Zero-Emission Power Train Certification Regulation; and the third notice covered the ''Omnibus'' Low NO_X Regulation.[12] EPA is only taking action on the first two notices in this decision.

As part of EPA's public comment process for CARB's waiver requests, we have received comments from several states and organizations representing states, health and environmental organizations, industry, and other stakeholders. The vast majority of comments EPA received supported granting the waiver requests. Commenters generally supporting the waiver requests included CARB,[13] environmental and public health organizations,[14] state and local governments,[15] states' organizations,[16] members of Congress,[17] and some auto manufacturers.[18] Commenters generally opposing the waiver requests included the Truck and Engine Manufacturers Association (EMA),[19] the National Automobile Dealers Association (NADA),[20] the American Fuel & Petrochemical Manufacturers (AFPM),[21] the American Trucking Associations (ATA),[22] the Western States Petroleum Association,[23] and the Texas Public Policy Foundation.[24] EPA has considered all comments including those submitted after the close of the comment period. After an evaluation of the record and comments, I have determined that the waiver opponents have not met their burden of proof in order for EPA to deny either of the two CARB waiver requests under any of the three waiver prongs set forth in section 209(b)(1). As such, EPA is granting CARB's two waiver requests.[25]

II. Background

A. EPA's Consideration of CARB's Request

On June 13, 2022, EPA announced the opportunity for hearing and comment on CARB's waiver requests in three **Federal Register** notices (FR Notices).[26] EPA held one public hearing on June 29 and June 30, 2022, covering all three FR Notices.[27] As noted above, EPA's decision here pertains only to the 2018 HD Warranty Amendments, the ACT Regulation, the ZEAS Regulation, and the ZEP Certification Regulation. EPA has considered all comments submitted pertaining to these regulations, including those submitted after the close of the comment period.[28]

1. 2018 HD Warranty Amendments

EPA's June 2022 FR Notice on CARB's waiver request regarding the 2018 HD Warranty Amendments asked for comment on several matters. Since CARB had submitted a within-the-scope request, EPA first invited comment on whether those amendments meet the criteria for EPA to confirm that they are

[11] Section 209(e)(2)(A) requires the Administrator to authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines under criteria similar to section 209(b) for new motor vehicles and engines. Considering the nearly identical language in both sections 209(b) and 209(e)(2)(A), EPA has reviewed California's requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).This means that CARB's nonroad standards must be consistent with the technological feasibility requirements of section 202(a)(2). *See* 80 FR 76169, 76170 (Dec. 9, 2015). *See Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1087 (D.C. Cir. 1996) (''. . . EPA was within the bounds of permissible construction in analogizing section 209(e) on nonroad sources to section 209(a) on motor vehicles.''). This historical approach to nonroad authorizations is not being revisited here.

[12] 87 FR 35760 (June 13, 2022); 87 FR 35765 (June 13, 2022); and 87 FR 35768 (June 13, 2022).

[13] CARB Initial 2018 HD Warranty Amendments Comments, Docket No. EPA–HQ–OAR–2022–0330–0063; CARB Initial ACT Comments, Docket No. EPA–HQ–OAR–2022–0331–0127; CARB Supplemental Comments, Docket Nos. EPA–HQ–OAR–2022–0330–0072, EPA–HQ–OAR–2022–0331–0133.

[14] Environmental and Public Health Organizations, Docket Nos. EPA–HQ–OAR–2022–0330–0066, EPA–HQ–OAR–2022–0331–0099; Health and Medical Organizations, Docket No. EPA–HQ–OAR–2022–0331–0057.

[15] *See, e.g.,* State of California et al, Docket No. EPA–HQ–OAR–2022–0331–0092 (including comments submitted on behalf of the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York); New York State Department of Environmental Conservation (NYSDEC), Docket Nos. EPA–HQ–OAR–2022–0330–0061, EPA–HQ–OAR–2022–0331–0103; Maine Department of Environmental Protection (Maine), Docket Nos. EPA–HQ–OAR–2022–0330–0034, EPA–HQ–OAR–2022–0331–0074; Colorado Energy Office (Colorado), Docket No. EPA–HQ–OAR–2022–0331–0034; Washington State Department of Ecology (Washington), Docket Nos. EPA–HQ–OAR–2022–0330–0056, EPA–HQ–OAR–2022–0331–0079; South Coast Air Quality Management District (SCAQMD), Docket No. EPA–HQ–OAR–2022–0331–0075; San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), Docket Nos. EPA–HQ–OAR–2022–0330–0055, EPA–HQ–OAR–2022–0331–0106.

[16] *See, e.g.,* Northeast States for Coordinated Air Use Management (NESCAUM), Docket Nos. EPA–HQ–OAR–2022–0330–0017, EPA–HQ–OAR–2022–0330–0053, EPA–HQ–OAR–2022–0330–0074, EPA–HQ–OAR–2022–0331–0104, EPA–HQ–OAR–2022–0331–0135, ; National Association of Clean Air Agencies (NACAA), Docket Nos. EPA–HQ–OAR–2022–0330–0035, EPA–HQ–OAR–2022–0330–0019, EPA–HQ–OAR–2022–0331–0067, EPA–HQ–OAR–2022–0331–0029; Ozone Transport Commission (OTC), Docket Nos. EPA–HQ–OAR–2022–0330–0062, EPA–HQ–OAR–2022–0330–0021, EPA–HQ–OAR–2022–0330–0075, EPA–HQ–OAR–2022–0331–0105, EPA–HQ–OAR–2022–0331–0033, EPA–HQ–OAR–2022–0331–0136.

[17] Padilla et al, Docket Nos. EPA–HQ–OAR–2022–0330–0025, EPA–HQ–OAR–2022–0331–0038.

[18] Tesla, Docket No. EPA–HQ–OAR–2022–0330–0038, EPA–HQ–OAR–2022–0331–0060; Rivian, Docket No. EPA–HQ–OAR–2022–0331–0066.

[19] EMA Testimony, Docket Nos. EPA–HQ–OAR–2022–0330–0016, EPA–HQ–OAR–2022–0331–0026; EMA Initial Comments, Docket Nos. EPA–HQ–OAR–2022–0330–0032, EPA–HQ–OAR–2022–0331–0071; EMA Supplemental Comments, Docket Nos. EPA–HQ–OAR–2022–0330–0071, EPA–HQ–OAR–2022–0331–0132,

[20] NADA, Docket Nos. EPA–HQ–OAR–2022–0330–0050, EPA–HQ–OAR–2022–0331–0090.

[21] AFPM, Docket No. EPA–HQ–OAR–2022–0331–0088.

[22] ATA, Docket No. EPA–HQ–OAR–2022–0331–0091.

[23] Western States Petroleum Association, Docket No. EPA–HQ–OAR–2022–0331–0109.

[24] Texas Public Policy Foundation, Docket No. EPA–HQ–OAR–2022–0330–0036, EPA–HQ–OAR–2022–0331–0059.

[25] In deciding to grant these waiver requests, EPA is relying on its legal interpretation of the statute as explained in this notice. In each case, EPA believes that its interpretation constitutes the best interpretation of the statute, applying traditional principles of statutory interpretation. Further, to the extent there is any genuine ambiguity within the statute related to these interpretations, EPA believes it has reasonably resolved such ambiguity. *See Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 866 (1984) (deference is owed to reasonable agency resolutions of statutory ambiguity).

[26] 87 FR 35760 (June 13, 2022); 87 FR 35765 (June 13, 2022); and 87 FR 35768 (June 13, 2022).

[27] A transcript for each day of the hearing (June 29th and 30th, 2022) can be found in each docket. June 29th Hearing Transcript, Docket Nos. EPA–HQ–OAR–2022–0330–0028 and EPA–HQ–OAR–2022–0331–0045, June 30th Hearing Transcript, Docket Nos. EPA–HQ–OAR–2022–0330–0029 and EPA–HQ–OAR–2022–0331–0044.

[28] EMA Supplemental Comments, Docket Nos. EPA–HQ–OAR–2022–0330–0071, EPA–HQ–OAR–2022–0331–0132; CARB Supplemental Comments, Docket Nos. EPA–HQ–OAR–2022–0330–0072, EPA–HQ–OAR–2022–0331–0133; Mass Comment Campaign sponsored by Union of Concerned Scientists, Docket Nos. EPA–HQ–OAR–2022–0330–0073, EPA–HQ–OAR–2022–0331–0134; NESCAUM, Docket Nos. EPA–HQ–OAR–2022–0330–0074, EPA–HQ–OAR–2022–0331–0135; OTC, Docket Nos. EPA–HQ–OAR–2022–0330–0075, EPA–HQ–OAR–2022–0331–0136; Mid-Atlantic/Northeast Visibility Union (MANEVU), Docket Nos. EPA–HQ–OAR–2022–0330–0076, EPA–HQ–OAR–2022–0330–0077, EPA–HQ–OAR–2022–0331–0138, EPA–HQ–OAR–2022–0331–0137.

within the scope of prior waivers. Specifically, we requested comment on whether California's 2018 HD Warranty Amendments: (1) Undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable Federal standards, (2) affect the consistency of California's requirements with section 202(a) of the Act, and (3) raise any other ''new issue'' affecting EPA's previous waiver or authorization determinations.[29]

EPA also solicited comment on whether it should grant a new waiver for the 2018 HD Warranty Amendments in the event that EPA cannot confirm that some or all of those amendments were within the scope of previous waivers. We therefore asked commenters to consider the three prongs for the denial of a waiver request under section 209(b)(1) of the CAA: whether (A) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious, (B) California does not need such standards to meet compelling and extraordinary conditions, and (C) California's standards and accompanying enforcement procedures are inconsistent with section 202(a) of the Clean Air Act.[30]

Regarding section 209(b)(1)'s second prong, EPA must grant a waiver request unless the Agency finds that California ''does not need such State standards to meet compelling and extraordinary conditions.'' EPA has interpreted the phrase ''need[s] such State standards to meet compelling and extraordinary conditions'' to mean that California needs a separate motor vehicle program as a whole in order to address compelling and extraordinary conditions in California (also known as the ''traditional'' interpretation). EPA noted its intention to use the traditional interpretation and sought comment on whether California needs the 2018 HD Warranty Amendments under section 209(b)(1)(B).[31]

With regard to section 209(b)(1)'s third prong, EPA has historically considered consistency with section 202(a) to require that California's standards are technologically feasible within the lead time provided, giving due consideration to costs, and that California and applicable Federal test procedures are consistent. EPA requested comment on what provisions from section 202(a) apply to California due to the reference to section 202(a) in section 209(b)(1)(C). EPA invited comment on how such provisions, to the extent they may apply to California's standards or enforcement procedures, should be considered in the context of EPA's evaluation of CARB's waiver request under the third prong.[32]

2. ACT, ZEAS, and ZEP Certification Regulations

EPA's June 2022 FR Notice on CARB's waiver request regarding the Advanced Clean Truck Regulation (ACT), the Zero Emission Airport Shuttle (ZEAS) Regulation, and the Zero-Emission Power Train (ZEP) Certification Regulation asked for comment on several matters. We requested comment on all aspects of a full waiver analysis applicable to each of the three regulations. Therefore, we asked commenters to consider the three waiver prongs under section 209(b)(1) of the CAA. EPA also noted its intention to use the traditional interpretation of section 209(b)(1)(B) and sought comment on whether California needs the ACT, ZEAS, and ZEP Certification Regulations, as well what provisions under section 202(a) should apply (and how such provisions should be evaluated) under section 209(b)(1)(C), which requires consistency with section 202(a).[33]

B. Principles Governing this Review

The CAA has been a paradigmatic example of cooperative federalism, under which ''States and the Federal Government [are] partners in the struggle against air pollution.'' [34] In Title II, Congress authorized EPA to promulgate emission standards for mobile sources and generally preempted states from adopting their own standards.[35] At the same time, Congress created an important exception for the State of California.

1. Scope of Preemption and Waiver Criteria Under the Clean Air Act

The legal framework that governs today's decisions stems from the waiver provision first adopted by Congress in 1967 and its subsequent amendments.[36] In title II of the CAA, Congress established only two programs for control of emissions from new motor vehicles—EPA emission standards adopted under the CAA and California emission standards adopted under its state law.[37] Congress accomplished this by preempting all state and local governments from adopting or enforcing emission standards for new motor vehicles, while at the same time providing that California could receive a waiver of preemption for its emission standards and enforcement procedures in keeping with its prior experience regulating motor vehicles, its role as a laboratory for innovation in emission reduction technologies for vehicles, and its serious air quality problems. This framework struck an important balance that protected manufacturers from multiple and different state emission standards and preserved a pivotal role for California in the advancement of control of emissions from new motor vehicles. Recognizing both the harsh reality of California's air pollution and California's ability to serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards and developing control technology, Congress intentionally structured this waiver provision to restrict and limit EPA's ability to deny a waiver to ensure that California had broad discretion in selecting the best means to protect the health and welfare of its citizens.[38]

Accordingly, section 209(a) preempts states or political subdivisions from adopting or attempting to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.[39] Under the

[29] 87 FR at 35762.

[30] *Id.*

[31] *Id.* at 35762–63.

[32] *Id.*

[33] 87 FR 35768, 35770 (June 13, 2022).

[34] *General Motors Corp.* v. *United States,* 496 U.S. 530, 532 (1990).

[35] ''The regulatory difference [between Titles I and II] is explained in part by the difficulty of subjecting motor vehicles, which readily move across state boundaries, to control by individual states.'' *Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1079 (D.C. Cir. 1996). Congress also asserted federal control in this area to avoid ''the specter of an anarchic patchwork of federal and state regulatory programs'' nationwide. *See MEMA I,* 627 F.2d 1095, 1109 (D.C. Cir. 1979).

[36] *Central Valley Chrysler-Jeep, Inc.* v. *Goldstene,* 529 F. Supp. 2d 1151, 1174 (''The waiver provision of the Clean Air Act recognizes that California has exercised its police power to regulate pollution emissions from motor vehicles since before March 30, 1966; a date that predates . . . the Clean Air Act.'').

[37] Motor vehicles are ''either 'federal cars' designed to meet the EPA's standards or 'California cars' designed to meet California's standards.'' *Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1079–80, 1088 (D.C. Cir. 1996) (''Rather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory standards.'').

[38] *See, e.g.,* S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (The waiver of preemption is for California's ''unique problems and pioneering efforts.''); 113 Cong. Rec. 30950, 32478 (''[T]he State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.'') (Statement of Sen. Murphy); *MEMA I,* 627 F.2d 1095, 1111 (D.C. Cir. 1979).

[39] 42 U.S.C. 7543(a)–(a) Prohibition No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the

Continued

terms of section 209(b)(1), after notice and opportunity for public hearing, EPA must waive the application of section 209(a) to California unless the Administrator finds that at least one of three criteria to deny a waiver in section 209(b)(1)(A)–(C) has been met.[40] EPA may thus deny a waiver, in the context of the Agency's adjudicatory review, only if it makes at least one of these three factual findings (associated with the three waiver criteria) based on evidence in the record, including arguments that opponents of the waiver have provided.

The 1970 CAA Amendments strengthened EPA's authority to regulate vehicular ''emission[s] of any air pollutant,'' while reaffirming the corresponding breadth of California's ability to regulate those emissions (by amending CAA section 202 and recodifying the waiver provision as section 209(b), respectively).[41] Congress also established the National Ambient Air Quality Standards (NAAQS) program, under which EPA issues air quality criteria and sets ambient air quality standards for so-called ''criteria'' pollutants, and states with regions that have levels of pollutants greater than those Federal standards must submit state implementation plans, or SIPs, indicating how they plan to attain the NAAQS. These attainment SIPs are often multi-year, comprehensive plans.

With the CAA Amendments of 1977, Congress allowed California to consider the protectiveness of its standards ''in the aggregate,'' rather than requiring each California standard to be as or more stringent than its Federal counterpart, to enable stronger standards for a specific pollutant where a weaker standard for a second pollutant was necessary due to interactions between control technologies.[42] Congress also approved EPA's interpretation of the waiver provision as providing appropriate deference to California's policy goals and consistent with Congress's intent ''to permit California to proceed with its own regulatory program'' for new motor vehicle emissions.[43]

In addition, the 1977 Amendments demonstrated the significance of California's standards to the Nation as a whole with Congress' adoption of a new section 177. Section 177 permits other states addressing their own air pollution problems to adopt and enforce California new motor vehicle standards ''for which a waiver has been granted'' if certain criteria are met.[44]

Any state with qualifying SIP provisions may exercise this option and become a ''section 177 State,'' without first seeking the approval from EPA.[45] Thus, the 1977 Amendments further recognize California's important role in mobile source air pollution control, both by making it easier for California to obtain waivers (by allowing the State's protectiveness determination to be made ''in the aggregate'') and by expanding the opportunity (via section 177) for other states to adopt California's standards.

Given the text, legislative history, and judicial precedent, EPA has consistently interpreted section 209(b) as requiring EPA to grant a waiver unless EPA or opponents of a waiver can demonstrate that one of the criteria for a denial has been met.[46] In this context, since inception, EPA has recognized its limited discretion in reviewing California waiver requests. Therefore, EPA's role upon receiving a request for waiver of preemption from California has consistently been limited and remains only to be to determine whether it is appropriate to make any of the three factual findings specified by the CAA. If the Agency cannot make at least one of the three findings, then the waiver must be granted. The three waiver criteria are properly seen as criteria for a denial. This reversal of the normal statutory structure embodies and is consistent with the congressional intent of providing deference to California to maintain and further develop its own new motor vehicle emission program.

Additionally, in previous waiver decisions, EPA has noted that section 209(b)(1) specifies particular and limited grounds for rejecting a waiver and has therefore limited its review to

control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

[40] 42 U.S.C. 7543(b)(1): (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

[41] In the 1970 Amendments, section 202(a) was divided into section 202(a)(1) and section 202(a)(2). Section 202(a)(1) included the directive for the Administrator to ''prescribe standards applicable to emissions of any air pollutant . . . which in his judgement cause, or contribute to, air pollution which may reasonably be anticipated to endanger publish health or welfare.'' The previous lead time requirement in section 202(a) was moved to section 202(a)(2) and included the directive that any regulation prescribed under 202(a)(1) ''shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.'' The 1970 CAA did not change the cross reference to section 202(a) in section 209(b)(1)(C). *See* CARB Initial ACT/ZEAS/ZEP Comments at 11–12. As described below, the 1977 Amendments did not change the cross reference to section 202(a) in section 209(b)(1)(C) but did expand the flexibility afforded to California under section 209(b). The 1977 Amendments also added section 202(a)(3) directing EPA to set heavy-duty vehicle emission standards for certain emissions for the 1983 model year and later. (Congress having identified a need for standards in 1970 ''had become impatient with the EPA's failure to promulgate a particulate standard'' for heavy duty vehicles.'' *NRDC,* 655 F.2d at 325 (citing S. Rep. No.127, 95th Cong., 1st Sess. 67 (1977), reprinted in 3 Legislative History 1441)).

[42] 42 U.S.C. 7543(b)(1). In further amendments to the Act in 1977, section 209 (formerly section 208) was amended to require the U.S. Environmental Protection Agency (EPA) to consider California's standards as a whole, so that California could seek a waiver from preemption if its standards ''in the aggregate'' protected public health at least as well as Federal standards. *See* Clean Air Act Amendments of 1977, Pub. L. 95–95, section 207, 91 Stat. 685. *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dep't of Env't Conservation,* 17 F.3d 521, 525 (2d Cir. 1994).

[43] H.R. Rep. No. 95–294, at 301 (1977).

[44] This provision was intended to continue the balance, carefully drawn in 1967, between states' need to meet increasingly stringent federal air pollution limits and the burden of compliance on auto-manufacturers. *See, e.g.,* H.R. Rep. No. 294, 95th Cong., 1st Sess. 309–10 (1977) (''[S]ection 221 of the bill broadens State authority, so that a State other than California . . . is authorized to adopt and enforce new motor vehicle emission standards which are identical to California's standards. Here again, however, strict limits are applied . . . . This new State authority should not place an undue burden on vehicle manufacturers . . . .''); *Motor Vehicle Mfrs. Ass'n* v. *NYS Dep't of Env't Conservation,* 17 F.3d 521, 527 (2d Cir. 1994) (''Many states, including New York, are in danger of not meeting increasingly stringent federal air pollution limits . . . . It was in an effort to assist those states struggling to meet federal pollution standards that Congress, as noted earlier, directed in 1977 that other states could promulgate regulations requiring vehicles sold in their state to be in compliance with California's emission standards or to 'piggyback' onto California's preemption exemption. This opt-in authority, set forth in section 177 of the Act, 42 U.S.C. 7507, is carefully circumscribed to avoid placing an undue burden on the automobile manufacturing industry.'')

[45] CAA section 177, 42 U.S.C. 7507.

[46] *MEMA I,* 627 F.2d at 1120–21 (''The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.''); *MEMA II,* 142 F.3d 449, 462 (D.C. Cir. 1998) (''[S]ection 209(b) sets forth the only waiver standards with which California must comply. . . . If EPA concludes that California's standards pass this test, it is obligated to approve California's waiver application.'').

those grounds.[47] EPA has also noted that the structure Congress established for reviewing California's standards is deliberately narrow, which further supports this approach. This has led EPA to reject arguments that are not specified in the statute as grounds for denying a waiver:

> The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California. Thus, my consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that I may consider under section 209(b).[48]

EPA's evaluation of accompanying enforcement procedures that are identified in section 209(b)(1)(C) is done by assessing the first and third waivers prongs at 209(b)(1)(A) and 209(b)(1)(C).[49]

2. Deference to California

EPA has also consistently noted that the text, structure, and history of the California waiver provision clearly indicate both congressional intent and appropriate EPA practice of leaving decisions on ''ambiguous and controversial matters of public policy'' to California's judgment.[50] In waiver decisions, EPA has thus recognized that congressional intent in limiting review of California waiver requests to the section 209(b)(1) criteria was to ensure that the Federal government did not second-guess the wisdom of state policy.[51] In an early waiver decision EPA highlighted this deference:

> It is worth noting . . . I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to ''catch up'' to some degree with newly promulgated standards. Such an approach . . . may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.[52]

This view is further supported by the House Committee Report accompanying the 1977 amendments to the Clean Air Act. The Report explained that, although Congress had the opportunity to restrict the waiver provision, it instead elected to expand California's flexibility to adopt a complete program of motor vehicle emission controls. According to the Report, the 1977 Amendments were intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, *i.e.,* to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.[53]

3. Standard and Burden of Proof

In *Motor and Equipment Manufacturers' Association* v. *EPA,* 627 F.2d 1095 (D.C. Cir. 1979) (*MEMA I*), the U.S. Court of Appeals for the District of Columbia stated, with regard to the standard and burden of proof, that the Administrator's role in a section 209 proceeding is to:

> [C]onsider all evidence that passes the threshold test of materiality and . . . thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.[54]

The court in *MEMA I* considered the standards of proof under section 209 for the two findings necessary to grant a waiver for an ''accompanying enforcement procedure'' (as opposed to the standards themselves): (1) Protectiveness in the aggregate and (2) consistency with CAA section 202(a) findings. The court instructed that ''the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.'' [55]

With respect to California's protectiveness determination, the court upheld the Administrator's position that to deny a waiver there must be clear and compelling evidence to show that the proposed procedures undermine the protectiveness of California's standards.[56] The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.[57]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for ''standards,'' as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: ''[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of compelling and extraordinary conditions and whether the standards are technologically feasible—Congress intended that the standard of EPA review of the State decision to be a narrow one.'' [58]

Although EPA evaluates whether there are compelling and extraordinary conditions in California, the Agency nevertheless accords deference to California on its choices for how best to address such conditions in light of the extensive legislative history of section 209(b). As noted earlier, the burden of proof in a waiver proceeding is on EPA and the opponents of the waiver. This is clear from the statutory language stating that EPA ''shall . . . waive'' preemption unless one of three statutory factors is met. This reading was upheld by the D.C. Circuit in *MEMA I,* which concluded that this obligation rests

[47] *See, e.g.,* 78 FR 2112 (January 9, 2013); 87 FR 14332 (March 14, 2022) (SAFE 1 Reconsideration Decision).

[48] 78 FR at 2115 (footnote omitted).

[49] 87 FR 35760, 35762–63 (June 13, 2022).

[50] 40 FR 23102, 23103–04 (May 28, 1975); *see also* LEV I, 58 FR 4166 (January 13, 1993), Decision Document at 64.

[51] *Ford Motor Co.* v. *Environmental Protection Agency (Ford Motor),* 606 F.2d 1293, 1302 (D.C. Cir. 1979) (''The Administrator is charged with undertaking a single review in which he applies the deferential standards set forth in Section 209(b) to California and either grants or denies a waiver without exploring the consequences of nationwide use of the California standards or otherwise stepping beyond the responsibilities delineated by Congress.'').

[52] 40 FR 23102, 23103–04 (May 28, 1975); LEV I, 58 FR 4166 (January 13, 1993), Decision Document at 64.

[53] H.R. Rep. No 294, 95 Cong., 1st Sess. 301–02 (1977) (cited in *MEMA I,* 627 F.2d at 1110).

[54] *MEMA I,* 627 F.2d at 1122.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See, e.g.,* 40 FR 21102–03 (May 28, 1975).

firmly with opponents of the waiver in a section 209 proceeding by holding that:

> The language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.[59]

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated, ''Here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'' [60] Therefore, the Administrator's burden is to act ''reasonably.'' [61]

III. Discussion

This section evaluates each of the two waiver requests and sets forth EPA's rationale for granting each separate request.[62] First, we identify the specific rubric by which we adjudicate each waiver request. Because the 2018 HD Warranty Amendments constitute ''accompanying enforcement procedures,'' as opposed to new standards, EPA evaluates this request under the more limited rubric for accompanying enforcement procedures, as detailed in section III.A below. However, even if EPA were to treat the 2018 HD Warranty Amendments as new onroad standards and evaluate them under the full waiver criteria applicable to such standards, the opponents of the waiver have failed to meet their burden of proof.

We next turn to the three waiver criteria, which we evaluate in turn in sections III.B–D. For each waiver criterion, we set forth EPA's general approach to evaluating the criterion, summarize the position of CARB and the commenters for each of the waiver requests, discuss EPA's analysis of the criterion, and finally present our conclusion.[63] Many of the waiver opponents' arguments centered on the third waiver prong and, in particular, on an argument that, notwithstanding EPA's conclusion that the California standards and accompanying enforcement procedures are feasible within the lead time given under the regulations, EPA must require California standards to include four years' lead time required for certain Federal heavy-duty vehicle standards set out in section 202(a)(3)(C). We address this argument in detail in section III.D.5. In every case, we conclude that the opponents of the waiver have failed to meet their burden of proof.

Finally, EPA received comments outside the scope of this action. We discuss these comments, relating to preemption under the Energy Policy and Conservation Act (EPCA), the Equal Sovereignty Doctrine and other constitutional issues, in section III.E. As the scope of EPA's review under section 209 is constrained, EPA has declined to consider them in granting these waiver requests.

A. Evaluation of CARB's 2018 HD Warranty Amendments

With respect to the 2018 HD Warranty Amendments, we first address the proper rubric by which to evaluate this regulation. To determine the proper rubric, EPA first evaluates whether CARB's 2018 HD Warranty Amendments should be considered standards or ''accompanying enforcement procedures'' because ''section 209(b) refers to accompanying procedures only in the context of consistency with section 202(a).'' [64] Specifically, under section 209(b)(1)(C), EPA is to deny a waiver if ''such state standards and accompanying enforcement procedures are not consistent with section 202(a).'' EPA then evaluates whether CARB's request relating to its 2018 HD Warranty Amendments should be treated as within-the-scope of a prior waiver request or as a request for a new waiver. As we explain below, EPA concludes that CARB's 2018 HD Warranty Amendments are ''accompanying enforcement procedures'' and that it is also appropriate to treat CARB's request as one for a new waiver. Given these determinations, EPA applies the first and third waiver prongs under 209(b)(1) (relating to California's protectiveness determination and consistency with 202(a)) in evaluating CARB's request. However, even if EPA were to treat CARB's 2018 HD Warranty Amendment as a new standard for which California is seeking a new waiver and apply all three waiver prongs, EPA would nonetheless grant the waiver.

CARB requested that the Administrator confirm that the 2018 HD Warranty Amendments fall within the scope of the 2005 waiver of preemption that the Administrator granted for California's emission standards and associated test procedures for 2007 and subsequent model year heavy-duty diesel vehicles and engines, and its waiver request includes discussion of how each of the relevant prongs applicable to enforcement procedures (*i.e.,* that the enforcement procedure does not undermine California's protectiveness determination and that there is consistency between the Federal and California enforcement procedures) are within the scope of the previously granted waiver. In the alternative, CARB requested EPA grant a new waiver of preemption and discussed each of the relevant prongs for a new waiver (*i.e.,* protectiveness, consistency and, if waiving a standard, the need for the program as a whole to meet compelling and extraordinary conditions in the state).[65] CARB noted that the 2018 HD Warranty Amendments encompass several elements that individually and collectively establish more rigorous emissions warranty and emissions maintenance schedule requirements.[66]

EPA believes that the 2018 HD Warranty Amendments are properly

[59] *MEMA I,* 627 F.2d at 1121.

[60] *Id.* at 1126.

[61] *Id.*

[62] EPA intends our grant of the waiver for each of the four California regulations at issue (*i.e.,* 2018 HD Warranty Amendments, ACT, ZEAS, and ZEP Certification Regulations,) to be severable. Were a reviewing court to set aside our waiver action regarding any particular regulation, or portion of any particular regulation, EPA intends for the actions on the remaining regulations and the remaining portion of the affected regulation to remain in effect.

[63] Although EPA issued separate Federal Notices that solicited comments on each waiver request, EPA is electing to grant waivers for all the regulations included in the two requests in this single document in which it discusses each of the two waiver criteria only once and then evaluates each of CARB's regulations under each criterion and makes separate decisions with respect to each regulation.

[64] *MEMA I,* 627 F.2d at 1111–12.

[65] *See* 2018 HD Warranty Amendments Waiver Support Document at 18–25. CARB maintained that the 2018 HD Warranty Amendments are within the scope of the waiver EPA granted for CARB's 2007 heavy-duty vehicle emission standards. 70 FR 50322 (August 26, 2005). Therefore, CARB's waiver request included information to demonstrate that the 2018 HD Warranty Amendments do not undermine the previous protectiveness determination associated with the 2007 emission standards nor do the Amendments affect the consistency of the heavy-duty vehicles emission standards with section 202(a) of the CAA. CARB also stated that it is not aware of any new issues raised by the Amendments. Alternatively, CARB stated that, if EPA must grant CARB a new waiver for the Amendments (in addition to the two waiver criteria already discussed for the within-the-scope request), California continues to need a separate motor vehicle program to meet compelling and extraordinary conditions.

[66] 2018 HD Warranty Amendments Waiver Support Document at 18–25.

considered accompanying enforcement procedures because they constitute criteria designed to determine compliance with applicable standards and are accordingly relevant to a manufacturer's ability to produce vehicles and engines that comply with applicable standards for their useful lives.[67]

Because accompanying enforcement procedures are only contained in section 209(b)(1)(C), or the third waiver prong, EPA's historical practice of considering whether to grant waivers for accompanying enforcement procedures tied to standards for which a waiver has already been granted is to determine only: (1) Whether the enforcement procedures threaten the validity of California's determination that its standards are as protective of public health and welfare as applicable Federal standards, (*i.e.,* the first prong) and (2) whether the Federal and California enforcement procedures are consistent (*i.e.,* the third prong).[68] EPA notes that these two criteria are similar to the questions EPA reviews for within-the-scope requests for both standards and enforcement procedures. However, when reviewing amendments to a previously waived standard or accompanying enforcement procedure, for which CARB seeks a within-the-scope determination from EPA, EPA also reviews whether the amendments raise any ''new issues'' affecting the Administrator's previous waiver determination, and if there are new issues that trigger a full review of the relevant two prongs.[69]

In this instance, EPA believes new issues have been raised by the amendments and therefore it is appropriate to review the Amendments under the complete waiver criteria applicable to accompanying enforcement procedures (*i.e.,* the first and third waiver prongs). Because under either compliance path the manufacturer is under an additional requirement that creates a new burden rather than a flexibility, EPA believes this necessarily creates a new question as to whether the accompanying enforcement procedure meets the requirements of the third waiver prong. EPA notes that there could be some level of uncertainty in determining whether ''new issues'' have been raised, including whether a compliance path where manufacturers only cover the costs of expected additional warranty claims is equivalent to a new, more stringent accompanying enforcement procedure. In addition, because the criteria for a within-the-scope waiver evaluation and a full waiver are similar, EPA believes it is prudent in this instance to review the request under the full waiver criteria (*i.e.,* the relevant two prongs identified above). The 2018 HD Warranty Amendments encompass several elements that individually and collectively establish more rigorous emissions warranty and emissions maintenance schedule requirements that raise issues regarding the technological feasibility of the aggregate requirements applicable to new heavy-duty vehicles and engines. Therefore, EPA is evaluating the 2018 HD Warranty Amendments under the two waiver criteria below that apply to accompanying enforcement procedures.[70]

B. First Waiver Criterion: Are California's Protectiveness Determinations Arbitrary and Capricious?

We now turn to California's protectiveness determinations for the regulations covered under each of its waiver requests. EPA's evaluation of this first waiver prong is performed under the construct explained here. Section 209(b)(1)(A) of the Clean Air Act requires EPA to grant a waiver unless the Administrator finds that California's determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards, is arbitrary and capricious. EPA may not disregard California's determination unless there is ''clear and compelling evidence'' to the contrary.[71] Moreover, ''[t]he language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements.''[72] Additionally, it is ''the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.''[73]

1. EPA's Historical Interpretation of Section 209(b)(1)(A)

EPA's long-standing interpretation (also called the ''traditional interpretation'') is that the phrase ''State standards'' in section 209(b)(1) means the entire California new motor vehicle emissions program.[74] Therefore, as explained below, when evaluating California's protectiveness determination, EPA compares the California standards as a whole to the Federal standards. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA has previously found were not arbitrary and capricious.[75] That evaluation follows the instruction of section 209(b)(2), which states: ''If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of [209(b)(1)].''[76]

To review California's protectiveness determination in light of section 209(b)(2), EPA conducts its own analysis of the newly adopted California standards to comparable applicable Federal standards. The comparison

[67] *MEMA I* at 1111–13 (''In that setting we believe that the Administrator correctly classified the in-use maintenance regulations as accompanying enforcement procedures' rather than as ''standards.''); Decision Document accompanying 51 FR 12391 (April 10, 1986), at 3. EPA sets emissions warranty periods under section 207(a) and not section 202(a). *See, e.g.,* 48 FR 52170 (November 16, 1983).

[68] *MEMA I,* 627 F.2d 1095, 1111, 1113; Decision Document accompanying 61 FR 53371 (Oct. 11, 1996) at 17; 74 FR 3030, 3032 (Jan. 16, 2009).

[69] 45 FR 54130 (Aug. 14, 1980); 46 FR 36742 (July 15, 1981); 75 FR 44948, 444951 (July 30, 2010).

[70] EPA believes it is only necessary to review: (1) Whether the enforcement procedures are so lax that they threaten the validity of California's determination that its standards are as protective of public health and welfare as applicable Federal standards, and (2) whether the Federal and California enforcement procedures are consistent. However, even if EPA were to review the enforcement procedures under the second waiver criterion (as EPA does in the alternative below, without conceding the second waiver criterion applies, which we include in the event that those opposed to the waiver believe the 2018 HD Warranty Amendments are equivalent to new emission standards rather than accompanying enforcement procedures), the opponents of the 2018 HD Warranty Amendments have not met their burden of proof regarding section 209(b)(1)(B).

[71] *MEMA I,* 627 F.2d 1095, 1121–22 (D.C. Cir. 1979).

[72] *Id. See also Ford Motor,* 606 F.2d 1293, 1297 (D.C. Cir. 1979).

[73] *MEMA I,* 627 F.2d at 1121.

[74] 74 FR 32744, 32749 (July 8, 2009); 70 FR 50322 (Aug. 26, 2005); 77 FR 9239 (Feb. 16, 2012); 78 FR 2112, 2123 (Jan. 9, 2013).

[75] 36 FR 17458 (Aug. 31, 1971). (''The law makes it clear that the waiver requests cannot be denied unless the specific finding designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.''). The ''more stringent'' standard expressed here in 1971 was superseded by the 1977 Amendments to section 209, which established that California's standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. The stringency standard remains, though, in section 209(b)(2).

[76] CAA section 209(b)(2).

quantitatively answers whether the new standards are more or less protective than the Federal standards.

Section 209 provides two paths for finding that California's protectiveness determination is reasonable. In addition to a side-by-side comparison of California and applicable Federal standards considering section 209(b)(2), California's program can still be at least as protective as EPA's program even if some (or even all) of the new or amended standards in a waiver request are less stringent than the applicable EPA standards if California's program, as a whole, is at least as protective as the Federal standards as a whole.[77] Thus, EPA first examines whether the side-by-side analysis under section 209(b)(2) resolves the protectiveness inquiry. If there are some EPA standards that are numerically more stringent that the California standards, then the question that EPA reviews is whether the new or amended California standards would cause the State's new motor vehicle emissions program as a whole (''in the aggregate'') to become less protective than EPA's program. A finding that California's protectiveness determination was arbitrary and capricious under section 209(b)(1)(A) must be based upon "'clear and compelling evidence' to show that proposed [standards] undermine the protectiveness of California's standards.'' [78]

As noted previously, when considering whether to grant waivers for accompanying enforcement procedures tied to standards for which a waiver has already been granted, EPA has long held that, under section 209(b)(1)(A)'s first prong, it will only address the question of whether the enforcement procedures are so lax that they threaten the validity of California's previous determination that its standards are as protective of public health and welfare as applicable Federal standards.[79]

2. CARB's Discussion of California's Protectiveness Determinations in the Waiver Requests

a. 2018 HD Warranty Amendments

With regard to the 2018 HD Warranty Amendments, CARB made a determination that the Amendments will not cause California's motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards in Resolution 18–24.[80] CARB noted that the 2018 HD Warranty Amendments do not reduce the stringency of the previously waived emission standards or the associated test procedures for 2007 and subsequent model year heavy-duty diesel engines and vehicles, but instead establish emissions warranty requirements for heavy-duty diesel engines and heavy-duty diesel vehicles that are more stringent than the corresponding Federal emission warranty requirements for such engines and vehicles.[81]

b. ACT, ZEAS, and ZEP Certification Regulations

Regarding CARB's request for a waiver for the ACT Regulation, ZEAS Regulation, and ZEP Certification Regulation, CARB noted that it made protectiveness determinations for each respective regulation in the request.

First, CARB stated that in Board Resolution 78–10 it determined that the requirements related to the control of emissions contained in the ACT Regulation will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards, and that no basis exists for EPA's Administrator to find that determination arbitrary and capricious.[82] CARB noted that its ACT Regulation is clearly more stringent than any applicable Federal requirements because there are no comparable Federal requirements.[83]

Second, the ACT, ZEAS, and ZEP waiver request also contained CARB's summary of the Board's protectiveness findings regarding its ZEAS Regulation and explained that there are no comparable Federal requirements.[84]

Finally, in the ACT, ZEAS, and ZEP waiver request, CARB noted that the ZEP Certification Regulation was also accompanied by the Board approved Resolution 19–15 that contained a determination that these regulations will not cause California's motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.[85]

3. Comments on California's Protectiveness Determinations

EPA did not receive any comment suggesting that CARB's 2018 HD Warranty Amendments threaten the validity of California's determination that its standards are as protective of public health and welfare as applicable Federal standards.[86]

However, EPA received several comments that claimed that CARB's protectiveness determinations in support of the ACT Regulation and the ZEAS Regulation were arbitrary and capricious.[87] One commenter claimed that CARB was pursuing a policy directive toward the acceleration of ZEVs in the medium- and heavy-duty truck sector by glossing over a number of impacts both within and outside the State of California that renders the ACT Regulation less protective than applicable Federal standards.[88] Several commenters asserted that CARB over-estimated the emission benefits of its standards, even though CARB noted that its standards would still enhance the relative protectiveness of the California

[77] *Id.*

[78] *MEMA I,* 627 F.2d at 1122.

[79] *MEMA I,* 627 F.2d 1095, 1113 n.36 (D.C. Cir. 1979)(The Administrator ''explored whether the procedures had a negative effect on the protectiveness of the California standards for which a waiver had already been granted. *See* 43 FR 32183 (1978), *reprinted in* J.A. at 56. This inquiry is perfectly consistent with the Administrator's past practice and his position in this court.'')

[80] EPA–HQ–OAR–2022–0330–0004.

[81] *Id.* at 19–20. CARB also noted that the newly established emission warranty periods for every category of California heavy-duty diesel engines and heavy-duty diesel vehicles exceed the corresponding federal emission warranty period of 5 years or 100,000 miles during this time frame. CARB also noted that the newly established minimum allowable maintenance schedules for emissions-related parts are more restrictive regarding allowable repairs or replacements of emissions-related parts than the corresponding federal allowable maintenance schedules, and the Amendments expand the scope of California's emissions warranty beyond the federal emissions warranty by expressly encompassing components monitored by HD OBD systems which, when they fail, cause the HD OBD system's malfunction indication light (MIL) to illuminate. *Id.*

[82] EPA–HQ–OAR–2022–0331–0003. *See* Board Resolution 20–19.

[83] *Id.* CARB further notes that ''because California's pre-existing motor vehicle emissions program does not require medium- or heavy-duty vehicles and engines to meet zero emission standards, it is evident that the ACT regulation will, in conjunction with other elements of California's motor vehicle emissions program for medium and heavy-duty vehicles, render California's motor vehicle emission emissions standards, in the aggregate, to be at least as protective of public health and welfare as applicable federal standards.''

[84] *Id.* at 20. *See* Board Resolution 19–16.

[85] *Id.* at 20–21.

[86] Although there is no information in the record that would support a finding that CARB's protectiveness determination was arbitrary and capricious in a section ''209(b)(2) type'' of analysis, we note that, because section 209(b)(1)(A) calls for an analysis of whether California's motor vehicle emission standards, in the aggregate, are as protective of public health and welfare as applicable Federal standards, EPA also incorporates the findings below regarding the protectiveness of the regulations in CARB's ACT, ZEAS, and ZEP waiver request to the finding regarding the HD Warranty Amendments.

[87] Although EPA discusses these comments as provided (meaning that some comments are discussed in the context of multiple regulations at once), EPA considered comments separately in its evaluation of California's protectiveness determination for each regulation.

[88] Valero at 2. This commenter asserted that CARB failed to conduct a full lifecycle analysis in order to understand the full emission impacts of battery electric vehicles and that CARB did not consider potential reductions that may be achieved by internal combustion engines.

program that EPA previously found to be as protective as the Federal program.[89] EPA did not receive any comments related to CARB's protectiveness determination for the ZEP Certification Regulation.

As noted above, EPA received comments that claimed that the ACT Regulation would slow down fleet turnover and that, by requiring zero-emission vehicles, this regulation would not ''result in lower emissions of GHGs and other pollutants than can be achieved by internal combustion engine (ICE) vehicles.'' [90] Another commenter contended that ''to the extent a CARB [commercial truck or tractor (CMV)] rule or standard is technologically infeasible, or likely result in new CMVs that are cost prohibitive'' or that raises reliability concerns then ''the agency'' would be acting ''arbitrarily and capriciously'' to issue such a rule or standard.[91]

In response, CARB noted that these commenters cannot establish ''that delayed purchases or pre-buys or other purchasing choices would lead to emissions increases as a result of ACT or ZEAS'' because ''both regulations will require displacement of higher-emitting conventional vehicles with zero-emission vehicles'' and ''[e]ven if that displacement is lower or slower than CARB estimated, these standards nonetheless could not make California's motor vehicle program less protective than EPA's.'' [92]

EPA also received comments that questioned the policy of CARB's adoption of the ACT and ZEAS Regulations. One commenter claimed that maintaining the existing Federal standards would be the best way for California to minimize environmental impacts, based on a full lifecycle assessment of emissions, instead of California's approach that would necessitate expensive battery electric technology that would slow fleet turnover.[93] Regarding the ACT Regulation some commenters also claimed that CARB should have adopted different regulatory approaches, such as one that incorporates increased introduction of renewable liquid and gaseous fuels, which the commenter claimed would be more cost effective.[94] In response, CARB noted that EPA is precluded from considering different policy or hypothetical rulemaking options that CARB might have considered and rather is properly guided by the language at section 209(b)(2) that clearly states that if each state standard is at least as stringent as the comparable Federal standard that such California standards shall be deemed at least as protective of public health and welfare as such Federal standards for purposes of section 209(b)(1).[95]

4. California's Protectiveness Determinations Are Not Arbitrary and Capricious

As described above, EPA's traditional analysis has been to evaluate California's protectiveness determination by comparing the new California standards, or amendments, to applicable EPA emission standards for the same pollutants. The comparison of EPA and California standards is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA has previously found were not arbitrary and capricious.[96] The prior statutory requirement that each California standard be ''more stringent'' than the Federal standard was superseded by the 1977 Amendments to section 209, which established that a waiver must be granted where California's standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. This was intended to afford California the broadest possible discretion in designing is motor vehicle emission program.

EPA did not receive any comments or information in the record that demonstrated that CARB's new, more stringent 2018 HD Warranty Amendments would threaten the validity of CARB's protectiveness determination applicable to these enforcement procedures. Based on the record EPA cannot make a determination that CARB's protectiveness finding regarding the 2018 HD Warranty Amendments was arbitrary and capricious.

EPA has received no comment or other information in the record to support an argument that EPA's statutory interpretation of the first waiver prong for its analysis of the California emission standards (*i.e.,* ACT Regulation, ZEAS Regulation, and ZEP Certification Regulation) is unreasonable. In addition, EPA received no comment or information that provided any type of numerical comparison of the stringency of CARB's standards to applicable Federal standards. Specifically, there is no evidence in the record to demonstrate, by way of numerical comparison, that CARB's standards are not as stringent, in the aggregate, as EPA's requirements.[97] To the extent that commenters stated that CARB over-estimated the emission benefits of its standards, on the basis of the record EPA agrees with CARB that, under a numerical comparison of the standards, the new standards will still be more stringent than the Federal program—especially in the case of the ACT and ZEAS Regulations, which have no comparable Federal requirements.

Therefore, we find that the opponents of the waiver have not met their burden of proof to demonstrate that any of CARB's protectiveness determinations associated with the regulations contained in the two waiver requests were arbitrary and capricious and,

[89] CARB Supplemental Comments, Docket Nos. EPA–HQ–OAR–2022–0330–0072, EPA–HQ–OAR–2022–0331–0133. CARB noted that if there are any benefits from the new standards then their adoption cannot render the existing California program less protective. CARB stated that, since there are no comparable federal requirements for ACT and ZEAS, this logic is all the more true.

[90] Valero at 2; *see also* AFPM at 8.

[91] NADA at 2–3. We further address these latter comments in our analysis of the third waiver criterion below. In general, EPA has long explained that ''questions concerning the effectiveness of the available technology are also within the category outside my permissible scope of inquiry,'' under section 209(b)(1)(C). 41 FR 44209, 44210 (October 7, 1976).

[92] CARB Supplemental Comments at 4.

[93] AFPM at 8–12.

[94] One commenter suggests that, to the extent the ACT Regulation is technologically infeasible or cost prohibitive for customers or otherwise raises reliability concerns, then CARB's protectiveness determination would be arbitrary and capricious. Another commenter stated that California has not conducted any air quality analysis per dollar of investment relative to the existing Federal standards versus the ACT Regulation. This commenter claimed that a full life-cycle analysis would reveal that the existing Federal NO_X standards are the better approach. AFPM at 12–15.

[95] CARB Supplemental Comments at 2.

[96] 78 FR 2112, 2123 (January 9, 2013).

[97] EPA notes that CARB's protectiveness determinations, associated with each of the regulations contained in its waiver request were not arbitrary and capricious despite subsequent changes to the ''applicable Federal standards'' in section 209(b)(1)(A). In this case changes in the applicable standards are reflected in EPA's recent rule to lower NO_X and other air pollutants from heavy-duty vehicles and engines starting in the 2027 model year. *See* 88 FR 4296 (January 24, 2023). EPA's regulation does not relate to emission warranty and other requirements for the same model year (2022–2023) heavy-duty vehicles and engines as the 2018 HD Warranty Amendments. This is in contrast to EPA's recent rulemaking where the extended emission warranty period takes place with the 2027 model year. Likewise, the EPA regulation does not relate to or does not set zero-emission vehicle requirements related to heavy-duty vehicles and engines as do the regulations contained in CARB's ACT, ZEAS, and ZEP waiver request. In addition, at the time CARB submitted its waiver requests the ''applicable Federal standards'' were EPA's regulations adopted in 2002 and applicable to 2007 and 2010 requirements, and not EPA's most recent rulemaking. As noted, no evidence is in the record to demonstrate, by way of numerical comparison, that CARB's standards are not as stringent, in the aggregate, as the prior EPA standards that commenced in the 2007 model year.

therefore, EPA cannot deny the CARB's waiver requests based on section 209(b)(1)(A).

Additionally, in response to comments suggesting that CARB should have adopted different policies or different regulations, or that CARB's ACT and ZEAS Regulations will not be effective, EPA notes that there are no comparable Federal standards mandating, for instance, sales of a certain percentage of ZEV and NZEV vehicles, or zero-emission airport shuttle fleet composition.[98] As such, any enhancement to CARB's motor vehicle emission program—including its heavy-duty vehicles standards—cannot render California's program less protective than the applicable Federal standards. Likewise, and as we further address these latter comments in our analysis of the third waiver criterion below, EPA is not permitted in its statutory role to assess different, hypothetical CARB regulations that CARB might have adopted and then, in turn, compare those regulations to Federal standards.[99] That is, the relevant question before EPA is whether California's standards are in the aggregate at least as protective as the Federal ones, not whether California hypothetically should have adopted a different program that the commenter prefers.

EPA also received no comments or evidence to support the view that zero-emission vehicles do not result in some degree of lower emissions—of either criteria pollutants or GHGs—than conventional vehicles do. EPA agrees with CARB that this logically supports a conclusion that the ACT and ZEAS Regulations, which require more and more of these vehicles, would increase the protectiveness of California's program.[100] Moreover, EPA does not agree with the commenters' claims that considering lifecycle emissions renders the protectiveness finding arbitrary and capricious. First, the scope of EPA's review of CARB's protectiveness determination is narrow and need not include far-reaching assessments of the environmental or other impacts of CARB's chosen regulations and associated policy decisions. Section 209(b)(1) does not require California or EPA to consider lifecycle emissions. Nor does it otherwise suggest that EPA must look broadly outside motor vehicle emissions to emissions from other sources, including those regulated under separate federal and state programs. Therefore, EPA is not required to consider potential broader environmental impacts in assessing protectiveness. Secondly, to the extent such impacts and decisions could be relevant to section 209(b)(1)(A), commenters failed to adduce sufficient evidence to support this argument considering California's technical findings relating to this issue.[101]

EPA also finds no evidence in the record, to the extent commenters asserted that fleet turnover would be slower, that supports the view that an emissions increase would occur because of the ACT or ZEAS Regulations. Such claims, without evidence that the regulations result in less protective emission standards do not meet the burden of proof on the opponents of the waiver.[102] Similar to commenters' claims that the regulations would result in slower fleet turnover, statements that these purchasing decisions will result in fewer emission benefits does not otherwise demonstrate that CARB's emission standards are less protective than applicable Federal standards, or that CARB's protectiveness determination was arbitrary and capricious.

5. Section 202(b)(1)(A) Conclusion

EPA believes that, given the lack of any comments or information in the record that demonstrate that CARB's new more stringent 2018 HD Warranty Amendments would threaten the validity of CARB's protectiveness determination, it has no basis to conclude that California's determination that its standards are at least as protective is arbitrary and capricious and therefore deny CARB's waiver request for the 2018 HD Warranty Amendments under section 209(b)(1)(A). The same conclusion applies were EPA to consider (in the alternative) the 2018 HD Warranty Amendments as emission standards as opposed to accompanying enforcement procedures.

Further, based on the record before EPA, we cannot find that CARB was arbitrary and capricious in its respective findings that the California heavy-duty vehicle and engine standards, including the ACT Regulation, the ZEAS Regulation, and the ZEP Certification Regulation) are individually, and in the aggregate, at least as protective of public health and welfare as applicable Federal standards. CARB has provided reasonably detailed information to support its protectiveness determination. Commenters have not provided sufficient information and analysis that calls CARB's analysis (associated with the California protectiveness determination) into question. Therefore, we find that the opponents of the waiver have not met their burden of proof to demonstrate that any of CARB's protectiveness determinations associated with the regulations contained within their waiver requests were arbitrary and capricious and, therefore, EPA cannot deny CARB's waiver requests based on section 209(b)(1)(A).

[98] In general, EPA has long explained that ''questions concerning the effectiveness of the available technology are also within the category outside [the Administrator's] permissible scope of inquiry,'' under section 209(b)(1)(C). 41 FR 44209, 44210 (October 7, 1976).

[99] EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was to ensure that the Federal government did not second-guess state policy choices. This has led EPA to state, ''It is worth noting . . . I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to ''catch up'' to some degree with newly promulgated standards. Such an approach * * * may be attended with costs, in the shaped of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.'' 40 FR 23103–04. *See also* LEV I, 58 FR 4166 (January 13, 1993), Decision Document at 64.

[100] CARB Final Statement of Reasons for ACT Regulation at 105–06, *https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2019/act2019/fsor.pdf;* CARB Supplemental Comments at 3–4 (''It is, in fact, unrefuted that zero-emission vehicles result in lower emissions (and not only of GHGs) than conventional vehicles. This fact naturally leads to the conclusion that requiring the sale (ACT) and use (ZEAS) of more and more of these vehicles increases the protectiveness of California's program which has previously been found to be at least as protective as EPA's.'').

[101] CARB Supplemental Comments at 3 (''[T]he only analysis offered—a report by the American Transportation Research Institute—does nothing to undermine CARB's determination. That report (also prepared after CARB's protectiveness determination) focused only on lifecycle GHG emissions from Class 8 trucks engaged in long hauls, and, as such, it cannot undermine CARB's protectiveness determination which was based on consideration of *all* affected pollutants and *all* regulated vehicles. In any event, even though it focused exclusively on the vehicles that CARB found the least promising for near-term electrification, the report nonetheless finds that zero-emission Class 8 trucks engaged in long hauls would have *lower* lifecycle GHG emissions than conventional Class 8 trucks. In other words, this report, too, supports the determination that California's program with ACT is at least as protective as EPA's federal program (which has no ACT-like standards)'' (original emphasis)).

[102] As previously mentioned, CARB performed a sensitivity analysis of both ''pre-buy'' and ''no-buy'' scenarios regarding both the ACT and ZEAS program. For the ACT Regulation, CARB found that it would cause no increases in emissions. CARB Supplemental Comments at 3–4.

C. Second Waiver Criterion: Does California Need Its Standards To Meet Compelling and Extraordinary Conditions?

Under section 209(b)(1)(B) of the Act, EPA must grant a waiver for California vehicle and engines standards and accompanying enforcement procedures unless EPA finds that California ''does not need such State standards to meet compelling and extraordinary conditions.'' EPA has traditionally interpreted this provision as requiring consideration of whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions.[103]

1. EPA's Historical Interpretation of Section 209(b)(1)(B)

For nearly the entire history of the waiver program, EPA has read the phrase ''such State standards'' in section 209(b)(1)(B) as referring back to standards ''in the aggregate,'' in the root paragraph of section 209(b)(1), which calls for California to make a protectiveness finding for its standards. EPA has interpreted the phrase ''in the aggregate'' as referring to California's program as a whole, rather than each State standard, and as such the Agency evaluates both protectiveness and need with reference to California's program as a whole.[104] EPA has reasoned that both statutory provisions must be read together so that the Agency reviews the same standards (*e.g.,* new motor vehicle emission standards program) for need under 209(b)(1)(B) that California considers in making its protectiveness determination, and that under this statutory framework EPA is to afford California discretion in assessing its need for its motor vehicle emission standards program.[105] EPA has also explained that section 209(b)(1)(C) also supports the ''whole program'' interpretation of section 209(b)(1)(B), as EPA's feasibility assessment necessarily must evaluate any interactions between the standards in the proposed program (as well as other existing compliance obligations) and whether those interactions create feasibility problems.[106] The D.C. Circuit has held that ''[t]he expansive statutory language gives California (and in turn EPA) a good deal of flexibility in assessing California's regulatory needs. We therefore find no basis to disturb EPA's reasonable interpretation of the second criterion.'' [107]

In addressing the Agency's reading of section 209(b)(1)(B) as addressing California's need for the motor vehicle emission program standards program as a whole in the 1983 LEV waiver request, for example, EPA explained that:

This approach to the ''need'' criterion is also consistent with the fact that because California standards must be as protective as Federal standards in the aggregate, it is permissible for a particular California standard or standards to be less protective than the corresponding Federal standard. For example, for many years, California chose to allow a carbon monoxide standard for passenger cars that was less stringent than the corresponding Federal standard as a ''trade-off'' for California's stringent nitrogen oxide standard. Under a standard of review like that proposed by MVMA/AIAM, EPA could not approve a waiver request for only a less stringent California standard because such a standard, in isolation, necessarily could be found to be contributing to rather than helping, California's air pollution problems.[108]

In 1994, EPA again had cause to explain the Agency's reading of section 209(b)(1)(B) in the context of California's particulate matter standards waiver request:

[T]o find that the 'compelling and extraordinary conditions' test should apply to each pollutant would conflict with the amendment to section 209 in 1977 allowing California to select standards 'in the aggregate' at least as protective as federal standards. In enacting that change, Congress explicitly recognized that California's mix of standards could 'include some less stringent than the corresponding federal standards.' See H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977). Congress could not have given this flexibility to California and simultaneously assigned to the state the seemingly impossible task of establishing that 'extraordinary and compelling conditions' exist for each standard.[109]

Congress has also not disturbed this reading of section 209(b)(1)(B) as calling for EPA review of California's whole program. With two noted exceptions described below, EPA has consistently interpreted this provision as requiring the Agency to consider whether California needs a separate motor vehicle emission program rather than the specific standards in the waiver request at issue to meet compelling and extraordinary conditions. Congress intended to allow California to address its extraordinary environmental conditions and foster its role as a laboratory for motor vehicle emissions control. The Agency's longstanding practice therefore has been to evaluate CARB's waiver requests with the broadest possible discretion to allow California to select the means it determines best to protect the health and welfare of its citizens in recognition of both the harsh reality of California's air pollution and the importance of California's ability to serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards and developing control technology.[110] EPA notes that ''the statute does not provide for any probing substantive review of the California standards by federal officials.'' [111] As a general matter, EPA has applied the traditional interpretation in the same way for all air pollutants, criteria and GHG pollutants alike.[112]

In a departure from its long-standing interpretation, EPA has on two separate instances limited its interpretation of this provision to California motor

[103] 87 FR 14332 (March 14, 2022).

[104] 49 FR 18887, 18890 (May 3, 1984) (''The interpretation that my inquiry under section 209(b)(1)(B) goes to California's need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statue as well.'').

[105] 74 FR 32744, 32751, n. 44, 32761, n.104 (July 8, 2009). *See also* 78 FR 2112, 2126–27, n.78 (January 9, 2013).

[106] EPA notes there would be an inconsistency if ''State standards'' meant all California standards when used in section 209(b)(1) but only particular standards when used in 209(b)(1)(B) and 209(b)(1)(C). EPA has traditionally interpreted the third waiver criterion's feasibility analysis as a whole-program approach. 87 FR 14361, n.266. See also 84 FR at 51345.

[107] *Am. Trucking Ass'n* v. *EPA,* 600 F.3d 624, 627 (D.C. Cir. 2010) (*ATA* v. *EPA*). *See also Dalton Trucking* v. *EPA,* No. 13–74019 (9th Cir. 2021) (''The EPA was not arbitrary and capricious in declining to find that 'California does not need such California standards to meet compelling and extraordinary conditions,' section 7543(e)(2)(A)(ii), under the alternative version of the needs test, which requires 'a review of whether the Fleet Requirements are per se needed to meet compelling and extraordinary conditions,' 78 FR at 58,103. The EPA considered 'the relevant factors,' *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co., Inc.,* 463 U.S. 29, 42–43 (1983), including statewide air quality, 78 FR 58,104, the state's compliance with Federal National Ambient Air Quality standards for ozone and $PM_{2.5}$ on a statewide basis, *id.* at 58,103–04, the statewide public health benefits, *id.* at 58,104, and the utility of the Fleet Requirements in assisting California to meet its goals, *id.* at 58,110. Contrary to Dalton's argument, the EPA did not limit its review to two of California's fourteen air quality regions. The EPA examined the relevant data provided by CARB, and it articulated a 'satisfactory explanation for its action including a rational connection between the facts found and the choice made.' *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.,* 463 U.S. at 43 (cleaned up).'').

[108] 58 FR 4166, LEV Waiver Decision Document at 50–51.

[109] 49 FR at 18887, 18890.

[110] *See, e.g.,* S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (The waiver of preemption is for California's ''unique problems and pioneering efforts.''); 113 Cong. Rec. 30950, 32478 (''[T]he State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.'') (Statement of Sen. Murphy).

[111] *Ford Motor,* 606 F.2d 1293, 1300 (D.C. Cir. 1979).

[112] 74 FR at 32763–65; 76 FR 34693; 79 FR 46256; 81 FR 95982.

vehicle standards that are designed to address local or regional air pollution problems.[113] In both instances EPA determined that the traditional interpretation was not appropriate for standards designed to address a global air pollution problem and its effects and that it was appropriate to address such standards separately from the remainder of the program (the alternative interpretation).[114] However, shortly after both instances, EPA explained that the reinterpretation of the second waiver prong in this manner is flawed and the alternative interpretation is inappropriate, finding that the traditional interpretation—in which EPA reviews the need for California's motor vehicle program—is the best interpretation.[115] In the SAFE 1 Reconsideration Decision, for example, the Agency evaluated the traditional interpretation and the appropriateness of interpreting section 209(b)(1)(B) in the same manner for all pollutants and provided a textual analysis of why both section 209(b)(1)(A) and section 209(b)(1)(C) better support interpreting 209(b)(1)(B) as referring to California's need for its mobile source emission program rather than to California's need for a specific standard. EPA has not identified any reason to revise the interpretation contained in the SAFE 1 Reconsideration Decision.[116] Further, EPA's two FR Notices for the HD waiver requests noted the intention to use the traditional interpretation.[117]

2. CARB's Discussion of California's Need for the Standards in the Waiver Requests

a. 2018 HD Warranty Amendments

As noted above, CARB maintained that the 2018 HD Warranty Amendments are an accompanying enforcement procedure and, as such, the second waiver prong at section 209(b)(1)(B) does not apply to the waiver analysis for this regulation. Alternatively, if EPA deems that the 2018 HD Warranty Amendments are standards subject to all three waiver prongs, then CARB maintained that the regulations meet the second waiver prong.[118] CARB also noted the same conclusion applies whether this request involves a new waiver (as EPA has determined) or (in the alternative), a within-the-scope determination.

b. ACT, ZEAS, and ZEP Certification Regulations

CARB provided similar context in its ACT Regulation, ZEAS Regulation, and ZEP Certification Regulation waiver support document. CARB noted that ''[t]hese three rulemaking actions individually and collectively implement measures in California's State Implementation Plan (SIP) that are needed for California to achieve compliance with national ambient air quality standards and to reduce emissions of greenhouse gases (GHGs).'' [119] CARB noted that its Executive Officer determined that ''California needs a separate motor vehicle emission program to meet compelling and extraordinary conditions'' based in part on a number of CARB Board findings and statements and information contained in Staff Reports for the regulations.[120] CARB also noted that, even if an alternative interpretation of section 209(b)(1)(B) requires an assessment of the need for individual emission standards, CARB needs the ACT Regulation, ZEAS Regulation, and ZEP Certification Regulation to address compelling and extraordinary conditions that California faces from both criteria pollution and from climate change—each regulation expressly requires categories of medium and heavy-duty vehicles and their powertrains to emit no criteria or GHG pollutants, thereby addressing these conditions in California. CARB further notes that EPA has consistently found that California needs emission standards to address criteria pollutants, and as each of these standards reduces those pollutants EPA has no basis upon which to find that California does not need the standards.[121]

3. Comments on Section 209(b)(1)(B)

EPA received several comments requesting a denial of the regulations under the two HD waiver requests based on section 209(b)(1)(B) grounds—that ''such State does not need such State standards to meet compelling and extraordinary conditions.'' Some commenters asserted that the need for California's standards under the second waiver prong should be interpreted on a standard-by-standard basis. In the context of such an interpretation several commenters claimed that one or more of the standards in the waiver requests were not needed to meet compelling and extraordinary conditions.

Regarding the interpretive issue of whether EPA should evaluate a need for the motor vehicle emission program versus an evaluation of the need for a specific standard, EPA received a comment that raises arguments that EPA has previously addressed in other waivers. For example, this commenter claimed that EPA continues to incorrectly interpret the waiver criteria in a manner that does not allow evaluation of each new California emission standard. The commenter asserted that EPA conflates the protectiveness criteria with the ''Needs Test'' in section 209(b)(1)(B).[122] This

[113] 73 FR 12156 (March 8, 2008); SAFE 1 at 51310.

[114] SAFE 1. In SAFE 1, EPA withdrew a portion of the waiver it had previously granted for California's Advanced Clean Cars (ACC) program—specifically, the waiver for California's zero emission vehicle (ZEV) mandate and the GHG emission standards within California's ACC program. EPA based its action, in part, on its determination that California did not need these emission standards to meet compelling and extraordinary conditions, within the meaning of section 209(b)(1)(B) of the CAA. That determination was in turn based on EPA's adoption of a new, GHG-pollutant specific interpretation of section 209(b)(1)(B). In any event, EPA expressly stated that its new interpretation of section 209(b)(1)(B) only applies to waiver requests for GHG emission-reducing standards, SAFE 1 at 51341, n. 263. Therefore, even under the SAFE 1 interpretation (which EPA does not agree with for the reasons explained below and in the SAFE 1 Reconsideration Decision), EPA's traditional interpretation would still apply to this request given all of the standards at issue are, in whole or in part, related to the reduction of criteria pollutant emissions, or would otherwise meet the SAFE 1 alternative interpretation test as it applied to GHG emission.

[115] 74 FR 32744 (July 8, 2009); SAFE 1 Reconsideration Decision at 14333–34, 14352–55, 14358–62.

[116] *Id.*

[117] *See* 87 FR 35765, 3767 (June 13, 2022).

[118] 2018 HD Warranty Amendments Waiver Support Document at 23–25. CARB noted that ''[t]he 2018 HD Warranty Amendments are projected to reduce statewide NO_X and PM emissions by 0.75 tons per day (tpd) and 0.008 tpd respectively, by 2030. NO_X emissions are projected to decrease in the South Coast Air Basin and in the San Joaquin Valley Air Basins by 0.24 and 0.18 tpd, respectively, by 2030.'' Waiver Support Document at 2.

[119] ACT/ZEAS/ZEP Waiver Support Document at 1.

[120] ACT/ZEAS/ZEP Waiver Support Document at 22–25 (citing ACT/ZEAS/ZEP Waiver Request).

[121] *Id.* at 27 (''As discussed in Section I, the ACT regulation is projected to reduce emissions of NO_X by 6.9 tons per day (tpd), and emissions of $PM_{2.5}$ by 0.24 tpd by 2031, and the ZEAS regulation is projected to reduce emissions of NO_X by 7.60 tons per year (tpy) emissions of $PM_{2.5}$ by 0.15 tpy, and emissions of GHGs by 81 MMT per day of CO_{2e} by 2031. By 2040, the ZEAS regulation is projected to reduce emissions of NO_X by 9.99 tpy, emissions of $PM_{2.5}$ by 1.7 tpy, and emissions of GHGs by 107 MMT per day of CO_{2e}. These emissions reductions will assist California in its efforts to attain the national and state ambient air quality standards for particulate matter and ozone, reduce individual health risk, and meet climate change goals. EPA has consistently found that California 'needs' emissions standards to address the compelling and extraordinary conditions resulting from criteria pollutants, including emissions standards that expressly specify limitations of emissions of GHGs, and therefore has no basis to find that the regulations do not satisfy the 'compelling and extraordinary' criterion.'').

[122] Texas Public Policy Foundation at 2–4. This commenter also asserted that legislative intent does not justify EPA's interpretation and that because California must submit a new waiver request each

commenter also asserted that EPA's traditional interpretation of the second waiver prong grants California with preferential regulatory treatment ''by rubber-stamping every regulatory change CARB makes'' and thus violates the equality of the states under the Equal Sovereignty doctrine and also raises questions of vast economic and political significance.[123]

EPA also received comments that there cannot be a need for GHG- and climate change-related standards (the ACT and ZEAS Regulations) under the second waiver prong. One commenter stated that the causes and effect of climate change are global, not local in nature, and therefore California does not need standards addressing climate change under the second waiver prong. Drawing on principles of equal sovereignty, one commenter asserted that section 209(b) is ''unconstitutional to the extent it is construed to allow California to set emission standards aimed at addressing global climate change, as opposed to California's local conventional pollution problems.'' [124] As such, the commenter argued that California cannot need GHG standards because, unlike criteria pollutant emissions, GHG emissions in California ''bear no relation'' to ''California-specific circumstances'' like the local conditions identified by Congress in enacting section 209.[125] The commenter also argued that California does not need the ACT or ZEAS Regulations because the harms of climate change are not unique to California and cannot be alleviated by regulating emissions from sources in one state alone. Similarly, another commenter argued that, because climate change is a global issue, a single-state standard will be less effective and more disruptive to the economy than a Federal rule will.[126] One commenter also asserted that, within the context of the alternative interpretation, California only needs to reduce criteria air pollution in two air districts and cannot therefore ''need'' statewide standards.[127]

In its own comments, CARB noted that California needs to reduce criteria pollution along major roadways throughout many parts of the State and that even if California only needed to reduce criteria pollutants in the two districts with the worst overall air quality, statewide standards are still needed due to trucks travelling from one part of the State to these districts.[128] CARB noted that EPA has consistently found these challenges, and the conditions that give rise to them, are ''extraordinary and compelling'' and thus that California needs a separate new motor vehicle emissions program.[129] CARB explained that its ZEV requirements (*i.e.,* the ACT Regulation, ZEAS Regulation, and ZEP Certification Regulation) will result in no tailpipe emissions, reduced brake wear PM emissions, and lower upstream emissions. As such, CARB stated that, at a minimum, California ''needs'' its ZEV requirements to achieve reductions in criteria pollution emissions including in extreme nonattainment areas and other areas overburdened by unhealthy air quality.[130]

EPA also received comments that California does not need the individual regulations in the waiver requests (as a factual matter) because there are other, more ''robust'' or ''logical'' existing or proposed standards and/or because these standards will not be effective in reducing criteria emissions. Regarding the 2018 HD Warranty Amendments, EPA received comment that California does not need such amendments because CARB's Heavy-Duty Inspection & Maintenance Program is more effective and because EPA's HD 2027 rule (''a 50-state harmonized approach'') would soon be finalized.[131] EPA also received comment that California does not need the ACT Regulation because they may actually increase criteria emissions by making new trucks more expensive and slowing fleet turnover.[132]

4. California Needs Its Standards To Meet Compelling and Extraordinary Conditions

With respect to the need for California's standards to meet compelling and extraordinary conditions, EPA continues to apply the traditional interpretation of the waiver provision.[133] Many of the adverse comments arguing against the traditional interpretation were also made in the SAFE 1 Reconsideration proceeding. EPA's response to applicable comments on these arguments remains the same as in the SAFE 1 Reconsideration decision, and the Agency incorporates the relevant reasoning in that action here.[134]

As stated above and similar to the SAFE 1 Reconsideration decision, EPA continues to believe the best way to interpret this provision is to determine whether California continues to have compelling and extraordinary conditions giving rise to a need for its own new motor vehicle emission program.[135] EPA believes this continues

time it alters or adds emission standards that California must also demonstrate a need for such standards—a test different from whether California continues to need its motor vehicle emission program.

[123] *Id.* at 3. *See also* AFPM at 16 (''[T]he 'whole program' approach would effectively force EPA to grant a waiver for any later standard California proposes once EPA decided initially that California 'needs' its own motor vehicle program to address criteria pollution. EPA decisions made in the 1970s would tie EPA's hands more than 50 years later and force approval of whatever new regulation CARB proposes for a waiver.'').

[124] AFPM at 2. To the extent that this commenter also argued that section 209(b) is ''unconstitutional in all its applications'' because it violates the equal sovereignty doctrine, that argument is addressed in section III.E.2.

[125] *Id.* at 6–7.

[126] ATA at 6–7.

[127] Texas Public Policy Foundation at 3.

[128] CARB Supplemental Comments at 5–6, n.36. *See also* CARB Initial ACT/ZEAS/ZEP Comments at 11, 14–15 (''[B]oth the South Coast and San Joaquin Valley air districts—which are home to over half of California's population—are classified as 'extreme nonattainment areas for the 2008 eight-hour federal ozone standard.'''') (''Indeed, California has the only extreme nonattainment regions for ozone in the country, and the San Joaquin Valley has the highest $PM_{2.5}$ levels in the country.'').

[129] CARB Initial ACT/ZEAS/ZEP Comments at 14.

[130] *Id. See also* Environmental and Public Health Organizations at 31–33 (''California continues to experience some of the worst air quality in the nation. The South Coast and San Joaquin Valley Air Basins are in non-attainment of the national ambient air quality standards for $PM_{2.5}$ and ozone. The South Coast has never met any of the federal ozone standards established pursuant to the Clean Air Act. . . California also faces compelling and extraordinary climate change impacts. With each passing year, the dangers of climate change and health-harming air pollution become more and more clear. Climate change worsens the effects of local pollutants: in addition to a severe increase in deadly wildfires and accompanying particulate pollution, increasing heat favors the formation of additional ozone, putting compliance with the ozone NAAQS further out of reach.''); SCAQMD at 1 (''The South Coast Air Basin continues to face extraordinary air pollution challenges . . . The area is nonattainment for fine particulates and classified 'extreme' for ozone nonattainment. . . . To highlight one aspect of one of the regulations, the Zero Emission Airport Shuttle Bus regulation will promote the use of zero-emission airport grand transportation at California's commercial airports. The South Coast Air Basin happens to be home to five commercial airports. Among many necessary initiatives for attainment of the NAAQS, Southern California simply needs zero-emission airport transportation to succeed.'').

[131] ATA at 5–6.

[132] AFPM at 2–3.

[133] EPA's two notices for comment on CARB's waiver requests noted that the review under the second waiver prong would be done under this traditional interpretation. EPA has not reopened this interpretive issue by these notices nor by this final decision.

[134] 87 FR 14332, 14334, 14352–55, 14358–62 (March 14, 2022).

[135] To the extent comments contend that EPA's interpretation of the second waiver prong provides preferential treatment to California over other States, EPA notes that the review of CARB waiver requests is limited to the criteria set forth in section 209 and that we need not engage in an Equal Sovereignty constitutional law analysis. (See SAFE 1 Reconsideration Decision at 14376). In any case, for the purposes of reviewing the second waiver prong, EPA incorporates the reasoning from the SAFE 1 Reconsideration Decision at 14360. As such, EPA evaluates CARB's waiver requests based

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to be true for section 209(b)(1)(B), which was at issue in the SAFE 1 Reconsideration action.[136] EPA finds that California has demonstrated that it needs its program to address compelling and extraordinary conditions, those arising from criteria pollution and separately, those arising from greenhouse gases. No comments have provided an analytical basis for undermining California's need.[137]

Although nothing in the statutory text limits California's program or the associated waivers to a certain category of air pollution problems, EPA notes that each of the regulations contained in the two waiver requests from CARB is clearly designed to address emissions of criteria pollutants and will have that effect, regardless of whether some also reduce greenhouse gases. As such, these standards are no different from all prior standards addressing criteria emissions that EPA has found to satisfy the section 209(b)(1)(B) inquiry. In any case, there is no statutory basis to suggest that GHG emissions should be treated any differently.

Further, it is inappropriate for EPA to second-guess CARB's policy choices and objectives in adopting its heavy-duty vehicle and engine standards designed to achieve long term emission benefits for both criteria emissions and greenhouse gas emissions. EPA's longstanding practice, based on the statutory text, legislative history, and precedent, calls for deference to California in its approach to addressing the interconnected nature of air pollution within the state. Critically, EPA is not to engage in ''probing substantive review'' of waiver requests,[138] but rather to ''afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.'' [139]

As noted above, the term compelling and extraordinary conditions ''does not refer to the levels of pollution directly.'' [140] California continues to experience compelling and extraordinary conditions that cause it to need a separate motor vehicle emissions program. These include geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.[141] For example, as stated in CARB's waiver request and additional written comment, California and particularly the South Coast and San Joaquin Valley Air Basins continue to experience some of the worst air quality in the nation and continue to be in nonattainment with several NAAQS.[142] In the context of these serious and long-lasting pollution challenges, California has demonstrated that every reduction in ozone precursor and particulate emissions is particularly critical.

In addition, EPA did not receive any adverse comments suggesting that California no longer needs a separate motor vehicle emissions program to address the various conditions that lead to serious and unique air pollution problems in California. EPA did receive comment that contends that California does not have a need for its standards as only two areas in the State (the San Joaquin Valley and the South Coast)

solely on the criteria in section 209(b)(1) and does not consider factors outside of those statutory criteria, including constitutional claims. EPA continues to note that Congress struck a reasonable balance in authorizing two standards (EPA's and California's if certain criteria are met) but that that equal sovereignty principle simply does not fit in section 209. EPA further addresses the commenter's concerns relating to the Equal Sovereignty doctrine in the Other Issues section below. Similarly, to the extent that commenters contend that EPA's traditional interpretation raises questions of vast economic and political significance where Congress must speak clearly, EPA believes that this doctrine is inapplicable. That doctrine posits that in certain extraordinary cases, Congress should not be presumed to delegate its own authority over matters of vast economic and political significance to Federal agencies in the absence of clear statutory authorization. These concerns have no logical connection to provisions that preserve state authority in areas that fall within the police powers of states, such as the protection of the environment. Further, EPA has consistently explained that section 209(b)(1) of the Act limits the Agency's authority to deny California's requests for waivers to the three criteria contained therein and as such the Agency has consistently refrained from reviewing California's requests for waivers based on any other criteria. EPA acknowledges that California adopts its standards as a matter of law under its state police powers, that the Agency's task in reviewing waiver requests is limited to evaluating California's request according to the criteria in section 209(b). Furthermore, the language of section 209 provides clear statutory authorization for the waiver framework, and the history of section 209(b) and (e) provide additional evidence that Congress intended for California to have great deference in designing its own vehicle program. *MEMA I,* 627 F.2d at 1111.

[136] EPA notes that if Congress had been concerned with only California's smog problems when it enacted section 209(b) in 1967 it would have limited California's ability to obtain a waiver to standards for only hydrocarbons and NO_X, which are the known automotive pollutants that contribute to California's smog problem. But Congress was aware that California would most likely decide to regulate other non-smog forming pollutants. ''[T]he total program for control of automotive emissions is expected to include [in addition to hydrocarbons and oxides of nitrogen] carbon monoxide, lead and particulate matter.'' 123 Cong. Rec. 30951 (November 2, 1967) (Remarks of Rep. Herlong). Further, Congress intended that California would serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards and developing control technology, which extends to ZEVs, BEVs, FCVs and PHEVs. ''The waiver of preemption is for California's ''unique problems and pioneering efforts.'' S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967); 113 Cong. Rec. 30950, 32478 (''[T]he State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.'') (Statement of Sen. Murphy). Thus, for example, in the 1990 Amendments Congress mandated California's LEV program, which includes the ZEV program, in its State Implementation Plan provision regarding fleet programs required for certain non-attainment areas relating to issuing credits for innovative and cleaner vehicles. Specifically, ''standards established by the Administrator under this paragraph . . . shall conform as closely as possible to standards which are established for the State of California for ULEV and ZEV vehicles in the same class. Section 246(f)(4). (''[W]hen it amended the Act in 1990, [Congress recognized] California's LEV program, including the ZEV mandate. *See e.g.,* Act sections 241(4), 243(f), 246(f)(4).'' *MVMA,* 17 F.3d at 536.) See also 87 FR at 14360.

[137] EPA notes that CARB ACT Regulation is only regulating emissions from new motor vehicles and that such standards are the types preempted under section 209(a). Section 209(b) requires EPA to waive such standards unless one or more of the specified criteria are found. CARB's ACT Regulation is focused on emissions of air pollutants from this vehicle source and to EPA's knowledge is not designed to address a broader set of transportation and energy issues nor is the scope of the waiver criteria in section 209 designed for such a broad and searching review.

[138] *Ford Motor,* 606 F.2d 1293, 1300 (D.C. Cir. 1979).

[139] *MEMA II,* 142 F.3d 449, 453 (D.C. Cir. 1998).

[140] 49 FR 18887, 18890 (May 3, 1984).

[141] In response to commenters that believe that the traditional interpretation is simply a ''rubber-stamp[ ]'' because EPA has already once decided that California ''needs'' its own motor vehicle program, EPA notes that although California has yet to resolve its pollution problems, that does not mean it will never do so or that Congress could not aim for that goal. *See* 87 FR at 14336 n.22. So long as those problems persist, however, EPA's affirmance of California's need for a separate vehicle program allows California to continue to serve as a ''laboratory'' for resolving its own pollution problems and those of the entire nation. *See MEMA I,* 627 F.2d at 1109–11.

[142] *See, e.g.,* CARB Supplemental Comments at 5–6, n.36; CARB Initial ACT/ZEAS/ZEP Comments at 11, 14–15; SJVUAPCD at 2 (''Despite achieving significant emissions reductions through decades of implementing the most stringent stationary and mobile regulatory control program in the nation, significant additional reductions in nitrogen oxide (NO_X) emissions are needed to attain the latest health-based National Ambient Air Quality Standards (NAAQS) for ozone and $PM_{2.5}$.''); State of California et al at 12–13 (''Sixteen of the 8-hour ozone nonattainment areas are located in California and the only two extreme nonattainment areas in the nation are located in the South Coast Air Basin and San Joaquin Valley of California. Indeed, for the South Coast Air Basin to meet the federal ozone standards, overall NO_X emissions need to be reduced by 70 percent from today's levels by 2023, and approximately 80 percent by 2031.''); Environmental and Public Health Organizations at 32 (''California continues to experience some of the worst air quality in the nation. The South Coast and San Joaquin Valley Air Basins are in non-attainment of the national ambient air quality standards for $PM_{2.5}$ and ozone. The South Coast has never met any of the federal ozone standards established pursuant to the Clean Air Act . . . [H]eavy-duty vehicles represent the largest source of NO_X emissions reductions needed to attain the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS), and California's air quality regulations, like those at issue here, are central to the state's attainment strategy for the South Coast Air Basin.'').

have serious air quality issues. EPA believes this commenter misses the mark for several reasons. The commenter provided no legal rationale for limiting the ''compelling and extraordinary conditions'' to those conditions experienced by all of California. In addition, California is responsible, in part, for developing State Implementation Plan (SIP) measures to address nonattainment and maintenance and EPA sees no basis to deny a waiver for regulations designed at the state level and that address emission sources that move around the state. Nor has the commenter provided sufficient data or analysis to demonstrate that other areas of California do not need the motor vehicle standards program to address compelling and extraordinary conditions. Based on the record, EPA is unable to identify any change in circumstances or any evidence to undermine EPA's prior findings that California needs its motor vehicle emissions program to address compelling and extraordinary conditions. Therefore, using the traditional approach of reviewing the need for a separate California program to meet compelling and extraordinary conditions, EPA cannot deny any of the waiver requests.

Further, EPA does not believe, to the extent that it is appropriate to examine the need for CARB's individual heavy-duty vehicle and engine standards to meet compelling and extraordinary conditions, that the opponents of the waiver requests have met their burden of proof that California does not need these standards. The record demonstrates that each regulation in the two waiver requests is designed to produce reductions in criteria emissions that continue to be a serious air quality concern in California, which is a result of its compelling and extraordinary conditions. While EPA believes that CARB has demonstrated the criteria emission reductions associated with its ACT, ZEAS, and ZEP Certification Regulations and therefore a need for such standards, EPA also believes that, to the extent such standards are designed to also address climate change conditions in California, such standards are needed to meet compelling and extraordinary conditions.[143] EPA notes that the record contains evidence that global warming continues to pose an extraordinary threat to the economic well-being, public health, natural resources and environment in California. These adverse impacts include exacerbation of local air quality problems, severe wildfires, extreme drought, acidification threats to marine ecosystems as carbon dioxide is absorbed by the ocean along California's coastline, and a host of other impacts.[144] EPA believes the same conditions and impacts assessed in the SAFE 1 Reconsideration Decision apply to this waiver decision and incorporates that analysis here.[145]

Regarding comments received that the 2018 HD Warranty Amendments are not needed because EPA's HD 2027 rule and CARB's Heavy-Duty Inspection & Maintenance Program are or will be more effective, EPA notes that California is entitled to substantial deference in its policy choices regarding the best path to address its air pollution problems, including the choice to adopt or retain emission standards that overlap with previous California standards and EPA's standards.[146] In the context of these arguments about effectiveness, it is important to note that under the statute, California's standards in the aggregate must be as protective as EPA's standards—there is no requirement that they be more protective. This reinforces the deference owed to California in its determination of whether it needs a particular configuration of standards as its program to address compelling and extraordinary conditions. In response to comments received that the specific regulations are not necessary (as a factual matter) because they may slow fleet turnover, EPA finds that these commenters have not met their burden of proof to demonstrate that such a result in fleet turnover will occur and that if it did occur, it would cause an increase in emissions. Commenters have also failed to demonstrate that California does not continue to need every reduction in criteria pollutant emissions it can obtain.[147] As EPA continues to believe California has compelling and extraordinary conditions, it is appropriate for EPA to continue giving substantial deference to California's policy choices on how it chooses to protect public health and welfare and achieve its air quality objectives.

5. Section 209(b)(1)(B) Conclusion

As previously explained, EPA believes that the traditional interpretation of the section 209(b)(1)(B) criterion is the best reading of the statute.[148] The traditional approach is for EPA to evaluate California's need for a separate motor vehicle emission program to meet compelling and extraordinary conditions. The issue of whether any particular standard is needed is not the inquiry directed under section 209(b)(1)(B). Applying the traditional approach of assessing California's need for a separate motor vehicle emissions program to address compelling and extraordinary conditions, with the reasoning noted above and with due deference to California, EPA cannot deny the respective waiver requests. CARB has repeatedly demonstrated the need for its motor vehicle program to address compelling and extraordinary conditions in California and opponents of the waiver requests have not demonstrated that California does not need its state standards to meet compelling and extraordinary conditions. Therefore, I determine that I cannot deny either of the waiver requests under section 209(b)(1)(B).

In addition, although EPA does not believe an interpretation that requires a demonstrated need for a specific standard is appropriate, EPA's review of the complete record indicates that opponents of the waiver requests have not met the burden of proof necessary to demonstrate that California does not

[143] 87 FR 14332, 14365–66 (March 14, 2022).

[144] California Supplemental ACT Comments at 16–17, California also noted that the ACT Regulation will ensure the development and commercialization of technology required to achieve further emission reductions to address climate changes and to attain national ambient air quality standards (NAAQS) in California.

[145] 87 FR 14332, 14334, 14352–55, 14358–62.

[146] *See, e.g.,* 78 FR at 2129 (''The Commenter . . . relies on the existence of the federal GHG standards and the 'deemed to comply' language to claim that there is no need for CARB's GHG standards . . . EPA believes that the commenter does not appropriately appreciate the role that Congress envisioned California to play as an innovative laboratory that may set standards that EPA may ultimately harmonize with or that California or EPA may otherwise accept compliance with the others emission program as compliance with their own.''). In addition, given that there are a variety of regulatory measures and levels of stringency that California may choose to address the durability of emission controls on vehicles and engines while in use, and the lack of evidence in the record that an inspection and maintenance program is more protective than a warranty regulation (or that both may be implemented at some point), EPA finds that opponents of the waiver have not met their burden of proof with evidence to support their policy preference on an inspection and maintenance program.

[147] CARB Supplemental Comments at 5–6 (''But AFPM provides no evidence that ACT will slow fleet turnover at all, let alone to the degree necessary to increase pollution. And none of these comments refutes CARB's conclusion that zero-emission vehicles placed into well-suited applications will be less expensive, over their lifetimes, than conventional ones, or explains why the requirement to sell a certain percentage of vehicles that will save owners or operators money would slow turnover to the (unspecified) extent required to increase emissions. Moreover, the recently passed Inflation Reduction Act includes numerous financial incentives that will decrease the cost of zero-emission heavy-duty vehicles, further undercutting the claim that the high costs of those vehicles will slow fleet turnover.'').

[148] 87 FR 14332, 14334, 14352–55, 14358–62 (March 14, 2022).

need its ACT Regulation, ZEAS Regulation, ZEP Certification Regulation, and the 2018 HD Warranty Amendments when assessed individually.

D. Third Waiver Criterion: Are California's Regulations Consistent With Section 202(a) of the Clean Air Act?

Under section 209(b)(1)(C), EPA must grant California's waiver request unless the Agency finds that California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. EPA's longstanding approach to this third waiver criterion is limited to reviewing California's feasibility assessment and evaluating whether the opponents of the waiver have met their burden of establishing: (1) That California's standards are technologically infeasible, or (2) that California's test procedures are inconsistent with the Federal test procedures. As with the other two criteria, our review is narrow and deferential to California.

Each of CARB's two waiver requests contained a demonstration that its standards in each request were based on technologies currently available or reasonably projected to be available in the lead time given and giving consideration to costs. As such, CARB argued that its standards did not create any issues regarding the consistency with section 202(a) requirements. CARB's waiver requests included their state rulemaking records for each standard, including CARB's detailed responses to any issues raised regarding technological feasibility.

Commenters opposed to the waiver did not argue that the 2018 HD Warranty Amendments were not technologically feasible or that any of the waiver requests presented inconsistent test procedures. Further, while EPA received comment to suggest that CARB's ACT Regulation and ZEAS Regulation were not appropriate policy choices, to the extent commenters raised feasibility issues regarding the ACT Regulation and ZEAS Regulation, such commenters either failed to meet the burden of proof to demonstrate infeasibility in light of California's demonstration of feasibility or such comments fell beyond the scope of EPA's technological feasibility review. As explained in detail below, based on our examination of the record, EPA finds that the commenters have failed to meet their burden of proof as to the third prong.

In addition, certain commenters asserted that, even if the standards were actually feasible, EPA should nonetheless deny the waiver based on the lead time and stability requirements for certain federal heavy-duty vehicle standards found in section 202(a)(3)(C) of the Act. These commenters claim that because the third waiver criterion requires California's standards to be ''consistent with'' section 202(a), California must necessarily comply with section 202(a)(3)(C), as that is a sub-provision of 202(a). This argument is inconsistent with the plain text of the statute. Congress used the phrase ''consistent with,'' not ''compliant with.'' The statutory phrase ''consistent with'' indicates that California's standards should be congruent and compatible with section 202(a), which requires that Federal standards provide adequate lead time and consider cost. Thus, EPA interprets this prong of the waiver analysis to require California's standards to be feasible. The statute does not, however, obligate California to comply with provisions of section 202(a) directed solely at the development and design of federal standards. This would make little sense given Congress' intent to set up two motor vehicle programs in title II—with California's program dedicated to address the state's air quality problems and serve as a testing ground for motor vehicle emissions policy designs and technologies. If exactly the same requirements and conditions apply to both the Federal and the California programs, then they would necessarily overlap extensively if not completely, and California could not serve as the testing ground that Congress intended. Further, applying some of the language in 202(a) to California standards would directly conflict with the text and intent of the waiver provisions in section 209. For those reasons, for over five decades, EPA has consistently granted waivers to California without assessing compliance with section 202(a)(3)(C), with a single exception (in 1994).

The commenters' argument regarding section 202(a)(3)(C) fails for a number of additional reasons. That provision, which requires at least four years of lead time and three years of stability, is a companion to a specific Federal standard-setting mandate, section 202(a)(3)(A). That mandate is for EPA to promulgate certain heavy-duty criteria pollutant standards that reflect the greatest degree of emission reduction achievable giving appropriate consideration to a number of factors. Congress paired the mandated stringency with the lead time and stability requirements. By contrast, California may adopt state standards that are ''in the aggregate'' at least as protective as the Federal standards. As such, California is also not obligated to comply with either the maximum stringency requirements or the companion lead time provision in section 202(a)(3)(C) to provide the four years of lead time and three years of stability that Congress determined was needed for the federal market.

This plain text reading is well-supported by the history and purpose of the Act and is also consistent with administrative and judicial precedents. Commenters rely heavily on EPA's single contrary decision in a 1994 medium-duty vehicle waiver (1994 MDV waiver) even though the interpretation contained in that decision was inconsistent with EPA's historical practice in waiver decisions both before and after 1994.[149] Indeed, by 2012 EPA had indicated that it did not believe section 202(a)(3)(C) applied to California's heavy-duty engines and vehicle standards and issued a decision consistent with its historical practice.[150] We acknowledge that the 1994 MDV waiver took a different position on this issue than we do today, but as explained below, we believe that our practice, both before and after the 1994 MDV waiver, represents the best understanding of the statute. Importantly, the interpretation in the 1994 MDV waiver is inconsistent with the plain text of the statute, as discussed below. In this action, EPA is therefore taking an approach similar to its approach both before and after the 1994 MDV waiver, and different from the 1994 MDV waiver.[151] EPA believes that its historical practice and application of the ''consistency with section 202(a)'' language is permissible and is the best interpretation of the statute based on all the relevant factors. Additionally, commenters also mistakenly rely on the D.C. Circuit's opinion in *American Motors Corp.* v. *Blum,* 603 F.2d 978 (D.C. Cir. 1979) (*Blum*). *Blum* addressed a different provision of the CAA and is distinguishable from the instant waivers.

The balance of this section begins with a discussion of EPA's longstanding approach to the third waiver criterion and relevant case law (III.D.1). We then

[149] See 77 FR 9239, 9249 (February 16, 2012); 46 FR 22302, 22304 (1981).

[150] 77 FR at 9239. Moreover, in October 2000, EPA informed California of the intent to ''conduct a new evaluation of . . . arguments . . . in regard to whether the lead time provisions of the Act apply to California. . . . [As well as] evaluate the applicability of the stability requirement in Section 202(a)(3)(C).'' Letter from Margo Oge, Director, Office of Transportation and Air Quality, to Michael Kenny, CARB Executive Officer (Oct. 24, 2000).

[151] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009).

summarize the positions of CARB and the commenters (III.D.2 and III.D.3 respectively). Subsequently, we evaluate the waiver requests under the historical approach, finding that those opposed to the waiver have failed to meet their burden of proof (III.D.4). We then explain why, contrary to the commenters' arguments, the statutory lead time requirements in section 202(a)(3)(C) do not apply to California (III.D.5). A brief conclusion follows (III.D.6).

1. Historical Interpretation of Section 209(b)(1)(C)

Under section 209(b)(1)(C), EPA must grant California's waiver request unless the Agency finds that California standards and accompanying enforcement procedures are ''not consistent'' with section 202(a) of the Act.[152] Section 202(a)(1) grants EPA authority to regulate motor vehicle emissions generally and the accompanying section 202(a)(2) specifies that those standards are to ''take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.'' [153] Thus, no specific lead time requirement applies to standards promulgated under section 202(a)(1). EPA has long limited its evaluation of whether California's standards are consistent with section 202(a) to determining if: (1) There is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time period; [154] or whether (2) California and Federal test procedures are incompatible so that a single vehicle could not be subjected to both tests.[155] EPA has also explained that ''the import of section 209(b) is not that California and Federal standards be identical, but that the Administrator not grant a waiver of Federal preemption where compliance with the California standards is not technologically feasible within available lead time.'' [156] Further, EPA's review is limited to the record on feasibility of the technology. Therefore, EPA's review is narrow and does not extend to whether the regulations under review are the most effective or whether the technology incentivized by California's regulations are the best policy choice or better choices should be evaluated. The Administrator has thus long explained that ''questions concerning the effectiveness of the available technology are also within the category outside my permissible scope of inquiry,'' under section 209(b)(1)(C).[157] California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the Federal and California test procedures conflicted, *i.e.,* if manufacturers would be unable to meet both the California and Federal test requirements with the same test vehicle.

In determining whether California standards are inconsistent with section 202(a), EPA makes a finding as to whether there is inadequate lead time to permit the development of technology that is necessary to meet the standards for which a waiver is sought. For this finding, EPA considers whether adequate technology is presently available or already in existence and in-use. If technology is not presently available, EPA will consider whether California has provided adequate lead time for the development and application of necessary technology prior to the effective date of the standards for which a waiver is being sought. Additionally, the D.C. Circuit has held that ''[i]n the waiver context, section 202(a) relates in relevant part to technological feasibility and to federal certification requirements. The technological feasibility component of section 202(a) obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology. The federal certification component ensures that the Federal and California test procedures do not impose inconsistent certification requirements. Neither the court nor the agency has ever interpreted compliance with section 202(a) to require more.'' [158]

Regarding the technology costs portion of the technology feasibility analysis, when cost is at issue EPA evaluates the cost of developing and implementing control technology in the actual time provided by the applicable California regulations. The D.C. Circuit has stated that compliance cost ''relates to the timing of a particular emission control regulation.'' [159] In *MEMA I,* the court addressed the cost of compliance issue at some length in reviewing a waiver decision. According to the court:

> Section 202's cost of compliance concern, juxtaposed as it is with the requirement that the Administrator provide the requisite lead time to allow technological developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures. See S. Rep. No. 192, 89th Cong., 1st Sess. 5–8 (1965); H.R. Rep. No. 728 90th Cong., 1st Sess. 23 (1967), reprinted in U.S. Code Cong. & Admin. News 1967, p. 1938. It relates to the timing of a particular emission control regulation rather than to its social implications. Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid *doubling or tripling* the cost of motor vehicles to purchasers. It, therefore, requires that the emission control regulations be technologically feasible within economic parameters. Therein lies the intent of the cost of compliance requirement (emphasis added).[160]

Previous waiver decisions are fully consistent with *MEMA I,* which indicates that the cost of compliance must reach a very high level before the EPA can deny a waiver. Therefore, past decisions indicate that the costs must be

[152] EPA must grant a waiver request unless it finds that there is: ''[i]nadequate time to permit the development of the necessary technology given the cost of compliance within that time period.'' H. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967). ''That California standards are not consistent with the intent of section 202(a) of the Act, including economic practicability and technological feasibility.'' S. Rep. No. 403, 90th Cong. 1st Sess. 32 (1967).

[153] CAA section 202(a)(2); H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977) (''Also preemption could not be waived if California standards and enforcement procedures were found not to be 'consistent with section 202(a)' (relating to the technological feasibility of complying with these standards).'').

[154] Previous waivers of Federal preemption have thus stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. *See e.g.,* 36 FR 8172 (April 30, 1971) (HD MY 1972 and later MY); 38 FR 30136 (Nov. 1, 1973); 40 FR 23102, 23105 (May 28, 1975) (extending waiver of April 30, 1971, to MY 1975 HD standards); 40 FR 30311 (July 18, 1975); 70 FR 50322 (August 26, 2005) (2007 California Heavy-Duty Diesel Engine Standards); 71 FR 335 (Jan. 4, 2006) (2007 Engine Manufacturers Diagnostic standards); 77 FR 9239 (February 16, 2012) (HD Truck Idling Requirements); 79 FR 46256 (Aug. 7, 2014) (the first HD GHG emissions standard waiver, relating to certain new 2011 and subsequent model year tractor-trailers); 81 FR 95982 (December 29, 2016) (the second HD GHG emissions standard waiver, relating to CARB's ''Phase I'' regulation for 2014 and subsequent model year tractor-trailers); 82 FR 4867 (January 17, 2017) (On-Highway Heavy-Duty Vehicle In-Use Compliance Program).

[155] To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet the state and the Federal requirements with the same test vehicle in the course of the same test. *See, e.g.,* 43 FR 32182 (July 25, 1978).

[156] 46 FR 22032, 22034–35 (April 15, 1981).

[157] 41 FR 44209, 44210 (October 7, 1976); 47 FR 7306, 7310 (February 18, 1982) (''I am not empowered under the Act to consider the effectiveness of California's regulations, since Congress intended that California should be the judge of 'the best means to protect the health of its citizens and the public welfare.'" (Internal citations omitted)).

[158] *MEMA II,* 142 F.3d 449, 463 (Emphasis added) (internal citations omitted).

[159] *MEMA* v. *EPA,* 637 F.2d. 1118 (D.C. Cir. 1979).

[160] *MEMA I* 627 F.2d at 1118 (emphasis added). *See also id.* at 1114, n.40 (''[T]he 'cost of compliance' criterion relates to the timing of standards and procedures.'').

excessive to find that California's standards are infeasible and therefore inconsistent with section 202(a).[161]

Regarding the burden of proof under the third prong, EPA has previously stated that the third prong's feasibility determination is limited to: (1) Whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, including whether they include adequate lead time or (2) that California's test procedures impose requirements inconsistent with the Federal test procedure. Additionally, the burden of proof regarding the cost component of feasibility also falls upon the waiver opponents.

The scope of EPA's review under this criterion is also narrow.[162] This is consistent with the motivation behind section 209(b) to foster California's role as a laboratory for motor vehicle emission control, in order ''to continue the national benefits that might flow from allowing California to continue to act as a pioneer in this field.'' [163] According to the D.C. Circuit, ''The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation.'' [164] EPA has thus long believed that California must be given substantial deference when adopting motor vehicle emission standards because such action may require new or improved technology to meet challenging levels of compliance. Over 50 years ago, EPA's Administrator discussed this deference in an early waiver decision that approved a waiver request for California:

> There is a well-established pattern that emission control technology have been phased in through use in California before their use nationwide. This pattern grew out of early recognition that auto caused air pollution problems are unusually serious in California. In response to the need to control auto pollution, California led the nation in development of regulations to require control of emissions. This unique leadership was recognized by Congress in enacting federal air pollution legislation both in 1967 and 1970 by providing a special provision to permit California to continue to impose more stringent emission control requirements than applicable to the rest of the nation.[165]

In a subsequent waiver decision approving a waiver request for California, the Administrator stated:

> It is worth noting . . . I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to ''catch up'' to some degree with newly promulgated standards. Such an approach * * * may be attended with costs, in the shape of a reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.'' [166]

In keeping with this deferential posture, as noted earlier, EPA's historical interpretation of section 209(b) has also been to assess whether California's program of motor vehicle emission standards *as a whole* provides for adequate lead time consistent with section 202(a). This is because EPA's long-standing interpretation is that the phrase ''State standards'' in section 209(b)(1) means the entire California new motor vehicle emissions program.[167] Similar to the second waiver criterion, EPA has also historically viewed the third waiver criterion's feasibility analysis as a whole-program assessment, *i.e.,* one that ensures manufacturers have sufficient lead time to comply with the program's standards as a whole, accounting for the interactions between technologies necessary to meet both new and existing standards, and any interactions between those technologies that would affect feasibility.[168] EPA's assessment under section 209(b)(1)(C) is thus not in practice a standard-by-standard review. Rather it involves an analysis of feasibility that builds on prior analyses of feasibility and any impacts of the new standards on the feasibility of the remainder of the program.[169]

EPA has also long recognized that the laboratory role and nature of California's standards may result in California amending or revising requirements after the grant of a waiver, or otherwise adjusting the implementation of the waived standards as circumstances dictate.[170] EPA's waiver practice when California amends a previously waived standard or accompanying enforcement procedure is to consider whether such an amendment is within the scope of a previously granted waiver or requires a new waiver. If EPA considers the amendment as within the scope of a prior waived standard, then the Agency reviews the amendment to determine that it does not undermine California's determination that its standards in the aggregate are as protective of public health and welfare as applicable Federal standards, does not affect the regulation's consistency with section 202(a), and raises no new issues affecting EPA's previous waiver decisions.

Decisions from the D.C. Circuit provide guidance regarding the lead time requirements of section 202(a). Section 202(a)(2) states that ''any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate

[161] *See, e.g.,* 47 FR 7306, 7309 (Feb. 18, 1982); 43 FR 25735 (Jun. 14, 1978); 46 FR 26371, 26373 (May 12, 1981).

[162] 41 FR 44208, 44210 (October 7, 1976)(''While section 209(b) requires consideration of whether the adoption of standards by California is consistent with section 202(a), nevertheless [the Administrator's] discretion in determining whether to deny the waiver is considerably narrower than [his] discretion to act or not to act in the context promulgating Federal standards under section 202(a).'').

[163] 40 FR 23102, 23103 (May 28, 1975) (waiver decision citing views of Congressman Moss and Senator Murphy).

[164] *MEMA I,* 627 F.2d 1095, 1110.

[165] 38 FR 10317, 10324 (April 26, 1973) (''[T]he experience of Federal and State officials as well as the industry itself in meeting such standards for California will facilitate an orderly implementation of the more stringent, catalyst-forcing standards for California.'').

[166] 40 FR 23102, 23104 (May 28, 1975). *See also* 78 FR 2111, 2115–16 (Jan. 9, 2013); 79 FR 46256, 46258 (Aug. 7, 2014); 81 FR 95982, 95984 (Dec. 29, 2016).

[167] 74 FR 32744, 32749 (July 8, 2009); 70 FR 50322 (Aug. 26, 2005); 77 FR 9239 (Feb. 16, 2012); 78 FR 2112, 2123 (Jan. 9, 2013).

[168] As a practical matter, EPA's consideration of the third waiver prong, like the first waiver prong, does not necessitate in every case that EPA re-review previously-approved aspects of California's program—for example, where it is evident that new standards will not interact with existing ones. But where a new waiver request might affect one of EPA's previous assessments under any of the waiver criteria, EPA reviews the program as a whole—or any aspect necessary to confirm alignment with the statutory text. 87 FR at 14361 and n.266.

[169] *Id.* at 14361. The feasibility assessment conducted for a new waiver request focuses on the standards in that request but builds on the previous feasibility assessments made for the standards already in the program and assesses any new feasibility risks created by the interaction between the standards in the petition and the existing standards.

[170] *See e.g.,* 68 FR 19811 (April 22, 2003), 71 FR 78190 (December 28, 2006), 75 FR 44948 (July 30, 2006).

consideration to the cost of compliance within such period.'' For example, in *Natural Resources Defense Council* v. *EPA (NRDC),* the court reviewed claims that EPA's PM standards for diesel cars and light trucks were both too stringent and not stringent enough. In upholding the EPA standards, the court concluded:

> Given this time frame [a 1980 decision on 1985 model year standards]; we feel that there is substantial room for deference to the EPA's expertise in projecting the likely course of development. The essential question in this case is the pace of that development, and absent a revolution in the study of industry, defense of such a projection can never possess the inescapable logic of a mathematical deduction. We think that the EPA will have demonstrated the reasonableness of its basis for projection if it answers any theoretical objections to the [projected control technology], identifies the major steps necessary in refinement of the technology, and offers plausible reasons for believing that each of those steps can be completed in the time available.[171]

Another key case addressing the lead time requirements of section 202(a) is *International Harvester* v. *Ruckelshaus (International Harvester).* In *International Harvester,* the court reviewed EPA's decision to deny applications by several automobile and truck manufacturers for a one-year suspension of the 1975 emission standards for light-duty vehicles. In the suspension proceeding, the manufacturers presented data which, on its face, showed little chance of compliance with the 1975 standards, but which, at the same time, contained many uncertainties and inconsistencies regarding test procedures and parameters. In a May 1972 decision, the Administrator applied an EPA methodology to the submitted data, and concluded that ''compliance with the 1975 standards by application of present technology can probably be achieved,'' and so denied the suspension applications.[172] In reviewing the Administrator's decision, the court found that the applicants had the burden of providing data showing that they could not comply with the standards, and if they did, then EPA had the burden of demonstrating that the methodology it used to predict compliance was sufficiently reliable to permit a finding of technological feasibility. In that case, EPA failed to meet this burden.

In *NRDC* the court pointed out that the court in *International Harvester* ''probed deeply into the reliability of EPA's methodology'' because of the relatively short amount of lead time involved (a May 1972 decision regarding 1975 MY vehicles, which could be produced starting in early 1974), and because ''the hardship resulting if a suspension were mistakenly denied outweigh[s] the risk of a suspension needlessly granted.'' [173] The *NRDC* court compared the suspension proceedings with the circumstances concerning the diesel standards before it: ''The present case is quite different; 'the base hour' for commencement of production is relatively distant, and until that time the probable effect of a relaxation of the standard would be to mitigate the consequences of any strictness in the final rule, not to create new hardships.'' [174] The *NRDC* court further noted that *International Harvester* did not involve EPA's predictions of future technological advances, but an evaluation of presently available technology.

2. CARB's Discussion of the Regulations' Consistency With Section 202(a) in the Waiver Requests

Each of CARB's waiver requests demonstrated that its standards were based on technologies currently available or reasonably projected to be available in the lead time provided under each regulation, taking into consideration costs and other factors. As such, CARB argued that its standards did not create any issues regarding consistency with section 202(a) requirements. CARB's waiver requests included the state rulemaking records for each standard, including CARB's response to any issues raised regarding technological feasibility. In this section III.D.2, we present CARB's arguments for each of its waiver requests in turn. In the following section III.D.3, we present the commenters arguments. EPA has reviewed the information submitted to the record of this proceeding to determine whether the parties opposing the waiver requests have met their burden to demonstrate that the respective standards (and accompanying enforcement procedures) are not consistent with section 202(a). As explained in subsection III.D.4 below, EPA has evaluated each of the waiver requests under the test historically used and is concluding that the opponents of the waiver requests have not met the burden of proof regarding the third waiver prong. EPA also discusses, in subsection III.D.5, why, contrary to the commenters' arguments, the statutory lead time requirements in section 202(a)(3)(C) do not apply to California.

a. 2018 HD Warranty Amendments

CARB's waiver request noted that the elements of the 2018 HD Warranty Amendments that lengthen the warranty periods present no issues regarding technical feasibility or lead time. At the outset, CARB noted that although manufacturers are incentivized to produce and use more durable emission related components and systems in 2022 and beyond, the manufacturers are not compelled to do so. Because manufacturers may elect to use their existing components to comply with the regulations, CARB contended that EPA's prior findings of adequate technical feasibility and lead time found within EPA's waiver for California's 2007 and later model years remains applicable and dispositive. CARB also noted that no commenters raised objections regarding the feasibility and lead time of the extended emission warranty periods during its rulemaking. CARB noted similar findings regarding the new minimum allowable maintenance schedules. CARB also noted its belief that it appropriately considered the costs of the 2018 HD Warranty Amendments and that it is not aware of any test procedure consistency issues.[175]

b. ACT, ZEAS, and ZEP Certification Regulations

CARB's ACT Regulation waiver request provided information pertaining to consistency with section 202(a)'s feasibility requirements for each of the three regulations covered by the request. CARB noted that the ACT Regulation's requirements that new 2024 MY medium- and heavy-duty ZEVs be produced and delivered for sale to ultimate purchasers in California are consistent with section 202(a) because the required technology already exists.[176] CARB's waiver request also

[171] *NRDC,* 655 F.2d 318, 331 (D.C. Cir. 1981).

[172] *International Harvester* v. *Ruckelshaus,* 478 F 2d. 615, 626 (D.C. Cir. 1979).

[173] *NRDC,* 655 F.2d 318, 330.

[174] *Id.* The ''hardships'' referred to are hardships that would be created for manufacturers able to comply with the more stringent standards being relaxed late in the process.

[175] 2018 HD Warranty Amendments Support Document at 20–23.

[176] ACT/ZEAS/ZEP Waiver Support Document at 31–32 (''As described in the ACT regulation's rulemaking record, medium- and heavy-duty ZEVs are currently commercially available . . . This includes vehicles from companies such as BYD, Motiv, Phoenix Motorcars, XOS, and others. Traditional manufacturers of heavy-duty vehicles, including Freightliner, Kenworth, Peterbilt, and Volvo, are currently demonstrating heavy-duty ZEVs in California, with the intent to launch commercial products by 2024. 15 manufacturers are offering more than 50 different ZEV truck and bus configurations, other than transit buses, from Class 3 through Class 8 through the Hybrid and Zero-Emission Truck and Bus Voucher Incentive

Continued

noted that the ACT Regulation implements the ZEV sales requirement through a credit and deficit mechanism, whereby manufacturers' deficits are generated commencing with the 2024 model year based, in part, on their annual sales of onroad vehicles with gross vehicle weight ratings (GVWRs) exceeding 8,501 pounds produced and delivered for sale in California. Manufacturers may earn credits by producing and delivering for sale, to ultimate consumers in California, certain types of ZEV vehicles, and subsequently there is a banking and trading system.[177]

Similarly, regarding the ZEAS Regulation, CARB noted that the technology needed to produce zero-emission airport shuttle vehicles currently exists.[178] Finally, CARB also noted that the ZEP Certification Regulation, requiring manufacturers to conduct energy-capacity testing for batteries used in zero-emission powertrains, presents no issues of technical feasibility because the specified test procedure only requires use of commercially available test equipment.[179]

In addition to showing that the required technology is already commercially available, CARB noted that it appropriately considered the cost of each of the regulations, including the incremental capital costs as well as total costs of ownership (TCO) to potential vehicle owners.[180] CARB noted that its Staff Report for the ACT Regulation included an estimate that the average incremental vehicle price for certain new ZEVs would be 30 percent to 60 percent higher than a comparable combustion-powered vehicle in certain years, with costs for these vehicles declining over time. Further, CARB noted that it had evaluated the TCO for purchasing an ACT compliant vehicle and all other related costs including fuel, maintenance, Low Carbon Fuel Standard revenue, and infrastructure, and noted that ZEVs in appropriate duty cycles can see a positive TCO by 2024 or sooner and reported similar TCO positive results for ZEAS by 2028.[181] CARB also noted that neither the ACT, ZEAS, nor ZEP Certification Regulations present any issues of test procedure inconsistency because there are no analogous Federal requirements and, as such, engines manufacturers are not precluded from complying with the California and Federal test requirements with one test engine or vehicle.[182]

3. Comments on Section 209(b)(1)(C)

EPA received a range of comments on each of CARB's regulations relating to the third criteria. Regarding the ACT Regulation, EPA received a comment that stated that the applicable technological feasibility criteria to apply is found in section 202(a)(3)(A).[183] This commenter maintains that CARB must demonstrate that the ACT standards ''are achievable through reasonably available technology, and must similarly consider related costs, energy, and safety factors'' and that CARB cannot meet this obligation. This commenter notes two separate studies regarding the current availability of electric and hydrogen fuel cell medium and heavy-duty trucks, and that one of the studies noted that electric trucks using present lithium battery technology would need levels of energy density and battery storage capacity to support a daily ranger of 600 miles at level that would weigh 6300 kg and cost approximately $180,000. This commenter maintains that CARB did not consider several factors including charging networks as well as safety issues and legal restrictions on commercial activity at rest stops. The commenter maintains that because these factors were not considered by CARB then it does not meet the requirements of section 202(a)(3)(A).[184] EPA also received supplemental comment from CARB that was submitted in response to comments submitted in opposition to the waiver for the ACT Regulation. CARB noted that several comments fail to satisfy opponents' burden of proof because they misunderstand the necessary showing or make no showing at all.[185] CARB also recognized the challenges to the technical feasibility of the ACT Regulation raised by one commenter but noted that no commenter has disputed CARB's evidence that the technology need to comply with the ACT Regulation already exists.[186] In addition, CARB responded to comments regarding ZEV constraints associated with operating ranges and performance characteristics.[187] Finally, CARB noted several commenters' assertions that CARB failed to account for and accurately assess a number of different costs associated with the ACT Regulation (*e.g.,* costs of manufacturing and maintaining ZEVs, battery replacement costs, reduced operational hours due to needs to recharge, etc.) and pointed to its rulemaking record and submissions to EPA that address such claims. And in any case CARB maintained that these commenters have not introduced evidence that establishes that the compliance costs as so excessive as to make the standards infeasible.[188]

Many of the comments EPA received on the third prong also focused not on whether the standards under review were actually infeasible under section 202(a)(2), but on whether CARB, to be consistent with section 202(a), must provide the four years of lead time and three years of stability for standards applicable to new heavy-duty vehicles and engines required under section 202(a)(3)(C). Commenters objected to the 2018 HD Emission Warranty Amendments and the ACT Regulation on the grounds that the third waiver criterion requires ''consistency'' with every provision of section 202(a) and therefore, by the text of the statute, CARB must provide four years of lead time and three years of stability for its new heavy-duty vehicle and engine

Program (HVIP). HVIP has provided funding for 2,456 zero-emission trucks and buses and 2,593 hybrid trucks since 2010 to support the long-term transition to zero-emission vehicles in the heavy-duty market. These commercially available zero-emission trucks and buses cover a wide variety of vocations and duty cycles; some vehicles available today include delivery vans, school buses, refuse trucks, cutaway shuttles, terminal tractors, and passenger vans.'').

[177] *Id.* at 7–10

[178] *Id.* at 33.

[179] *Id.* at 34–36.

[180] *Id.* at 36–38 (ACT), at 38–39 (ZEAS), and 39–40.

[181] *Id.*

[182] *Id.* at 39.

[183] Valero at 4. This commenter does not discuss the phase ''greatest degree of emission reduction achievable through application of technology'' in 202(a)(3)(A)(i) and whether and how it is related to its cited language regarding the consideration to ''cost, energy, and safety factors.''

[184] *Id.* at 4–6.

[185] CARB Supplemental Comments at 11. CARB noted both EMA and WSPA comments that do not provide any elaboration of why the lead time provided is not reasonable. ''[S]ection 209(b) does not give [the Administrator] the latitude to review procedures at the State level, and the EPA hearing is not the proper forum in which to raise these objections. Similarly, objections pertaining to the wisdom of California's judgment on various public policy matters are beyond the [Administrator's] scope of inquiry.'' 43 FR 32184 citing 42 FR 44209, 44210 (October 7, 1976).

[186] *Id.* at 11–12.

[187] *Id.* at 12. (CARB's analysis found that although certain market segments presented challenges, a large number of other segments are well suited for electrification across the medium- and heavy-duty truck market, including refuse trucks, yard trucks and box trucks within the Class 8 vocational market. CARB expects that the demand for heavy-duty ZEVs will significantly increase as ZEV technology improves, resulting in increased operating ranges and decreased vehicle prices.''). CARB also provided updated data and noted recently enacted federal action.

[188] *Id.* at 12–13 (Citing the ACT waiver request at 31–39, ACT ISOR at IX–8, ACT FSOR at IX–23–IX–24, IX–27–IX–28, ACT FSOR at 105, 192, 204–222, 269–274 (respond to comments asserting that CARB did not accurately assess cost impacts of the ACT Regulation).

standards.[189] In response, supporters of the regulations argued that ''consistency'' does not require identicality with lead time and stability requirements imposed on EPA. Such a strict imposition, they argued, would frustrate Congress' intent to give California flexibility and deference to create innovative standards that are more stringent than the Federal standards.[190] Identicality also cannot be required, they argued, because it would be impossible for certain sub-provisions of section 202(a) to apply to CARB.[191] In response, one commenter argued that, even if some provisions of 202(a) are relevant only to EPA and not CARB, ''consistency'' still requires CARB to abide by relevant provisions, such as 202(a)(3)(C)'s lead time and stability requirements.[192]

EPA also received comment that four years of lead time is supported by Federal case law and EPA's prior waiver decisions. In particular, one commenter noted EPA's 1994 MDV waiver decision document, which found that CARB is subject to 202(a)(3)(C)'s four-year lead time requirement.[193] That decision considered the plain text and congressional intent of the CAA as well as the 1979 D.C. Circuit case, *American Motors Corporation* v. *Blum* (*Blum*), which incorporated a specific minimum two-year lead time from CAA section 202(b)(1)(B) into the 202(a)(2) general technological feasibility analysis. The commenter explained that the D.C. Circuit in *Blum* ''found that the Congressionally-specified lead time requirement was implicitly incorporated into section 202(a)(2)'' and argues that *Blum's* logic applies equally to section 202(a)(3)(C).[194]

4. California's Standards Are Consistent With Section 202(a) Under EPA's Historical Approach

As explained above, EPA has historically applied a consistency test under section 202(a) that calls for the Administrator to first review whether adequate technology already exists, and if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect.[195] After a review of the record, information, and comments received in this proceeding, EPA has determined that the opponents of the waiver request for CARB's regulations have not demonstrated that these regulations are inconsistent with section 202(a). As noted above, CARB's waiver requests indicated that control technology either presently exists or is in use, and opponents do not provide information that sufficiently meets their burden of proof.

The rationale supporting EPA's determination is organized as follows. Applying its historical approach of section 209(b)(1)(C) to CARB's regulations, EPA first examines whether the opponents of the waiver requests at issue have met their burden of proof to demonstrate that the regulations are not technologically feasible, within the lead time provided and giving consideration to cost. We present our analysis for each of the regulations in the two waiver requests (the 2018 HD Warranty Amendments, the ACT, ZEAS, and the ZEP Certification Regulations), in subsections III.D.4.a and b below. We conclude, under EPA's historical approach to the third waiver criterion, that the opponents of the waiver have not met their burden of proof.

a. 2018 HD Warranty Amendments

As previously described, the 2018 HD Warranty Amendments lengthen the warranty periods for new heavy-duty vehicles and engines commencing with the 2022 model year. Manufacturers can choose to meet the new warranty periods either through installing more durable emission related components (with an associated increase in cost) or by relying upon existing emission related components designed to meet applicable emission standards and cover any increase in costs associated with additional emission warranty claims and repairs due to the increase in the warranty periods. Opponents of a waiver for the 2018 HD Warranty Amendments do not claim that the regulation is actually infeasible under EPA's approach. If EPA had received such comments, it would be appropriate to evaluate whether more durable emission related components are technologically feasible (giving consideration to the cost of such components) and to evaluate the costs for manufacturers to choose to use existing components and cover the costs of additional emission warranty related claims.

[189] EMA Initial Comments at 4–5, 6–7; EMA Supplemental Comments at 1. NADA at 2; WSPA at 2.

[190] *See, e.g.,* CARB Initial ACT Comments at 17–18; CARB Initial Omnibus Low NOx Comments at 9 (submitted as Exhibit 4 of CARB's Initial ACT Comments); CARB Supplemental Comments at 7–8; Environmental and Public Health Organizations at 22–24. EPA notes CARB's contention that section 202(a)(3)(C) was designed with specific purposes by Congress, and that such purposes were, in part, to minimize the burden associated with new standards and the associated new designs of affected vehicles and that in many instances CARB's regulations do not require a redesign of existing vehicles. (''The clear purpose of Section 202(a)(3)(C) is to protect manufacturers with respect to specific EPA standards, from having to perform redesigns without four years of lead time or more often than every three years.'' But ''the year-on-year changes in the legal obligations imposed by ACT are different from those imposed by more traditional vehicle emission standards—the kind of standards Congress had in mind when it drafted Section 202(a)(3)(C).'' See CARB Supplemental Comments, 9–11 and CARB Initial ACT Comments at 19–22. As explained below, EPA finds its textual assessment of 202(a)(3)(C) to be sufficient to determine the inapplicability to California and that it is not necessary to examine the underpinnings of this aspect of CARB's argument.

[191] *See, e.g.,* CARB Initial Omnibus Low NO_X Comments at 16–17 (submitted as Exhibit 4 of CARB's Initial ACT Comments); CARB Supplemental Comments at 7–8; Environmental and Public Health Organizations at 20–21; ACT/ZEAS/ZEP Waiver Support Document at 31–32 (citing the ACT FSOR at 131).

[192] EMA Supplemental Comments at 4 (''Of course, all of the provisions of section 202(a) are directed on their face to EPA, not California, and that is no reason to distinguish one part of section 202(a) from another. Consistency means that CARB must abide by and avoid contradicting those provisions that are relevant. CARB agrees that it must abide by the technology lead-time requirement directed at EPA in section 202(a)(2), and CARB must equally abide by the four-year lead-time requirement in section 202(a)(3)(C) that is directed at EPA in precisely the same way. Neither of those provisions is uniquely applicable to EPA'').

[193] EMA Initial Comments at 3; EMA Supplemental Comments at 2–3.

[194] EMA Initial Comments at 7–9 (''The D.C. Circuit's reasoning in *Blum* applies with equal force here: failing to apply the minimum four-year leadtime requirement would frustrate the leadtime that Congress explicitly found to be necessary for [heavy-duty on-highway] standards.''); EMA Supplemental Comments at 2–3 (''In addition to the general technology-based lead-time required for all vehicles and engines, section 202(a)(3)(C) is aimed specifically at the heavy-duty industry, which is not vertically integrated, involves much lower production volumes, is more capital intensive, requires longer planning and product development timelines, and requires longer time periods to recoup large capital investments. *See, e.g.,* Hearing on S.1630 Before Subcomm. on Env't Protection, 101st Cong. 312–13 (1989). These considerations make lead-time necessary regardless of whether it is EPA or CARB that adopts the applicable standards with which the industry must make investments to comply. Thus, as EPA rightly concluded in 1994, the section 202(a)(3)(C) lead-time requirement is no different than the lead-time provision at issue in *Blum.*'').

[195] EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the Federal test procedure. *See, e.g.,* 38 FR 30136 (Nov. 1, 1973); 40 FR 30311 (July 18, 1975); 71 FR 335 (Jan. 4, 2006) (2007 Engine Manufacturers Diagnostic standards); 70 FR 50322 (August 26, 2005) (2007 California Heavy-Duty Diesel Engine Standards); 77 FR 9239 (February 16, 2012) (HD Truck Idling Requirements); 78 FR 2111, 2132 (Jan. 9, 2013); 79 FR 46256 (Aug. 7, 2014) (the first HD GHG emissions standard waiver, relating to certain new 2011 and subsequent model year tractor-trailers); 81 FR 95982 (December 29, 2016) (the second HD GHG emissions standard waiver, relating to CARB's ''Phase I'' regulation for 2014 and subsequent model year tractor-trailers); 82 FR 4867 (January 17, 2017) (On-Highway Heavy-Duty Vehicle In-Use Compliance Program).

During the course of EPA's waiver proceeding, we did not receive any comments or evidence to suggest, let alone meet the burden of proof, that the emission control technology needed for the new extended emission warranty periods and the new minimum allowable maintenance schedules did not meet the consistency with section 202(a) requirement.

Likewise, EPA received no comments concerning CARB's separate point regarding the options within California's regulation that incentivize manufacturers to produce more durable emission related parts. EPA received no comments that this separate compliance strategy, of using existing emission control parts and covering the costs of any additional emission warranty claims, was infeasible or too costly. In addition, we did not receive any comments or evidence during the waiver proceeding to suggest such concerns were raised during California's rulemaking. CARB also noted that there are no test procedure consistency issues. EPA has not received comment during the waiver comment period regarding any of these matters.[196]

Therefore, based on the record before us, EPA cannot find that the opponents of the 2018 HD Warranty Amendments waiver have met their requisite burden of proof to demonstrate that such requirements are inconsistent with section 202(a). Thus, EPA cannot deny CARB's 2018 HD Warranty Amendments waiver request on this basis.[197]

b. ACT, ZEAS, and ZEP Certification Regulations

At the outset, EPA notes two key principles among others that guide EPA's evaluation of technological feasibility within section 209(b)(1)(C). As previously explained, first, EPA considers whether adequate technology is either presently available or already in existence and in-use. If technology is not presently available, EPA will consider whether California has provided adequate lead time for the development and application of necessary technology prior to the effective date of the standards for which a waiver is being sought. Second, EPA has thus long believed that California must be given substantial deference when adopting motor vehicle emission standards because such action may require new or improved technology to meet challenging levels of compliance and that California plays a laboratory role. EPA is guided both by the amount of lead time provided by CARB and principles set forth in cases such as *International Harvester* and *NRDC.* This is EPA's historical approach, and it is applied in this decision. As such, the requirements of section 202(a)(3)(A) do not apply to California. Nevertheless, the factors such as energy and safety found in section 202(a)(3)(A) have been addressed by California and are part of the record here.

EPA finds that CARB's assessment of technology, lead time and cost was based on reasonable assumptions and EPA has received no subsequent comment during the waiver proceeding to indicate otherwise. Although EPA received comment suggesting that EPA's technological feasibility analysis should be performed under the criteria of section 202(a)(3)(A), the Agency explains below that section 202(a)(3)(A) does not apply to California. As also explained, section 202(a)(3)(A) was designed by Congress to explicitly address EPA rulemaking activities. As such, EPA's historical waiver approach of applying section 202(a)(2), for purposes of assessing technological feasibility, lead time and cost as required by section 209(b)(1)(C), also applies to California's heavy-duty vehicle and engine emission standards. Nevertheless, EPA has examined the waiver opponents comments regarding the requisite battery technologies (including weight, infrastructure, and safety issues).[198]

CARB's ACT Regulation waiver request provided information pertaining to consistency with section 202(a) for each of the three regulations covered by the request. CARB noted that the ACT Regulation's requirements that new 2024 MY medium- and heavy-duty ZEVs be produced and delivered for sale to ultimate purchasers in California are consistent with section 202(a) because the required technology already exists.[199] In addition, although EPA received limited cost data from a commenter, EPA finds no requisite evidence in the record or comments that suggest that such technology does not exist at reasonable costs (including the costs to consumers), or that ZEV trucks and buses that cover a variety of vocation and duty cycles are not commercially available.[200] EPA also notes that the ACT Regulation includes deficit and credit generation provisions whereby manufacturers have the flexibility to phase in differing products over time and mitigate deficits in later model years or through trading. Further, in examining costs where technologies already exist, EPA is also guided by how costs are juxtaposed with lead time. Costs in this context relates to the timing of a particular emission control technology rather than to broader considerations.[201] Opponents of the waiver have not met their burden of proof to demonstrate the ACT Regulation is inconsistent with section 202(a). The commenters have not demonstrated, based on EPA's assessment of the record on the overall feasibility of technology and costs, that a disruption to the heavy-duty vehicle and engine manufacturing industry would occur or that there is an undue burden on this industry as a result of the ACT Regulation. The record includes evidence of the ability of manufacturers to introduce certain service classes of vehicles that may have availability of central charging and lower costs, and in a timeframe and sequence that meets the ZEV phase-in requirements of the ACT Regulation. Further, while the heavy-duty vehicles that meet the ACT Regulation includes initial development costs and costs of integrating the technology to the vehicles (the cost of compliance) and other higher upfront costs for certain vehicles and in certain years, than traditional or conventionally fueled vehicles, the opponents of the waiver have not met their burden of proof to demonstrate that such costs of compliance are prohibitive. Beyond the technological feasibility of the emission controls needed to meet the applicable standards, EPA is also sensitive to the costs of the vehicles as well as the TCO of such vehicles. There is no indication that the ZEV vehicles today and projected to meet the ACT Regulation would be experience cost increases close in magnitude to prohibitive levels. Additionally, EPA agrees with CARB

[196] The record for this waiver proceeding also includes the ISOR and FSOR for CARB's 2018 HD Warranty Amendments rulemaking (included in the 2018 HD Warranty Amendments Waiver docket at EPA–HQ–OAR–2022–0330–0006 and EPA–HQ–OAR–2022–0330–0014). EPA has received no comment that questions CARB's findings.

[197] EPA evaluates the lead time associated with a CARB's regulation by in part examining the date of CARB's adoption of the regulation and when manufacturers are required to meet the regulation. EPA is guided both by the amount of lead time provided and by the principles set forth in cases such as *International Harvester* and *NRDC.* EPA finds no evidence in the record that manufacturers were unable to comply with CARB's requirements that commenced with the 2022 model year.

[198] EPA finds that it is beyond the scope of EPA's review to examine the feasibility of CARB's standards outside of California, including in states adopting CARB's standards (section 177 states). See 78 FR 2143, 74 FR 32744.

[199] ACT/ZEAS/ZEP Waiver Support Document at 31–32.

[200] *Id.* at 18.

[201] *MEMA I* at 1118. (''Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers.'').

that the opponents of the waiver that asserted claims regarding various battery issues such as replacement costs, weight, and inabilities to travel longer distances have not demonstrated that the compliance costs are so excessive to make the standards infeasible. EPA notes that CARB, in adopting the ACT Regulation, performed a market segment analysis for 87 market segments that use Class 2b–8 trucks, and assessed their suitability for electrification based on issues including payload, daily operational ranges, infrastructure access, and space considerations.[202] EPA finds that CARB has reasonably identified technologies and vehicle applications that are available in the near term as well as reasonable evidence that the performance and demand for heavy-duty ZEVs will significantly improve as technology evolves. Separately, EPA notes that CARB has submitted extensive information to EPA regarding its assessment of battery technology—including safety, the suitability of the grid and charging infrastructure, and related issues related to the ACT Regulation as a policy choice.[203]

Therefore, the phase-in of ZEV sales percentages in the ACT Regulation falls within the feasibility tests set forth in *International Harvester* and *NRDC* and the opponents of the waiver have not met their burden of proof to refute CARB's analysis and projections. Similarly, EPA finds no evidence in the record that suggests that technology needed to produce zero emission airport shuttle vehicles to meet the ZEAS Regulation does not exist or that manufacturers would not be able to meet the ZEP Certification Regulation.[204] To the extent that commenters suggest preferred feasible alternatives but do not argue that the CARB regulations are technologically infeasible themselves, EPA again notes that CARB has significant discretion in the policy choices it makes to address California's air pollution problems.[205] ''The structure and history of the California waiver provision clearly indicate a Congressional intent and an EPA practice of leaving the decision on ambiguous and controversial public policy to California's judgment.[206]

Therefore, based on the record before us, EPA cannot find that the opponents of the ACT, ZEAS, and ZEP Certification Regulations waiver request have met their requisite burden of proof to demonstrate that such requirements are inconsistent with section 202(a) under EPA's historical approach to the third waiver criterion.[207] Thus, EPA cannot deny CARB's ACT, ZEAS, and ZEP Certification Regulations waiver request on this basis.[208]

5. The Inapplicability of Section 202(a)(3)(C) to the Third Prong

Certain commenters asserted that, even if the standards are technologically feasible, EPA should nonetheless deny the waiver based on the lead time and stability requirements found in section 202(a)(3)(C).[209] These commenters claim that because the third waiver criterion requires California's standards to be ''consistent with'' section 202(a), California must necessarily comply with section 202(a)(3)(C), as that is a sub-provision of 202(a). This argument is inconsistent with the plain text of the statute. The statutory phrase ''consistent with'' indicates that California's standards should be congruent and compatible with section 202(a), which in turn sets forth requirements for Federal standard-setting. The statute does not, however, obligate California to comply with every single provision of section 202(a). Not only would doing so make little sense given Congress' intent to set up two motor vehicle programs in title II—with California's program dedicated to address the state's air quality problems and serve as a testing ground for motor vehicle emissions policy designs and technologies—but it would also conflict with the text and intent of the waiver provisions in section 209.

[202] CARB Supplemental Comments at 12 (see appendix E to the ACT ISOR).

[203] See CARB's FSOR at 9–10 (discussion of alternative fueled vehicles and regulatory suggestion of ultra-low NO_X rather than the ZEV levels on ACT, in context of grid readiness); FSOR at 124–127 (grid resiliency); FSOR at 103 (CARB notes ''The Board approved the regulation without off-ramps to ensure that vehicle manufacturers, suppliers, and infrastructure manufacturers have certainty in making long-term investments needed to ensure large-scale deployment of ZEVs in California. The regulation's structure gives manufacturers flexibility to bank credits, shift sales between weight classes, and trade credits with other manufacturers. These flexibility provisions give manufacturers assurance that they can comply and does not introduce the uncertainty associated with potential off-ramps.''); ACT Waiver Request at 31–39. *See also,* ACT ISOR at IX–8, IX–23 to IX–24, IX–27 to IX–28, 10, 192, 204–22, and 269–74.

[204] *Id.* While the ZEAS Regulation regulates fleet operators of airport shuttles, EPA acknowledges that the emission levels expressed in the ZEAS Regulation are emission standards preempted under section 209(a) and require a waiver of preemption under 209(b). *See Engine Manuf. Ass'n v South Coast Air Quality Mgmt. Dist.,* 541 U.S. 246, 255 (2004). Although the ZEAS Regulation does not expressly require operators to purchase cleaner new vehicles because regulated parties may comply by converting existing internal combustion vehicles to zero-emissions vehicles, EPA nevertheless believes it necessary to evaluate the purchasing requirements and options within the ZEAS Regulation and waives preemption of the ZEAS Regulation by this action.

[205] *See, e.g., Ford Motor,* 606 F.2d 1293, 1302 (D.C. Cir. 1979) (''There is no indication in either the statute or the legislative history that Congress intended to permit the Administrator to supplant its emission control regulations with those of California, no matter how sagacious and beneficial the latter may be. Nor is there any evidence that the Administrator is supposed to determine whether California's standards are in fact sagacious and beneficial.''). To the extent comments suggest that consistency with 202(a) requirements includes limits on the types of emission standards that may be adopted, these claims do not pertain to the third prong analysis. Rather, the consistency with section 202(a) requirement relates to the technological feasibility of California's standards as explained in this decision. Further, the Administrator has long explained that ''questions concerning the effectiveness of the available technology are also within the category outside my permissible scope of inquiry,'' under section 209(b)(1)(C). 41 FR 44209, 44210 (October 7, 1976); 47 FR 7306, 7310 (February 18, 1982) (''I am not empowered under the Act to consider the effectiveness of California's regulations, since Congress intended that California should be the judge of 'the best means to protect the health of its citizens and the public welfare.'''' (Internal citations omitted)). Finally, one commenter (AFPM at 12–13) specifically suggests that consistency with section 202(a), including section 202(a)(3)(A), means California cannot require particular technologies. However, as we explain below, section 202(a)(3)(A) does not apply to California and EPA evaluates the third waiver prong under the technological feasibility, lead time, and costs requirements in section 202(a)(2). Further, with respect to CARB's ability to set particular technology requirements, see 71 FR 78190 (December 28, 2006) and Decision Document at EPA–HQ–OAR–2004–0437–0173, at 35–46).

[206] 40 FR 213101, 23103 (May 28, 1975).

[207] EPA recognizes that CARB may make different policy choices based on the air quality and other conditions within the State, and that EPA does not play the role of second-guessing such choices. It also follows that, in response to the ACT Regulation, a manufacturer will determine which product offerings to make available in the California marketplace during the transition to and for showing compliance with the new standards. These market choices could include offering for sale a limited set of products. Given the statutory scheme, the EPA Administrator is to give very substantial deference to California's judgments. *See also International Harvester* v. *Ruckelshaus,* 478 F 2d. 615, 640 (D.C. Cir. 1979) (''We are inclined to agree with the Administrator that as long as feasible technology permits the demand for new passenger automobiles to be generally met, the basic requirements of the Act would be satisfied, even though this might occasion fewer models and a more limited choice of engine types. The driving preferences of hot rodders are not to outweigh the goal of a clean environment.'').

[208] EPA evaluates the lead time associated with CARB's regulation by examining the date of CARB's adoption of the regulation and when manufacturers are required to meet the regulation. The CARB Board adopted the ACT Regulation on June 25, 2020. EPA is guided both by the amount of lead time provided and by the principles set forth in cases such as *International Harvester* and *NRDC.* The lead time here is between the CARB Board's adoption of the ACT Regulation in June 2020 and the compliance implementation for the 2024 model year (recognizing that manufacturers may choose to certify earlier in 2023 for the 2024 model year). EPA finds no evidence in the record that manufacturers are unable to comply with CARB's requirements that commence with the 2024 model year.

[209] Formerly contained in section 202(a)(3)(B), the 1990 Amendment renumbered this section as section 202(a)(3)(C).

The commenters' argument regarding section 202(a)(3)(C) fails. That provision, which requires at least four years of lead time and three years of stability, is a companion to a specific Federal standard-setting mandate, section 202(a)(3)(A). That mandate is for EPA to promulgate certain heavy-duty standards for hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter that reflect the ''greatest degree of emission reduction achievable'' using technology that EPA determines will be available for a given model year, giving appropriate consideration to cost, energy, and safety factors associated with application of those technologies. In conjunction with this directive to set standards reflecting the ''greatest degree of emission reduction achievable,'' section 202(a)(3)(C) requires EPA to provide the four years of lead time and three years of stability for the Federal standards.

The statute is also explicit that California, by contrast, may adopt state standards that are ''in the aggregate'' at least as protective as the Federal standards—a starkly different structure than requiring each of the relevant heavy-duty standards to reflect the ''greatest degree of emission reduction achievable.'' As such, the requirement for EPA to find, in granting a waiver, that California's standards ''are not [in]consistent with'' section 202(a) cannot mean that California's standards comply with every provision of section 202(a). Further, given that California's standards are *not* subject to the ''greatest degree of emission reduction achievable'' mandate, and apply only in a limited market, it would make little sense in the statutory scheme to obligate California to comply with the companion lead time provision in section 202(a)(3)(C) to provide four years of lead time and three years of stability.

This plain text reading is well-supported by the history and purpose of the Act and is also consistent with administrative and judicial precedents. Commenters rely heavily on EPA's single cursory and contrary decision in a 1994 MDV waiver, even though by 2012 EPA had indicated that it did not believe section 202(a)(3)(C) applied to California's heavy-duty engines and vehicle standards.[210] We acknowledge that the 1994 waiver action took a different position on this issue than we do today. EPA believes that the interpretation of the ''consistency with section 202(a)'' language that EPA has historically applied—both before and after the 1994 waiver—is permissible and is the best view based on all the relevant factors. EPA's reasoning in the 1994 MDV waiver is unpersuasive, as explained below, especially because this aspect of the 1994 MDV waiver is inconsistent with both prior and subsequent agency decisions,[211] and more importantly, it is inconsistent with the plain text of the statute. EPA is therefore taking a different approach from the 1994 MDV waiver.[212] Additionally, commenters also mistakenly rely on the D.C. Circuit's opinion in *American Motors Corp.* v. *Blum,* 603 F.2d 978 (D.C. Cir. 1979) (*Blum*). *Blum* addressed a different provision of the CAA and is readily distinguishable from the instant waivers.

a. EPA's Historical Practice Is Supported by the Text, Context, and Purpose of the Statute

We begin by interpreting the text of section 209(b)(1)(C), which requires EPA to assess whether CARB's standards are ''*consistent* with section [202(a)].'' The mere fact that Congress placed a provision applicable to Federal standards in section 202(a) does not mean California must comply with it in order for its standards to be ''consistent'' with section 202(a).[213] Rather, what the ''consistent with'' provision requires must ''account for the broader context of the statute as a whole'' [214] and should be based on analysis of the text, context, purpose, and history of the relevant portions of the Act. The term ''consistent'' means ''marked by harmony, regularity, or steady continuity: free from variation or contradiction,'' ''marked by agreement,'' and ''showing steady conformity to character, profession, belief, or custom.'' [215] These definitions support the conclusion that the phrase ''consistent with section 202(a)'' does not require California's standards to comply with all sub-provisions in section 202(a), but rather calls for congruence and compatibility. Caselaw from the D.C. Circuit explaining the meaning of the phrase ''consistent with'' in other parts of the Clean Air Act also supports this understanding that the phrase does not mean lockstep correspondence.[216]

EPA thus believes that the phase ''consistent with'' does not require California's standards to strictly conform or comply with *every* provision in section 202(a). After all, that would defeat the scheme Congress set up to encourage *two* sets of standards—the Federal standards and California's standards. Congress chose the term ''consistent with'' instead of, for example, ''comply with,'' or terms connoting identicality such as ''the same as,'' or ''identical to'' in section 209(b)(1)(C).[217] The use of ''consistent with'' in section 209, rather than ''identical'' or the like, makes perfect sense because Congress established two programs for control of emissions from new motor vehicles in Title II—EPA emission standards adopted under the Act and California emission standards adopted under its state law. Motor vehicles are ''either 'federal cars' designed to meet the EPA's standards or 'California cars' designed to meet California's standards.'' [218] Thus, an interpretation that every portion of section 202(a) must be applicable to California standards would defeat Congress's plan.[219] In contrast, EPA's

[210] 77 FR 9239 (February 16, 2012).

[211] See 77 FR 9239, 9249 (2012); 46 FR 22302, 22304 (1981).

[212] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009).

[213] The D.C. Circuit has noted ''section 202's pervasive regulation of national motor vehicle emission standards'' and explained that if the entire provision were applicable to California ''[the Administrator] would be powerless to consider waiving federal preemption for California's emission standards and certification process. This lack of power would render the waiver provision and indeed, the express preemption provision mere surplusage.'' *MEMA I,* 627 F.2d at 1122.

[214] *Wisconsin* v. *EPA,* 938 F.3d 303, 316 (D.C. Cir. 2019) (''We note that we do not conclude that the phrase 'consistent with' in the Good Neighbor Provision necessarily effects an incorporation of the full contours of every provision of Title I in pure, lockstep fashion. As we have observed elsewhere in construing the same words in the context of the same statute, the phrase 'consistent with' other statutory sections 'calls for congruence or compatibility with those sections, not lock-step correspondence.'''') (Citing *Envtl. Def. Fund Inc.* v. *EPA,* 82 F.3d 451, 460 (D.C. Cir. 1996); *Nuclear Energy Institute, Inc.* v. *EPA,* 373 F.3d 1251, 1270 (D.C. Cir. 2004)).

[215] Consistent, *https://www.merriam-webster.com/dictionary/consistent* (last accessed Jan. 30, 2023).

[216] See *Wisconsin* v. *EPA,* 938 F.3d 303, 316 (D.C. Cir. 2019) (collecting authorities).

[217] EPA notes, moreover, that elsewhere in the statute Congress did use the term ''identical,'' indicating that Congress knew how to clearly express when it wanted identicality as opposed to consistency. For example, under section 177, Congress ''permitted other states to 'piggyback' onto California's standards, if the state's standards 'are *identical* to the California standards for which a waiver has been granted for such model year.''' *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 521, 525 (2d Cir. 1994) (Emphasis added); Similarly, in section 211(c)(4)(A)(ii), state fuel controls that are ''*identical*'' to controls promulgated under section 211(c)(1) are otherwise not preempted. (Emphasis added). Section 211(c)(4)(A)(ii)(Emphasis added).

[218] *Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1079–80, 1088 (D.C. Cir. 1996).

[219] For example, the requirement in section 202(a)(3)(D) for the Administrator to conduct a study for the practice of rebuilding heavy-duty engines and, on the basis on such study, consider prescribing requirements for rebuilding practices is clearly directed at EPA and not a requirement of California. It would not be a reasonable reading of

historical practice regarding ''consistent with'' is in accordance with both Congress's structure and the case law that guides how the phrase should be interpreted by ensuring that California, in setting its standards, evaluates the same factors that EPA does—*e.g.,* feasibility, lead time, and cost. EPA also ensures that enforcement mechanisms, such as test procedures, are compatible to avoid creating challenges for automakers in complying with both California and federal standards.[220] For example, EPA has considered California's classification scheme for heavy-duty vehicles as consistent with section 202(a), even though it is not identical to the federal classification.[221] This understanding of ''consistent with'' is supported by case law, such as *MEMA II:* ''Section 209(b)(1) makes clear that section 202(a) does not require, through its cross-referencing, consistency with each federal requirement in the act. . . . California's consistency [with section 202(a)] is to be evaluated 'in the aggregate,' rather than on a one-to-one basis. CAA section 209(b)(1).'' [222] In sum, section 209(b)(1)(C) does not require California to conform identically to every provision of section 202(a).

Having established that California's standards do not need to be identical to or meet all of the requirements set out in section 202(a) for Federal standards, we now turn to the question whether California's standards must comply with section 202(a)(3)(C)'s requirements to be ''consistent'' with section 202(a). To answer this question, EPA further examines the statute's text and purpose. Based on the plain language, statutory context and legislative history, we conclude that the best view is that compliance with section 202(a)(3)(C) is not necessary for consistency. In particular, section 202(a)(3)(C) is a companion lead time provision that applies to Federal standard-setting under section 202(a)(3)(A) and is therefore not relevant to California's program.

In general, section 202(a)(3), which was first added in the 1977 Amendments, reflected congressional frustration at EPA's slow pace of regulating emissions from heavy-duty vehicles and engines and was thus a direct command to EPA.[223] By its terms, section 202(a)(3)(A)(i) directs EPA to establish standards for hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter emissions from heavy-duty vehicles and engines that ''reflect the greatest degree of emission reduction achievable.'' [224] Section 202(a)(3)(C) in turn requires that such stringent standards (''those promulgated . . . under this paragraph,'' section 202(a)(3)(C)) have at least four years of lead time and apply for no less than three model years.[225] Congress intended the fixed lead time and stability provisions of section 202(a)(3)(C) as a companion to the requirement in section 202(a)(3)(A) to promulgate national standards which ''reflect the greatest degree of emission reduction achievable,'' balancing the mandate for the most stringent possible standards with granting regulated manufacturers a minimum amount of lead time and considering costs and other factors.[226] Congress chose these prescribed lead time and stability requirements because of industry concerns over the level of stringency expected of EPA's national standards. According to the D.C. Circuit ''[t]hat requirement was enacted for the benefit of manufacturers to allow time for them to design and develop engines in compliance with newly promulgated standards.'' [227] Both the four-year lead time and the three-year stability time frames thus provide assurance to the heavy-duty industry of a minimum amount of lead time and stability to meet EPA's national standards considering the mandate to EPA to promulgate standards which reflect the greatest degree of emission reduction achievable under in section 202(a)(3)(A).[228] (''It seems that Congress intended the EPA in promulgating standards with an adequate lead period to engage in reasonable predictions and projections in order to force technology.'').[229]

Several factors indicate that section 202(a)(3)(C) is a companion provision to section 202(a)(3)(A). As a general matter, the level of stringency of a standard and its accompanying lead time are intertwined. Notably, a standard does not act in isolation, but rather goes into effect after a certain amount of lead time and in a particular model year (*e.g.,* a 1 gram/mile standard effective beginning model year 2027). The feasibility of a standard, including the availability of technology and its costs, also depends on the lead time provided. Further, the actual impact of a standard, whether on regulated entities or its protectiveness of public

section 209(b)(1)(C) to require California to complete an identical study in order to be ''consistent with'' section 202(a).

[220] 42 FR 2337, 2338 (January 11, 1977).

[221] *Id.* (A medium duty vehicle is defined by the CARB as a subset of the heavy-duty vehicle class, and is any motor vehicle (except a passenger car) with a gross vehicle weight rating (GVWR) of between 6000 and 8500 pounds).); See also, 43 FR 1829, n.2, 1830, n.9 (January 12, 1978); CARB Waiver Request at 3 n.6; 78 FR 2114 n.9 (Medium-duty vehicles (MDVs) are vehicles in California's regulations between 8,500 and 114,000 lbs GVWR that are also called Class 2b/Class 3 vehicles. These vehicles are generally termed heavy-duty vehicles under EPA's regulation).

[222] *MEMA II,* 143 F.3d 449, 463–64.

[223] *NRDC* v. *Thomas,* 805 F.2d 410 (D.C. Cir. 1986) (for the history and treatment of the 1977 Amendments for heavy-duty vehicles and engines particulate matter, oxides of nitrogen, carbon monoxide and hydrocarbons standards). Acting under the 1977 Amendments, EPA first promulgated heavy-duty vehicle and engines standards on May 15, 1985 (50 FR 10606) but by that time California had been granted waivers for heavy-duty vehicles and engines standards (*See for example,* 34 FR 7348 (May 6, 1969); 36 FR 8172 (April 30, 1971); 40 FR 23102 (May 28, 1975); Section 202(a)(3)(A)(iii) was originally contained in the 1977 Senate bill ''applicable to emissions of carbon monoxide, hydrocarbons, particulates, and oxides of nitrogen from heavy duty trucks, buses, and motorcycles and engines thereof.'' S. Rep. No. 252, 95th Cong., 1st Sess. at 19 (1977). *See* S. Rep. No.127, 95th Cong., 1st Sess. 193 (1977), reprinted in 3 Legislative History 1567. The 1977 Amendments added section 202(a)(3) directing EPA to set heavy-duty vehicle emission standards for certain emissions for the 1983 model year and later. (Congress having identified a need for standards in 1970 ''had become impatient with the EPA's failure to promulgate a particulate standard'' for heavy duty vehicles.'' *NRDC,* 655 F.2d at 325 (citing S. Rep. No.127, 95th Cong., 1st Sess. 67 (1977), reprinted in 3 Legislative History 1441). This language appears in the same legislative history where Congress expressed approval for EPA's implementation of the waiver provision over the past decade and expanded California's discretion to adopt standards that were intended to address the state's severe air quality issues.

[224] *NRDC* v. *Thomas,* 805 F.2d at 414–16.

[225] Formerly contained in section 202(a)(3)(B), the 1990 Amendments renumbered this section as section 202(a)(3)(C) and slightly modified its terms while still retaining the four-year lead time and three-year stability requirement and extending this lead time to standards promulgated by EPA for the control of NO_X emissions from heavy-duty vehicles and engines. (''Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.'' Section 202(a)(3)(C)).

[226] *NRDC* v. *Thomas,* 805 F.2d 420–23 (Rejecting argument that the terms ''maximum'' and ''greatest'' before the phrase ''degree of emission reduction'' meant that EPA must set standards at the performance level of the best vehicle or engine and upholding instead EPA's consideration and balancing of all relevant factors in setting applicable standards.).

[227] EPA ''cannot cite us to any precedent allowing a court to ignore an explicit leadtime requirement.'' *NRDC* v. *Thomas,* 805 F.2d at 435 (Reversing EPA's decision to provide less than the statutorily mandated four-year lead time for certain model year heavy-duty vehicles and engines standards.). See also, 805 F.2d 435 n.40.

[228] ''[I]n adding section 202(a)(3)(A)(iii) . . . Congress directed the EPA to give priority to establishing particulate emission standards for heavy-duty vehicles and left the agency free to exercise its power under section 202(a)(1) to regulate light-duty automobiles, whether diesel-powered or otherwise.'' *NRDC.,* at 326; H.R. Conf. Rep. No. 294, 95th Cong., 1st Sess. 542–43 (1977) (''Additional revisions of up to 3 years each could be granted at three-year intervals thereafter;'' and Congress ''provides four years lead time before temporary or permanent revision of any statutory standard.'').

[229] *NRDC* v. *Thomas,* 805 F.2d at 430.

health and the environment, depends on the lead time provided.

The context of the statute also evinces the link between sections 202(a)(3)(A) and (C). EPA's general authority to establish motor vehicle standards is found in section 202(a)(1), which authorizes the Administrator to prescribe emission standards for motor vehicles upon making an endangerment finding but does not specify the stringency of the standard (*i.e.,* there is no requirement to promulgate standards that reflect the greatest degree of emission reduction achievable).[230] Section 202(a)(1) in turn is accompanied by the general lead time provision in section 202(a)(2), which does not set any fixed lead time but rather allows the Administrator to determine the lead time ''necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.'' By contrast, in enacting section 202(a)(3), Congress was more prescriptive in both the appropriate level of stringency and lead time, requiring both standards that reflect the greatest degree of emission reduction achievable for specific pollutants emitted from heavy-duty vehicles and at least four-year lead time. This contextual contrast between sections 202(a)(1)–(2) and 202(a)(3) further demonstrates the close link between the standard-setting provision in section 202(a)(3)(A) and the lead time provision in section 202(a)(3)(C). That is, Congress departed from EPA's general authority to set motor vehicle emission standards in sections 202(a)(1)–(2) in two respects by making a very specific legislative compromise in 202(a)(3): (1) By forcing stringent standards that reflect the greatest degree of emission reduction achievable, while (2) also expecting that such standards may be sufficiently difficult to achieve such that manufacturers would be entitled to a minimum of four years of lead time and three years of stability.[231] Legislative history supports this connection.[232] Opponents of the waiver, however, contend that California's standards must ''reflect the greatest degree of emission reduction achievable'' required for Federal standards in 202(a)(3)(A) and meet the companion lead time and stability requirements in section 202(a)(3)(C).

Congress' direction to EPA in sections 202(a)(3)(A) and (C) stands in stark contrast to its approach to California's standards. EPA's practice of providing a highly deferential review of California's standards in waiver proceedings was already well established by 1977, and Congress recognized and approved of this practice.[233] And in the very same 1977 Amendments, Congress instructed California to consider the protectiveness of its standards ''in the aggregate,'' rather than requiring each California standard being as or more stringent than its Federal counterpart.[234] Congress explicitly recognized that California's mix of standards could ''include some less stringent than the corresponding federal standards.''[235] ''[T]here is no question that Congress deliberately chose in 1977 to expand the waiver provision so that California could enforce emission control standards which it determined to be in its own best interest even if those standards were in some respects less stringent than comparable federal ones.''[236] The four-year lead time and three-year stability requirement for heavy-duty engines and vehicles standards contained in section 202(a)(3)(C) should thus be properly viewed as applying to EPA's standard-setting authority under section 202(a)(3)(A), and not California's authority as applied under the waiver provisions. To give proper effect to the ''in the aggregate'' language in section 209(b)(1), and for California to retain its ability to set more stringent standards for some pollutants and less stringent for others, California is not explicitly required, nor should it be implicitly required by the cross-reference to section 202(a), to set heavy-duty vehicle emission standards that ''reflect the greatest degree of emission reduction.'' In other words, the legislative compromise that Congress established in 202(a)(3) for Federal standard-setting—between standards that reflect the greatest degree of emission reduction achievable and at least four years of lead time and three years of stability—does not make sense in the California context: since California can establish differing (and sometimes less stringent) standards than what is required by 202(a)(3)(A), it also follows that it may prescribe differing lead time and stability requirements than what is required by 202(a)(3)(C))—provided those requirements are ''consistent with'' EPA's general approach to addressing feasibility, lead time, and cost pursuant to section 202(a)(2). The 1977 Amendment to section 209(b)(1) thus also supports the view that California's standards should be reviewed under the traditional feasibility test of section 202(a), and that California need only provide lead time it deems sufficient based on its analysis of technology feasibility and cost for standards at issue, and that EPA reviews California's determinations.

As previously noted, the 1977 Amendments removed the stringency requirements for California standards

[230] And ''[w]hile section 209(b) requires consideration of whether the adoption of standards by California is consistent with section 202(a), nevertheless [the Administrator's] discretion in determining whether to deny the waiver is considerably narrower than [his] discretion to act or not to act in the context promulgating Federal standards under section 202(a). . . . [The Administrator] would therefore feel compelled to approve a California approach to the regulation of . . . emissions which [he] might choose not to adopt at the Federal level.'' 41 FR 44210.

[231] *NRDC* v. *Thomas,* 805 F.2d at 421–24, 430, 435. EPA acknowledges that the lead time requirements in 202(a)(3)(C) apply to ''any standard promulgated or revised under this paragraph'' and that paragraph (3) also includes other standard-setting provisions. We view these additional provisions as further support for the main argument in the text: the lead time requirements in 202(a)(3)(C) accompany specific Federal standard-setting requirements and do not act in isolation. Thus, those lead time requirements were not intended to apply to all Federal standards for heavy-duty vehicles or engines, much less to apply to California standards. See *infra* footnote 250. Instead, they apply only to standards ''promulgated or revised under this paragraph.''

[232] H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 542–43 (1977) (The conference agreement provides four years lead time before temporary or permanent revision of any statutory standard and requires the Administrator to promulgate particulate standards based on criteria set forth in the House interim standards provision. These standards are to become effective as expeditiously as practicable taking into account the lead time necessary to comply, but in no event later than 1981 model year.). This legislative history from the Conference Report indicates that section 202(a)(3)(C) provides lead time and stability requirements for standards promulgated under section 202(a)(3)(A).

[233] In the 1977 Amendments to section 209(b)(1), Congress also approved EPA's interpretation of the waiver provision as providing appropriate deference to California's policy goals and consistent with Congress's intent ''to permit California to proceed with its own regulatory program'' for new motor vehicle emissions. H.R. Rep. No. 95–294, at 301 (1977); *MEMA I,* 627 F.2d at 1120–21 (''The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.''); *Id.* at 1110 (''The Committee amendment is intended *to ratify and strengthen* the California waiver provision and to affirm the underlying intent of that provision, *i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.*'' *Citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 30102 (1977), U.S. Code Cong. Admin. News 1977, p. 1380 (emphasis in original).'')

[234] ''Congress decided in 1977 to allow California to promulgate individual standards that are not as stringent as comparable federal standards, as long as the standards are 'in the aggregate, at least as protective of public health and welfare as applicable federal standards.'' *Ford Motor,* 606 F.2d 1293, 1302 (DC Cir. 1979) (''[T]he 1977 amendments significantly altered the California waiver provision.'').

[235] H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977).

[236] *MEMA I,* 627 F.2d at 1110.

under review and now allows for granting waivers if standards are ''in the aggregate'' as protective of health as federal standards in section 209(b)(1). This amendment reflected California's wish to ''trade off'' controlling carbon monoxide emissions, which were not as critical of a problem in California, for NO_X emissions, which were and continue to present severe air quality challenges in California.[237] Therefore, California's carbon monoxide standards can now be less stringent than federal standards.[238] Recognizing that both carbon monoxide and NO_X are also listed in section 203(a)(3)(C), and then reading this section as applicable to California's heavy-duty vehicles standards, however, would entirely undermine the purpose of the 1977 Amendments. Under such a reading, if California identified a need to relax an existing carbon monoxide standard to enable a much more stringent NO_X standard, based on the interactions between the control technologies involved, it would be precluded from doing so because the carbon monoxide standard would not meet the ''greatest degree of emission reduction'' requirement. This result is in direct conflict with Congress amending section 209(b)(1) to enable California to do precisely that, with precisely those pollutants.[239] As such, it is not a reasonable reading of the statute.

Moreover, the D.C. Circuit has held that not all the 1977 amendments to the Clean Air Act apply in the waiver context. In *MEMA I,* for instance, the Court held that section 302 was inapplicable to section 209 because ''[s]ection 302(k)'s definition [of standards] was not enacted until ten years after the original waiver provision, and it was developed in the context of regulating emissions from stationary sources.'' [240] Similarly, Congress developed section 202(a)(3) in the context of the nationwide regulation of emissions from heavy-duty engines and vehicles by EPA, a decade after enactment of the original waiver provision and also after California had been regulating heavy-duty engine emissions with the appropriate waivers that EPA granted applying the traditional consistency test.[241] In amending section 202(a) to ensure more effective Federal regulation of certain heavy-duty vehicle emissions, Congress gave no indication that it had any intention of upending the application of the traditional consistency test to California standards.

Further, as far back as 1967 Congress in enacting section 209(b) recognized that emissions technology would be introduced and tested first in California before nationwide introduction and use.[242] According to the D.C. Circuit: ''The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding Federal program; in short, to act as a kind of laboratory for innovation.'' [243] EPA has thus also long recognized Congressional intention that California ''pioneer'' emissions control.[244] EPA's view is supported by legislative history. Congress recognized California's severe air quality problems and envisioned California's role as an innovative laboratory for motor vehicle emission standards and control technology. California's ''unique [air pollution] problems and [its] pioneering efforts justif[ied] a waiver of the preemption section;'' California ''should serve the Nation as a 'testing area' for more protective standards.'' [245] Similarly, California is to ''blaze its own trail with a minimum of federal oversight.'' [246] EPA has thus ''[h]istorically granted waivers allowing the introduction of new technology in California prior to its introduction nationwide'' intending for the phase-in of new control technology in California as a means of successful implementation nationwide.[247] The Administrator has explained that allowing California to first introduce technology ''best serves the total public interest and the mandate of the statute. It promotes continued momentum toward installation of control systems meeting the statutory standards while minimizing risks incident to national introduction of new technology.'' [248] Applying fixed lead time and stability requirements to the California heavy-duty vehicle program would thwart California's ability to serve as a laboratory of vehicle emission reduction technologies and delay the transfer of

[237] 58 FR 4166, LEV Waiver Decision Document at 50–51.

[238] *MEMA II,* 142 F.3d at 464 (''EPA has observed, 'California would not be denied a waiver if its CO standard were slightly higher than the federal . . . standard. . . . This is despite the fact that section 202(g) contains specific standards for CO that EPA must promulgate.' EPA Air Docket A–90–28, Doc. No. V–B–1 at 47.'').

[239] *MEMA II,* 142 F.3d at 464 (''California would not be denied a waiver if its CO standard were slightly higher than the federal . . . standard. . . . This is despite the fact that section 202(g) contains specific standards for CO that EPA must promulgate.''); *MEMA I,* 627 F.2d at 1110 n.32 (explaining the specific intent of Congress to allow California carbon monoxide standards to be less stringent than federal carbon monoxide standards).

[240] *MEMA I,* 627 F.2d 1095, 1112 n.35 (DC Cir. 1979) (''For this reason we find unpersuasive petitioners' suggestion that section 302(k) of the Clean Air Act, 42 U.S.C. 7602(k) (Supp. I 1977), which contains a definition of ''emission standards,'' controls our examination of the meaning of the word ''standards'' in section 209); *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 521, 533 (2d Cir. 1994).

[241] ''The 1977 Amendment also drew heavily on the California experience in the ten years since enactment of the first waiver provision. *See* 123 Cong. Rec. H4852 (daily ed. May 21, 1977); *id.* at H5061 (daily ed. May 25, 1977).'' *MEMA* I, 627 F. 2d. 1095, 1111 n.34; *For example,* EPA granted a waiver for 1972 and later heavy-duty vehicles gasoline standards to California on May 6, 1969 (34 FR 7348). In turn, EPA first promulgated heavy-duty vehicle and engine standards pursuant to the 1977 Amendments in 1985. 50 FR 10606 (May 15, 1985).

[242] S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (The waiver of preemption is for California's ''unique problems and pioneering efforts.''); 113 Cong. Rec. 30950, 32478 (''[T]he State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.'') (Statement of Sen. Murphy); *MEMA I,* 627 F.2d 1095, 1111 (DC Cir. 1979).

[243] *MEMA I,* 627 F.2d 1095, 1110.

[244] 38 FR 10317, 10324 (April 26, 1973). There is a general pattern that emission control technology have been phased in through use in California before their use nationwide. This pattern grew out of early recognition that auto caused air pollution problems are unusually serious in California. In response to the need to control auto pollution, California led the nation in development of regulations to require control of emissions. This unique leadership was recognized by Congress in enacting Federal air pollution legislation both in 1967 and 1970 by providing a special provision to permit California to continue to impose more stringent emission control requirements than applicable to the rest of the nation. In 1973 for example, the Administrator granted a waiver to California that would force the use of emissions catalyst while setting national standards that would not call for such technology. The Administrator explained that ''[i]f the new technology is largely restricted to California vehicles in 1975, it is the testimony of both General Motors and Ford that all the processes needed to mass produce catalyst cars can be tested out on a limited scale that makes tighter quality control possible and allows extra energy to be applied to the cure of any problems that may arise [ ]. Both companies also stated that they would be able to focus their energies to deal more effectively with such in use failures as did occur if the first introduction of catalysts were in a limited geographical area [ ].'' Notably, the Administrator was acting under a somewhat analogous provision to section 202(a)(3)(A)(ii) by calling for standards that ''reflect the greatest degree of emissions control which is achievable by application of technology which the Administrator determines is available giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers.'' Section 202(b)(5)(C).

[245] S. Rep. No. 90–403, at 33 (1967); 113 Cong. Rec. 30950, 32478 (''[T]he State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.'') (Statement of Sen. Murphy); *MEMA I,* 627 F.2d 1095, 1111 (D.C. Cir. 1979).

[246] *Ford Motor Co.,* v. *EPA,* 606 F.2d 1293, 1297 (D.C. Cir. 1979).

[247] 49 FR 18887, 18894 (May 3, 1984).

[248] 38 FR 10317, 10319 (April 26, 1973).

those innovations to the country as a whole under federal standards. Given Congress's desire for California to serve as a laboratory for innovation, the traditional feasibility inquiry under section 209(b)(1)(C) suffices to ensure that manufacturers have sufficient time to deploy technologies to comply within the California market while allowing California to move faster in deploying feasible technologies than the fixed lead time and stability requirements would allow.

Additional statutory text and context further supports our historical view. A plain reading of ''under this paragraph'' in section 202(a)(3)(C) means *under paragraph 3.*[249] Paragraph 3 grants EPA the authority to: (1) Establish heavy-duty engine and vehicles standards for four listed pollutants in 202(a)(3)(A)(i), (2) classify or categorize heavy-duty vehicles and engines in 202(a)(3)(A)(ii); (3) revise earlier promulgated heavy-duty standards in 202(a)(3)(B); and (4) establish standards for motorcycles in 202(a)(3)(E).[250] EPA has thus long read and applied in its regulatory practice ''under this paragraph'' in section 202(a)(3)(C) as meaning *under paragraph 3, i.e.,* section 202(a)(3).[251] In other words, the lead time and stability requirements apply to, and only to, certain regulations authorized under paragraph 3. EPA has thus also long read section 202(a)(3)(C) as the authority to provide the specified lead time and stability requirements for heavy-duty vehicle and engine emissions standards that are promulgated ''under this paragraph''—under paragraph 3 (''That requirement was enacted for the benefit of manufacturers to allow time for them to design and develop engines in compliance with newly promulgated standards.'').[252] Specifically, this language applies when EPA promulgates heavy-duty vehicle and engine emissions standards for the listed pollutants: hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter emissions from heavy-duty vehicles, under section 202(a)(3).[253] The 1994 MDV decision that commenters rely on also acknowledged this reading of section 202(a)(3)(C) at the time. By contrast, California's standards are *not* promulgated under section 202(a)(3); as a general matter, California adopts standards for which it seeks a waiver as a matter of law under its police powers.[254]

Additional reasons justify not applying 202(a)(3)(C) to the 2018 HD Warranty Amendments. Specifically, it has been EPA's long-standing view that section 207, which requires manufacturers to provide an emissions warranty for heavy-duty engines, is the grant of authority to EPA to promulgate heavy-duty vehicles emissions warranty requirements.[255] Accordingly, section 202(a)(3) is inapplicable to Federal warranty requirements, and it would not be reasonable to give it force in California's warranty requirements. Notably, the D.C. Circuit has agreed, holding that ''California is not required to comply with section 207 to get a waiver.[256] Further, EPA has also long considered CARB's warranty amendments as not standards themselves, but rather accompanying enforcement procedures because they constitute criteria designed to better ensure compliance with applicable standards and are accordingly relevant to a manufacturer's ability to produce vehicles and engines that comply with applicable standards.[257] And while ''section 209(b) refers to accompanying procedures only in the context of

[249] In deciding to grant these waiver requests, EPA is relying on its legal interpretation of the statute as explained in this notice. In each case, EPA believes that its interpretation is the best interpretation of the statute, regardless of judicial deference. *Guedes* v. *ATF,* 45 F.4th 306, 313 (D.C. Cir. 2022). Moreover, to the extent the statute is ambiguous, EPA's interpretation is reasonable and entitled to deference. *Washington All. of Tech. Workers* v. *DHS,* 50 F.4th 164, 192 (D.C. Cir. 2022).

[250] One commenter also mistakenly suggests that 202(a)(3)(B) may also apply to California. EMA Supp. Comment at 6. To begin with, the commenter's argument is internally inconsistent. Compare id. at 6, with id. at 4 (''certain provisions in section 202(a)(3) are not directly relevant to CARB—for example, because they authorize EPA to revise standards (*i.e.,* section 202(a)(3)(B))''). Underscoring the point, there are other obligations imposed on EPA by section 202(a) that are not imposed on California. For example, the requirements involving motorcycles under section 202(a)(3)(E) do not apply to California, (EPA has issued waivers for California's motorcycle standards that include 42 FR 1503 (January 7, 1977); 41 FR 44209 (October 7, 1976); 43 FR 998 (January 5, 1978)), neither does the consultation requirement under section 202(a)(5)(A), nor do certain requirements of section 202(a)(6) addressing onboard vapor recovery. Moreover, applying section 202(a)(3)(B) to California would, as with applying section 202(a)(3)(A), create a conflict with section 209(b). Section 209(b)'s ''in the aggregate'' language allows California to adopt any standards so long as they are in the aggregate more protective than the federal standards; California is not limited to the fixed numerical NOx standards found in section 202(a)(3)(B)(ii), or to revising standards based on certain air quality information as provided by 202(a)(3)(B)(i). Further, section 202(a)(3)(B)(i) grants the Administrator discretion to revise certain heavy-duty standards that the Administrator previously ''promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph).'' This provision is closely linked with section 202(a)(3)(A). That is, notwithstanding the mandate in section 202(a)(3)(A) for EPA to promulgate heavy-duty standards for the four listed pollutants that reflect the greatest emissions reductions achievable, section 202(a)(3)(B)(ii) allows EPA to revise such standards based on certain air quality information. See section 202(a)(3)(A)(i) (including the proviso ''unless the standard is changed as provided in subparagraph (B)''). As explained above, section 202(a)(3)(A) does not apply to California, and thus section 202(a)(3)(B)(ii) does not either. Separately, section 202(a)(3)(B)(ii) also does not apply to California because California is not revising standards previously promulgated under the CAA, whether ''under, or before the date of, the enactment of'' the 1990 CAA Amendments. Finally, to the extent the commenter is specifically concerned with greenhouse gas aspects of California's regulations, EPA notes that in the federal standard-setting context, the agency has promulgated heavy-duty GHG standards under its general standard-setting authority in section 202(a)(1)–(2) and does not apply the four-year lead time and three-year stability requirements in section 202(a)(3)(C) in such heavy-duty GHG rulemakings. See 87 FR 17436–37 & n.26 (Mar. 28, 2022) (''Section 202(a)(3)(A) and (C) . . . do not apply to regulations applicable to GHGs.''); 81 FR 73512 (Oct. 25, 2016); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles EPA Response to Comments Document for Joint Rulemaking 5–34 to 5–36 (Aug. 2011).

[251] ''[I]n adding section 202(a)(3)(A)(iii) . . . Congress directed the EPA to give priority to establishing particulate emission standards for heavy-duty vehicles, and left the agency free to exercise its power under section 202(a)(1) to regulate light-duty automobiles, whether diesel-powered or otherwise.'' *NRDC* v. *EPA,* 655 F.2d 318, 326 (D.C. Cir. 1981); *See, e.g.,* EPA's statutory authority requires a four-year lead time for any heavy-duty engine or vehicle standard promulgated or revised under CAA section 202(a)(3). *See also* 81 FR 95982 (December 29, 2016); 79 FR 46256 (August 7, 2014); 77 FR 73459 (December 10, 2012); 73 FR 52042 (September 8, 2008).

[252] EPA ''cannot cite us to any precedent allowing a court to ignore an explicit leadtime requirement.'' *NRDC* v. *Thomas,* 805 F.2d at 435. *See also,* 805 F.2d 435, n.40.

[253] *NRDC* v. *Thomas,* 805 F.2d at 414–16, 435 (reversing EPA decision to provide less than the statutorily mandated four-year lead time for certain model year heavy-duty vehicles and engines standards.); 805 F.2d 435 n.40; *See also, e.g.,* 87 FR 17414, 17420 n.26 (March 28, 2022) (''Section 202(a)(3)(A) and (C) apply only to regulations applicable to emissions of these four pollutants.''); 87 FR 17435–36. EPA's statutory authority requires a four-year lead time for any heavy-duty engine or vehicle standard promulgated or revised under CAA section 202(a)(3).

[254] *Central Valley Chrysler-Jeep, Inc.* v. *Goldstene,* 529 F.Supp.2d 1151, 1174 (''The waiver provision of the Clean Air Act recognizes that California has exercised its police power to regulate pollution emissions from motor vehicles since before March 30, 1966; a date that predates . . . the Clean Air Act.'').

[255] *Auto. Parts Rebuilders Ass'n* v. *EPA,* 720 F.2d 142, 149 (D.C. Cir. 1983) (Section 207 ''commands that the Administrator 'shall prescribe regulations which shall require manufacturers to warrant [their cars].' '' (Alteration in original)). *See* Decision Document for the Notice of Scope of Preemption for California's amendments to warranty regulations pertaining to 1983 and later model year passenger cars, light-duty vehicles, medium- and heavy-duty vehicles and motorcycles, V–B–1, at 65, n.132 and 66–67; 51 FR 12391 (Apr. 10, 1986).

[256] *MEMA II,* 142 F.3d at 466–67.

[257] *MEMA I* at 1111–13; Decision Document accompanying 51 FR 12391 (April 10, 1986), at 3; 43 FR 32182, 32184 (July 25, 1978). EPA sets emissions warranty period under section 207(a) and not section 202(a). *See, e.g.,* 48 FR 52170 (November 16, 1983).

consistency with section 202(a),'' EPA has long reviewed the accompanying procedures under the traditional consistency test.[258] In any event, the 2018 HD Warranty Amendments would not be properly considered emission standards for the listed pollutants that would come within the purview of section 202(a)(3)(C).

Further, section 202(a)(3)(C) by its terms applies to onroad heavy-duty vehicles and engines, not to nonroad vehicles or engines.[259] Considering the nearly identical language in both sections 209(b) and 209(e)(2)(A), EPA has reviewed California's requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).[260] Under the third authorization criterion, EPA historically has interpreted the consistency inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(b)(1)(C), and section 209(e)(1) of the Act. And, in evaluating consistency with section 209(b)(1)(C), for purposes of consistency with section 202(a) EPA has applied the traditional feasibility test where the inquiry is solely whether California standards are feasible within the lead time provided.[261] EPA has thus never applied section 202(a)(3)(C) to authorizations for nonroad engines and vehicles, explaining for instance that ''section [202(a)(3)(C)] by its own terms applies only to standards applicable to emissions from new heavy-duty on-highway motor vehicle engines, not the nonroad engines being regulated by California.'' [262]

Considering the 1977 Amendments and subsequent ones, Congress could have explicitly provided that the four-year lead time and three-year stability requirements in section 202(a)(3)(C) apply to California heavy-duty standards, had that been Congress's intent. For example, Congress could have changed the text of section 209(b)(1)(C) to say, ''compliant with'' rather than ''consistent with.'' It did not. Further demonstrating the point, in section 202(m)(2) regarding certain standards that were determined infeasible by EPA, Congress set out a specific delayed lead time requirement that is ''consistent with corresponding regulations or policies adopted by the California Air Resources Board.'' [263] Similarly, in section 428 of the 2004 Consolidated Appropriations Act Congress required that EPA specifically address safety implications of any California standard for certain engines prior to granting authorizations under section 209(e).[264] Section 202(a)(3)(C), however, is devoid of either any explicit language or exception that would be read as a reference to California's heavy-duty standards.[265] A provision that would require the Administrator to preclude California from revising the state's heavy-duty standards for a minimum of three model years would appear to be an important enough limitation for Congress to explicitly set out in either section 202 or 209 especially if Congress intended California to be the judge of the ''best means to protect the health of its citizens and the public welfare.'' [266] EPA thus believes more explicit Congressional directive is needed prior to precluding California from revising standards for heavy-duty vehicles and engines that are to be sold in that state.[267]

In any event, except for the 1994 MDV waiver, since the 1977 Amendments EPA has granted heavy-duty engine and vehicle waivers where California has provided less than four years of lead time from adoption of its regulations and three years stability also under the traditional consistency test.[268] Congress did not add anything to section 202(a)(3) during the 1990 amendments to the Clean Air Act to indicate its applicability to California.[269] And, in

[258] *MEMA I,* 627 F.2d at 1111–12.

[259] Section 202 of the CAA pertains to new motor vehicles or new motor vehicle engines, and motor vehicles and engines is further defined in section 216 of the CAA. Section 216 also provides the definition of nonroad engine and nonroad vehicle and provides that nonroad engines are not subject to standards promulgated under section 202 of the CAA.

[260] *See Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1087 (D.C. Cir. 1996) (''. . . EPA was within the bounds of permissible construction in analogizing section 209(e) on nonroad sources to section 209(a) on motor vehicles.'').

[261] On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2)(A), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards. 59 FR 36969 (July 20, 1994). EPA revised these regulations in 1997. These regulations were further slightly modified and moved to 40 CFR part 1074, *See* 73 FR 53979 (Oct. 8, 2008). As stated in the preamble to the 1994 rule, EPA has historically interpreted the section 209(e)(2)(A)(iii) ''consistency'' inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers). In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation.

[262] See, for example, 77 FR 9249, n.73.

[263] ''The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles *if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.*'' Section 202(m)(2) (Emphasis added). By the time of this amendment California had been regulating heavy-duty vehicle and engine emissions with the appropriate waivers that EPA granted applying the traditional consistency test. *See, e.g.,* 34 FR 7348 (May 6, 1969) (HD gasoline MY 72 and later); 36 FR 8172 (April 30, 1971) (HD diesel MY 72 and later MY); 40 FR 23102, 23105 (May 28, 1975) (extending waiver of April 30, 1971, to MY 1975 HD standards).

[264] Codified at 40 CFR 1074.105(c). ''In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.''

[265] In contrast, for example, under section 246(f)(4), which sets out a State Implementation Plan provision regarding fleet programs required for certain non-attainment areas, ''standards established by the Administrator under this paragraph . . . shall conform as closely as possible to standards which are established for the State of California for ULEV and ZEV vehicles in the same class.'' And ''[f]*or vehicles of 8,500 lbs. GVWR or more, the Administrator shall promulgate comparable standards for purposes of this subsection.*'' Section 246(f)(4) (Emphasis added).

[266] H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301–302 (1977).

[267] Moreover, in 1977, the congressional record indicates that at least one heavy-duty vehicle and engine manufacturer requested that Congress amend section 209(b) by limiting this waiver provision to only light-duty vehicles and engines. According to the engine manufacturer, California's heavy-duty vehicle standards would be on par with federal standards by 1983. Hearing on S. 251, 252 and 253 Before Subcomm. On Env't Protection, H.R. Rep. No. 95–294, 95th Cong. 1st Sess. 4221–23 (1977). There was no concurrent testimony from a member of Congress in 1977 or 1990 regarding the intent of section 202(a)(3) and certainly nothing to indicate that it would apply to California. While there was general testimony from a member of industry during the 1990 process, there is no evidence in the record suggesting the applicability of 202(a)(3)(C) to California. Hearing on S.1630 Before Subcomm. on Env't Protection, 101st Cong. 312–13 (1989). In any event, ''The 1977 Amendment also drew heavily on the California experience in the ten years since enactment of the first waiver provision. *See* 123 Cong. Rec. H4852 (daily ed. May 21, 1977); *id.* at H5061 (daily ed. May 25, 1977).'' *MEMA I,* 627 F. 2d. 1095, 1111 n.34.

[268] *For example,* 34 FR 7348 (May 6, 1969 (HD gasoline MY 1972 and later); 36 FR 8172 (April 30, 1971) (HD diesel MY 1972 and later MY); 43 FR 1829 (January 12, 1978); 49 FR 18887 (May 3, 1984).

[269] The 1990 Amendments did extend the four-year lead time and three-year stability to standards

Continued

2012, EPA specifically rejected commenters assertions that section 202(a)(3)(C) applied to California, stating that EPA's lead time inquiry relates to technological feasibility and that there is no additional requirement imposed by the section 209 criteria.[270]

Turning to section 209(b), in section 209(b)(1) Congress directed that EPA ''shall'' grant waivers absent one of the three limited bases for a waiver denial.[271] Section 209(b)(1) ''contains an imperative to do an act—grant the waiver after a hearing—once California has made the protectiveness determination.'' [272] Congress did not amend section 209(b)(1)(C) in the 1977 Amendments, rather the ''more stringent'' standard required for California standards and contained in section 209(b)(1) in the 1967 Act was superseded by amendments to section 209, which established that California's standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. Specifically, under section 209(b)(1), California is now required to make a protectiveness finding ''in the aggregate'' for each waiver request by looking at the summation of the standards within its vehicle program. The protectiveness finding does not call for identicality of the standards under review with Federal standards. Instead, the 1977 Amendments to section 209(b)(1), which reflected California's preference to ''trade off'' emissions of carbon monoxide, which was not as critical a problem in California, for NO_X emissions, which were and continue to present severe air quality challenges in California.[273] With this amendment, California was no longer required to design a program where each standard was equally or more stringent than the applicable Federal standards, but rather can prioritize the emission reductions it views as most important for its citizens and to regulate certain pollutants less stringently than the Federal government, as long as the state program standards are in the aggregate at least as protective as the Federal standards.[274] CARB may now design motor vehicle emission standards that are not as stringent as Federal standards but when considered collectively with other standards would be best suited to address California air quality problems, as long as the in the aggregate, the protectiveness finding is made and it is not arbitrary and capricious.[275] ''[T]here is no question that Congress deliberately chose in 1977 to expand the waiver provision so that California could enforce emission control standards which it determined to be in its own best interest even if those standards were in some respects less stringent than comparable federal ones.'' [276]

It is also this protectiveness determination by California, under section 209(b)(1) that determines EPA's scope of review for consistency under section 209(b)(1)(C).[277] EPA has reasoned that this is appropriate because the phrase ''in the aggregate,'' which as earlier explained is California's whole program precedes ''such state standards,'' which is the relevant language in section 209(b)(1)(C).[278] EPA has thus long read both sub-provisions together so that the Agency reviews California's entire program for both protectiveness and feasibility.[279] So, EPA's historic practice has been to conduct the technology feasibility analysis for CARB's standard under review as a whole-program assessment, *i.e.,* one that ensures manufacturers have sufficient lead time to comply with the program's standards as a whole, accounting for the interactions between technologies necessary to meet both new and existing standards.[280] And most importantly, because California can ''include some less stringent [standards] than the corresponding federal standards'' California would logically not be expected to take section 202(a)(3)(C) into account in any protectiveness finding made for a waiver request for California standards with a shorter lead time than specified in section 202(a)(3)(C), and such standards would otherwise be properly considered more stringent than Federal standards.[281] ''[T]he agency's long-standing interpretation that section 209(b) does not require California to establish

promulgated by EPA for control of NO_X emissions from heavy duty engines and vehicles. (''The conference agreement adopts the House provisions, modified to retain the Senate oxides of nitrogen (NO_X) standard for heavy-duty engines effective in model year 1998, and to reinstate the four-year lead time and three-year stability provisions in current law.'' Conference Report on S. 1630 (H. Rept. 101–952) 103d Cong. 1st Sess. 887).

[270] 77 FR 9239, 9249 (Feb. 16, 2012) (''However, the lead-time inquiry EPA undertakes relates to technological feasibility. Specifically, consistency with section 202(a) requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect . . . EPA then has no further inquiry into lead-time, because no additional requirement is imposed by the section 209 criteria.''). EPA acknowledges that the regulations at issue in this 2012 waiver decision concerned nonroad engines, not heavy-duty on-highway motor vehicle engines, and that the Agency noted, in that decision, that ''even if the language in [section 202(a)(3)(C)] were relevant to its consistency analysis, that section by its own terms applies only to standards applicable to emissions from new heavy-duty on-highway motor vehicle engines, not the nonroad engines being regulated by California.'' *Id.* at 9249, n.73.

[271] *See, e.g., Ford Motor Co.,* 606 F.2d 1293, 1302 (''The Administrator is charged with undertaking a single review in which he applies the deferential standards set forth in Section 209(b) to California and either grants or denies a waiver without exploring the consequences of nationwide use of the California standards or otherwise stepping beyond the responsibilities delineated by Congress.'').

[272] *MEMA I,* 627 F.2d 1095, 1120.

[273] The House Committee recognized ''California's longstanding belief that stringent control of oxides of nitrogen emission from motor vehicles may be more essential to public health protection than stringent control of carbon monoxide,'' and was aware that it might be technologically difficult to meet both the NO[x] standards California desired and the federal CO standard. Accordingly, Section 209(b) was rewritten to permit California to obtain a waiver of federal preemption so long as it determines that its emission control standards would be, ''*in the aggregate,* at least as protective of public health and welfare as applicable Federal standards.'' *Ford Motor,* 606 F.2d 1293, 1297 (D.C. Cir. 1979).

[274] H.R. Rep. No. 95–294, 95th Cong., 1st Sess., 301–302 (1977). The amendment is to afford California ''the best means to protect the health of its citizens and the public welfare.'' (*Motor Vehicle Mfrs. Ass'n* v. *NYS Dep't of Env't Conservation,* 17 F.3d at 525 (''section 209 (formerly section 208) was amended to require the U.S. Environmental Protection Agency (EPA) to consider California's standards as a package, so that California could seek a waiver of preemption if its standards 'in the aggregate' protected public health at least as well as federal standards.'')).

[275] 74 FR at 32761 (''Congress decided in 1977 to allow California to promulgate individual standards that are not as stringent as comparable federal standards, as long as the standards are 'in the aggregate, at least as protective of public health and welfare as applicable federal standards.''); *Ford Motor,* 606 F.2d 1293, 1302 (D.C. Cir. 1979) (''[T]he 1977 amendments significantly altered the California waiver provision.'').

[276] *Ford Motor Co.,* 606 F.2d 1293, 1301; *MEMA II,* 142 F.3d 464 (''California would not be denied a waiver if its CO standard were slightly higher than the federal . . . standard. . . . This is despite the fact that section 202(g) contains specific standards for CO that EPA must promulgate.'').

[277] EPA's assessment under 209(b)(1)(C) is not in practice a standard-by-standard review. EPA believes it appropriate to read the entirety of 209 together, along with its purposes, in order to properly interpret its components such as 209(b)(1)(C). *See e.g.,* 87 FR 14332.

[278] 78 FR 2131–45. EPA notes that the term ''such state standards'' in 209(b)(1)(C) allows the Agency, in appropriate circumstances, to review the consistency of CARB's suite of standards, for a particular vehicle category, with section 202(a). For example, EPA evaluated all of the standards (LEV III criteria pollutant, ZEV sales mandate, and GHG standards) of the ACC program in recognition of the aggregate costs and lead time associated with CARB's standards as well as technologies that may be employed to meet more than one standard.

[279] 49 FR 14353–54, 14358–62. EPA notes there would be an inconsistency if ''State standards'' meant all California standards when used in section 209(b)(1) but only particular standards when used in 209(b)(1)(B) and 209(b)(1)(C). EPA has historically interpreted the third waiver criterion's feasibility analysis as a whole-program approach. 87 FR 14361, n.266.

[280] 38 FR 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).

[281] *See for example,* 41 FR 44209, 44212 (October 7, 1976).

perfect compliance with the CAA to obtain a waiver is particularly plausible because section 209(b) explicitly requires only that the state's standards 'be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.' CAA section 209(b)(1).'' [282]

Section 202(a)(3)(C) also requires that standards for heavy-duty vehicles and engines apply for no less than three model years without revision.[283] Under a commenter's argument, the Administrator would have to ''align'' or make a finding that precludes California from revising each one of the standards under review for a minimum of three model years, under section 202(a)(3)(C).[284] Commenters' reading of ''consistency'' would thus require EPA to first conduct ''the narrow[ ] . . . congressionally mandated EPA review'' under which EPA's scope of review is delineated by the protectiveness finding California has made, and then a second broader review, beyond the confines of EPA's historic waiver practice, that would account for the stability requirements for California cars.[285] Under this reading, ''[EPA] must come to the rather curious conclusion that Congress intended the Administrator to approach every new set of California standards wearing two hats one expressly provided by statute and the other a product of elusive inference. Under the first he would undertake the cursory review set forth in Section 209(b) for purposes of deciding whether to grant California a waiver of preemption; and under the other he would turn around and, apparently in the course of a full-fledged rulemaking proceeding, plumb the merits of the California standards.'' [286] EPA disagrees. ''The Administrator has consistently held since first vested with the waiver authority, his inquiry under section 209 is modest in scope. He has no broad and impressive authority to modify California regulations.'' [287] ''[H]is role with respect to the California program is largely ministerial.'' [288] And ''[t]he statute does not provide for any probing substantive review of the California standards by federal officials.'' [289] Rather ''[t]he Administrator is charged with undertaking *a single review* in which he applies the deferential standards set forth in Section 209(b) to California and either grants or denies a waiver without exploring the consequences of nationwide use of the California standards or otherwise stepping beyond the responsibilities delineated by Congress.'' (Emphasis added).[290] As previously discussed, the deference called for in reviewing California's waiver request led EPA to explain over 50 years ago:

> Even on this issue of technological feasibility I would feel constrained to approve a California approach to the problem which I might feel unable to adopt at the Federal level in my own capacity as a regulator. The whole approach to the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to 'catch up' to some degree with newly promulgated standards. Such an approach to automotive emission control might be attended with costs, in the shape of reduced product offering, or price and fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency, under the statutory scheme outlined above I believe I am required to give very substantial deference to California's judgment on that score.[291]

Commenters' reading would also introduce two different tests for the evaluation of the consistency of California's standards under the third prong: one for onroad heavy-duty vehicle and engine standards; and a different one for nonroad heavy-duty vehicle and engine standards. For one set of standards, EPA would continue evaluation of technology feasibility under the traditional test while other standards would have to be evaluated for consistency under the four-year lead time and minimum three-model year stability requirements. This would create a dichotomy, for example, between California's heavy-duty onroad and nonroad vehicle and engine standards that address hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter that is neither supported by the statute nor EPA's waiver practice. It would be particularly confounding, in that as a general matter, the only difference between certain heavy-duty vehicles is the placement in service with some heavy-duty engines being used interchangeably for either onroad or nonroad purposes. Since the inception of the waiver program EPA has reviewed both California's onroad and nonroad heavy-duty engine standards under the traditional test. This waiver practice predated the 1990 Amendments that provided for authorizations of nonroad engines and vehicles standards by over two decades. Thus, for example, over fifty years ago EPA, in granting a waiver of preemption for California's 1972 and 1973 MY HD vehicles, also denied the waiver for certain nonroad utility vehicles under the historical technology feasibility test.[292] Since the 1990 amendments and considering the identical language in both sections 209(b) and 209(e)(2)(A), EPA has reviewed California's requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that we have historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).[293] Specifically, EPA's practice has been to conduct the consistency inquiry called for under section 209(e)(2)(A)(iii) by evaluating, at a minimum, whether California's standards and enforcement procedures for nonroad engines and vehicles are consistent with section 209(a), section

[282] *MEMA II,* 142 F.3d at 463.

[283] ''Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines *shall apply for a period of no less than 3 model years* beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.'' Section 202(a)(3)(C)(Emphasis added).

[284] EMA Initial Comments at 5, 11.

[285] *Ford Motor,* 606 F.2d 1293, 1298–99.

[286] *Id.* at 1302.

[287] *MEMA I,* 627 F.2d at 1119 (internal citations omitted).

[288] *Id.* at 1123 n.56 (''[T]he Administrator has no broad mandate to assure that California's emissions control program conforms to the Administrator's perceptions of the public interest. Absent the contingency that he is able to make contrary findings, his role with respect to the California program is largely ministerial.'').

[289] *Ford Motor,* 606 F.2d at 1301.

[290] *Id.* at 1302.

[291] 36 FR 17158 (August 31, 1971); See also See 78 FR at 2133. (EPA notes that when reviewing California's standards under the third waiver prong, the Agency may grant a waiver to California for standards that EPA may choose not to adopt at the Federal level due to different considerations).

[292] 36 FR 8172 (April 30, 1971) (Provided that due to considerations of technological feasibility, this waiver of such standards and procedures (1) shall not become applicable with respect to hydrocarbon and carbon monoxide emissions from nonroad utility vehicles (as defined at 45 CFR 85.1(a), 35 FR 17288); 34 FR 7348 (May 6, 1969) (Due to technological feasibility and lead-time issues, exhaust emission standards and test procedures for 1970 gas-powered light duty vehicles are not applicable to off-road utility vehicles until April 30, 1970, and not at all unless provision is made for calculating emissions of hydrocarbons and carbon monoxide. Due to technological feasibility issues, standards and procedures for 1971 and later gas-powered light-duty vehicles are not applicable to off-road utility vehicles unless provision are made for calculating emissions of hydrocarbons and carbon monoxide. Due to technological feasibility issues, fuel evaporative emission standards and test procedures for 1970 and later gas-powered light duty vehicles are not applicable to off-road utility vehicles until April 30, 1970).

[293] *See Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1087 (D.C. Cir. 1996) (''. . . EPA was within the bounds of permissible construction in analogizing section 209(e) on nonroad sources to section 209(a) on motor vehicles.'').

209(e)(1) and section 209(b)(1)(C).[294] In short, ''EPA's review of California's regulations under the third statutory criterion is quite deferential, limited to judging whether a regulation is 'not consistent' with the terms of section 7543. *See* 42 U.S.C. 7543(e)(2)(A)(iii).''[295]

The ''technological feasibility component of section 202(a) [only] obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology.''[296] Under EPA's historical practice, standards that are technologically feasible because technology is presently in use are ''consistent with section 202(a).'' So too are standards for which technology is reasonably projected to be available by the relevant model year. For California standards, that ends the inquiry. Otherwise, the Administrator, who has long explained that his role in the waiver context is ''modest in scope'' and not to ''overturn'' and ''substitute his judgment'' for those of California would nevertheless impose a four-year lead time requirement on California despite a showing that necessary emission control technology is available and otherwise well within the bounds of EPA's historical waiver practice of reviewing feasibility.[297] Doing so would be inconsistent with the statutory text and the structure that Congress put in place to enable innovation in California's market. In sum, ''the import of section 209(b) is not that California and Federal standards be identical, but that the Administrator does not grant a waiver of Federal preemption where compliance with the California standards is not technologically feasible within available lead time.''[298]

b. Neither AMC v. Blum nor the 1994 MDV Waiver Dictate a Contrary Interpretation

As also noted above, EPA received comment that the D.C. Circuit's decision in *Blum* along with EPA's 1994 MDV waiver constrain EPA and require it to apply the precise requirements of section 202(a)(3)(C) California's program in reviewing for consistency with section 202(a).[299] But the lead time section at issue in *Blum* is distinguishable from section 202(a)(3)(C) in several key respects, and *Blum* thus does not control consideration of that latter section. In *Blum,* the D.C. Circuit held that a waiver of preemption that denied a small volume manufacturer the statutorily mandated lead time specified as an exception in section 202(b)(1)(B) was incorrectly granted because the relevant California's standards did not provide two-year lead time and were thus inconsistent with section 202(a) under the third waiver prong.[300] According to the court, ''Congress itself finds and mandates that with respect to small manufacturers a lead period two years is necessary. We think the effect of this congressional mandate is to assimilate or incorporate in section 202(a)(2) the proviso of section 202(b)(1)(B).''[301]

There are several important distinctions between *Blum* and the present waivers. As an initial matter, *Blum* is not directly on point because it did not resolve the applicability of section 202(a)(3)(C) in a California waiver proceeding. Nor did *Blum* suggest that all nationally applicable lead time requirements in section 202 must apply to California. Rather, *Blum* performed a detailed analysis of the text and history of the specific provision at issue, section 202(b)(1)(B), and found that that provision alone must be strictly applied for California's standards to be ''consistent'' with section 202(a). Applying the same kind of detailed textual and historical analysis here, EPA concludes that section 202(a)(3)(C) does not apply in the California waiver context.[302]

Moreover, the facts surrounding section 202(b)(1)(B) in *Blum* and section 202(a)(3)(C) here are quite different. *Blum* dealt with a narrow, time-limited issue: whether a specific group of manufacturers were entitled to relief from certain NO_X standards for two model years shortly after the enactment of the 1977 Amendments. Congress made findings specific to those standards and that group of manufacturers, including one of the petitioners in the litigation by name. The court of appeals gave substantial weight to the specific findings Congress made and the detailed legislative history. By contrast, section 202(a)(3)(C) deals with a much broader set of standards applying to a broader set of manufacturers over an indefinite period of time—none of which Congress specifically evaluated. Applying section 202(a)(3)(C) to California's program is not necessary because it was not grounded in manufacturer and model year-specific findings and would, as discussed above, interfere with California's ability to serve as a laboratory—all in stark contrast to the application of section 202(b)(1)(B). Congress purposely crafted statutory language in section 202(b)(1)(B) to provide practical flexibility that would only apply for a short period of time (the 1981 and 1982 model years) with knowledge of the industry at the time, and the court of appeals in *Blum* acknowledged the congressional purpose of this language. This short-lived statutory exception no longer applies in EPA rulemakings, nor does it apply to California at this point in time. In contrast, there is no evidence that Congress evaluated questions of lead time and stability with respect to future California heavy-duty standards—or that it had any intent to constrain the form of California's standards, in contrast to the federal standards tied to the ''greatest degree of emission reduction achievable'' mandate. And more importantly, there are no similar legislative findings or other legislative history indicating that Congress believed all manufacturers needed at least four years of lead time to meet CARB's heavy-duty standards generally or the standards that are the subject of these waiver requests specifically. Indeed, as EPA has explained, CARB set forth a detailed explanation of the feasibility of its standards and commenters have failed to meet their burden of proof to show that the standards are infeasible.

As noted, there is a critical textual distinction between the issue addressed in *Blum* and the one here. In *Blum,* the applicability of section 202(b)(1)(B) to California resulted from an exception to the general lead time of section 202(a)(2) that Congress provided for certain motor vehicle manufacturers for a short period of time and for specified model years. Immediately introducing section 202(a)

[294] 40 CFR part 1074, subpart B, 73 FR 59379 (October 8, 2008).

[295] *American Trucking Assoc.* v. *EPA,* 600 F.3d 624, 629 (D.C. Cir. 2010).

[296] *MEMA II,* 142 F.3d at 463 (Internal citations omitted).

[297] H.R. Rep. No. 95–294, at 302 (The Administrator ''is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State.'').

[298] 46 FR 22032, 22034–35 (April 15, 1981).

[299] 59 FR 48625 (September 22, 1994) and associated Decision Document at EPA–HQ–OAR–2022–0330, (MDV Waiver Decision Document).

[300] Waiver of preemption for California to Enforce NO_X emissions standards for 1981 and later model years passenger cars. 43 FR 25729 (June 14, 1978).

[301] *American Motors Corp.* v. *Blum,* 603 F.2d 978, 981 (D.C. Cir. 1979) (''Section 202(b)(1)(B) directs that the regulations prescribed by the Administrator pursuant to section 202(a) shall require that NO_X emissions may not exceed 2.0 grams per vehicle mile for vehicles and engines manufactured during model years 1977 through 1980. For those manufactured during model year 1981 and thereafter, NO_X emissions may not exceed 1.0 grams per vehicle mile. . . . In establishing these regulations the Administrator is bound by section 202(a)(2) to allow such lead time as he finds necessary.'')

[302] *See* section III.D.5.a.

is the phrase ''Except as otherwise provided in subsection (b) –),'' which by its terms means that section 202(b) governs over the more general and potentially conflicting terms in section 202(a). But Congress did not disturb the applicability of section 202(a)(2) for subsequent model years standards and the D.C. Circuit held accordingly: ''In establishing these regulations [for model year 1981 and thereafter] the Administrator is bound by section 202(a)(2) to allow such lead time as he finds necessary.'' [303] There is also nothing to indicate Congressional intent to override section 202(a)(2). But commenters' reading would have the Administrator do just that by allowing section 202(a)(3)(C) to govern over section 202(a)(2) even where California has made a showing of technology feasibility for the standards under review.

According to relevant legislative history of section 202(b)(1)(B), that language was introduced due to concerns that small volume manufacturers would not be able to comply with the 1.0 gram per mile NO_X standard for light-duty vehicles. According to statements made by members of Congress at the time of the amendment's introduction and debate, the amendment was intended to apply to only American Motors Corporation and one other small manufacturer (Avanti) because the standard required the development of a specific technology that they would have to purchase and adapt from other manufacturers, so these small volume manufacturers would be unavoidably behind in the pollution abatement timetable from the very beginning.[304] This legislative history was crucial to the *Blum* Court's holding that Congress had ''f[ound] and mandate[d] that with respect to small manufacturers a lead period of two years is necessary.'' In contrast, there does not appear to be similar legislative history detailing a special or peculiar need for the strict lead time requirements for section 202(a)(3)(C), which was enacted in the same year Amendments as section 209(b)(1)(B), that would indicate Congress's belief that a specific amount of lead time was ''necessary.'' [305]

Moreover, after *Blum,* the D.C. Circuit also considered a somewhat analogous argument in *MEMA II,* where petitioners maintained that section 202(m), which calls for promulgation of regulations ''under section 202(a),'' meant that EPA was to evaluate applicability of section 202(m) to California's onboard diagnostic regulations for consistency with section 202(a). The court disagreed, held that section 202(m) does not apply, and declined to extend its holding in *Blum,* holding instead that ''section 209(b)(1) makes clear that section 202(a) does not require, through its cross-referencing, consistency with each federal requirement in the act. California's consistency is to be evaluated 'in the aggregate,' rather than on a one-to-one basis.'' [306] According to the court ''[a]lthough statutory cross-referencing presents a superficially plausible textual argument linking compliance with subsection (m) to compliance with subsection (a), the agency has long interpreted the statute to give California very broad authority, and the court has held that this interpretation is not unreasonable.'' [307]

EPA also disagrees with commenter's claim that the 1994 MDV waiver constrains and binds EPA in the current waiver review. EPA is retaining the position it has consistently held with the sole exception of the 1994 MDV waiver for all the reasons discussed herein.[308] EPA notes that in *MEMA II* the court revisited *Blum* and explained:

> Petitioners' reliance on American Motors Corp., [ ] is misplaced. In that case, EPA viewed the petitioner's complaint about the lead time for a proposed action by CARB to be solely based on section 202(b), not section 202(a), and so was not cognizable in the waiver process. The court disagreed, observing that the lead time for implementation of the NO_X standard was governed by section 202(a)(2) and concluding that the California regulation, which denies to [petitioner] a lead time of two years, is inconsistent with section 202(a)(2). *Id.* at 981. Thus, the American Motors decision did not suggest that all of the subsections of section 202 were incorporated into subsection (a) for the purposes of assessing a California waiver application. Instead, it concluded that the EPA had granted a waiver without determining whether California had met the standards of section 202(a).'' [309]

And in the intervening years since the 1994 MDV waiver, EPA has not applied section 202(a)(3)(C) to a number of other waiver decisions for California's heavy-duty standards.[310] For instance, in 2012 EPA did not require four years of lead time nor address the stability requirements for California's heavy-duty truck idling standards under section 202(a)(3)(C) and explicitly disagreed with comments asserting its applicability.[311] Similarly, in 2008, 2012, 2014, and 2016, EPA did not require four years of lead time nor address the stability requirements for California's heavy-duty vehicle and engine greenhouse gas waivers as well as the On-Board Diagnostics requirements under section 202(a)(3)(C).[312] So, the 1994 MDV waiver remains the sole waiver decision where EPA reviewed California standards for consistency with section 202(a) under both section 202(a)(3) and the historically-applied technology feasibility test (202(a)(2)). At the time of the 1994 MDV waiver, EPA posited that ''*Blum* indicates that California would be required to provide the statutory lead time required under section 202(a)(3)(C).'' [313] But EPA did not

[303] *American Motors Corp.* v. *Blum,* 603 F.2d 978, 981.

[304] 123 Cong. Rec. S9233 (daily ed. June 9, 1977). Even the EPA Administrator acknowledged AMC's specific need for extra lead time in a letter to Congress in support of the amendment. Both the amendment's sponsor and the Administrator explained that the 1.0 gram/mile standard created a ''peculiar'' and ''special'' problem for AMC and other small manufacturers. The two years of lead time was intended to give these small manufacturers adequate time to ''modify and adapt the system [purchased from other manufacturers] to [their] own product line.'' *Id.*

[305] To the extent commenters cite statements in the legislative history regarding the need for three years of stability and four years of lead time, EPA notes that none of the cited statements are from members of Congress themselves and are instead testimony from commenters themselves. *See, e.g.,* EMA Initial Comments at 10. But see, H.R. Rep. No. 95–294 at 542 (1977) (For standards promulgated under section 202(a)(3)(A) ''[a]dditional revisions of up to 3 years 'each could be granted at three-year intervals thereafter;' '' and Congress ''provides four years lead time before temporary or permanent revision of any statutory standard.'').

[306] *MEMA II,* 142 F.3d at 463.

[307] *Id.* at 464 (''[I]t would appear virtually impossible for California to exercise broad discretion if it had to comply with every subsection of section 202 that cross-referenced subsection (a). See, *e.g.,* CAA section 202(b), (g), (h), (j), (m)(1), (m)(2), (m)(4).'').

[308] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009).

[309] 142 F.3d at 464, n.14 (internal citations omitted).

[310] 70 FR 50322 (August 26, 2005) (2007 California Heavy-Duty Diesel Engine Standards); 71 FR 335 (Jan. 4, 2006) (2007 Engine Manufacturers Diagnostic standards); 77 FR 9239 (February 16, 2012) (HD Truck Idling Requirements); 79 FR 46256 (Aug. 7, 2014) (the first HD GHG emissions standard waiver, relating to certain new 2011 and subsequent model year tractor-trailers); 81 FR 95982 (December 29, 2016) (the second HD GHG emissions standard waiver, relating to CARB's ''Phase I'' regulation for 2014 and subsequent model year tractor-trailers); 82 FR 4867 (January 17, 2017) (On-Highway Heavy-Duty Vehicle In-Use Compliance Program).

[311] 77 FR 9239, 9249 (Feb. 16, 2012).

[312] 73 FR 52042 (September 8, 2008); 77 FR 73459 (December 10, 2012); 79 FR 46256 (August 7, 2014); 81 FR 95982 (December 29, 2016). EPA also notes that several waivers have been granted for California's on-highway motorcycles (*See for example,* 42 FR 1503 (January 7, 1977); 41 FR 44209 (October 7, 1976); 43 FR 998 (January 5, 1978); 46 FR 36237 (July 14, 1981)).

[313] 59 FR 48625 (September 22, 1994) and associated Decision Document at EPA–HQ–OAR–2022–0330, (MDV Waiver Decision Document) at page 26 (''Under section 209, the Administrator has an oversight role to review California lead time decisions associated with their rules. While CARB may well choose to provide a different amount of

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address the stability requirements also contained within section 202(a)(3)(C) that requires standards for heavy-duty vehicles and engines to apply for no less than three model years without revisions. Where section 202(a)(3)(C) applies, standards must allow at least three model years of stability, meaning that no revisions or amendments are allowed until after three model years. The 1994 MDV Waiver was also silent on California's longstanding practice of amending standards for which a waiver has been granted.[314] EPA's waiver practice has long allowed for such revisions under the rubric of within-the-scope amendments, which calls for review of California standards that have been amended under both the protectiveness finding and the technology feasibility requirements of the third waiver prong.[315] In other words, there is no prescribed lead time for within-the-scope amendments because EPA reviews them under the traditional consistency test. The 1994 MDV waiver did not wrestle with the implications of applying section 202(a)(3)(C) to waiver decisions for either of these important factors—the constraints on California's ability to drive innovations in vehicle emission control technologies, as Congress intended, with a four-year lead time and a three-year stability requirement, and the problematic constraint such an interpretation would impose on California's ability to amend standards for which a waiver has been granted to address any newly emergent issues. As such, the conclusions in the decision are based on insufficient analysis.

In the 1994 MDV waiver, EPA also reviewed the standards under the traditional technology feasibility test finding that ''no significant development nor associated lead time is required.'' [316] Notably, California had provided four-year lead time for the standards at issue. Thus, EPA was not confronted by the situation as in the instant waiver where California had made a feasibility showing of presently available technology.

EPA in 1994 also did not discuss an earlier 1981 decision denying the petition for reconsideration that sought reconsideration of a waiver decision on grounds that *Blum* also required the Administrator to take certain lead time provisions into account when considering California waiver requests at issue.[317] In 1981, shortly after *Blum,* EPA explained in relevant part that:

> The specific Congressional finding that under prescribed circumstances additional lead time is necessary is unique to the small volume manufacturer provision, and is not present in the other sections of the Act. Moreover, the fact that Congress determined that qualified manufacturers such as AMC are entitled to additional lead time was the critical factor leading to the Court's decision. *AMC* v. *Blum* did not involve or discuss other Federal waiver provisions, which, unlike section 202(b)(1)(B), do not reflect such a Congressional finding.[318]

EPA further explained that

> The small-volume manufacturer waiver provision was interpreted by the court as a ''proviso'' to section 202(a) of the Act, such that the determination of technological feasibility of the 1.0 gpm NO_X, standard in question within available lead time is taken out of the hands of the Administrator and is made by *the unique Congressional finding of 202(b)(1)(B*) (Emphasis added).[319]

Most significant was EPA's explanation of the protectiveness finding California makes under section 209(b)(1) on EPA's consistency determination. EPA explained:

> California standards need not be identical to their Federal counterparts, even those established in waiver decisions. An argument along those lines would be inconsistent with section 209(b) of the Act. Because California has special air pollution problems, section 209(b) permits the Administrator to waive Federal preemption to permit the State of California to implement its own air pollution control programs that are, in the aggregate, at least as protective as nationally applicable standards. *The import of section 209(b) is not that California and Federal standards be identical, but that the Administrator not grant a waiver of Federal preemption where compliance with the California standards is not technologically feasible within available lead time, consistent with section 202(a).*[320]

Lastly, EPA has examined the text of section 177 of the CAA, added by Congress in the 1977 Amendments. At the time that Congress was affording California additional programmatic flexibility and policy deference with the addition of the ''in the aggregate'' language to section 209(b)(1), Congress added section 177 to allow other States (those with plan provisions approved under Part D) to adopt California's new motor vehicle emission standards if certain criteria are met. Such criteria include that the State standards adopted be identical to the California standards for which a waiver has been granted for such model year, and that ''California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).'' [321] EPA notes that Congress understood and acted to specify a number of years of lead time applicable to other States before those States could enforce standards under section 177. In the same 1977 Amendments, Congress did not specify that the lead time and stability requirements in the new section 202(a)(3)(C) were applicable to either California or to states adopting California's standards under section 177. EPA believes there is no basis to find or infer that the section 202(a)(3)(C) requirements apply to California. And, as importantly, Congress established a structure under which California would receive a waiver for standards that EPA deemed would be feasible (or that opponents had not demonstrated to be infeasible), with the lead time provided within the California market, specifically.[322] Other States (section 177 States) could enforce California's standards but would have to allow two years of lead time. It is assumed that these additional two years would allow manufacturers time to comply with the expanded market for which the California standards apply, which would still not be a fully national market subject to EPA standards.[323]

lead time for light-duty vehicles than EPA has determined is necessary, *Blum* instructs that the specific lead time requirements of section 202 apply to both agencies with equal force. Again, the *Blum* court interpreted literally the specific congressional requirement of lead time and stated, '[t]he necessity for lead time cannot be obviated by a waiver.'" *Id.* at 32; (As Congress intended, EPA has liberally construed the section 209 waiver provision to give California broad discretion with its program. Nonetheless, EPA's discretion is not unlimited. In light of the plain language and Congressional intent of sections 202 and 209, and applying the rationale of *Blum,* I find that the opposing parties have provided persuasive arguments that California is subject to the four-year lead time requirement under section 202(a) (3) (b) of the Act and is required to provide four years of lead time for the proposed MDV standards.).

[314] *See, e.g.,* 76 FR 61095 (October 3, 2011) (granting California a within-the-scope waiver for its 2008 amendments to its ZEV Standard); 71 FR 78190 (December 28, 2006) (granting California a within-the-scope waiver for its 1993–2003 amendments to its ZEV Regulations).

[315] *See, e.g.,* the Notice of Scope of Preemption for California's amendments to warranty regulations pertaining to 1983 and later model year passenger cars, light-duty vehicles, medium- and heavy-duty vehicles and motorcycles; 51 FR 12391 (Apr. 10, 1986).

[316] 1994 MDV Waiver Document at 48–49 (''In view of these facts, I agree with CARB's assessment that adequate technology exists and may be readily adapted to enable MDVs to meet all of CARB's standards. Thus, no significant development nor associated lead time is required.'').

[317] Petition for Reconsideration of Waiver of Federal Preemption for California To Enforce Its NO_X Emission Standards and Test Procedures: Notice of Denial. 46 FR 22032 (April 15, 1981).

[318] 46 FR 22034.

[319] *Id.*

[320] 46 FR 22034–35.

[321] 42 U.S.C. 7507(1), 7507(2); *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 527.

[322] 78 FR at 2143, n.165.

[323] *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 527; *American Automobile Mfrs. Ass'n,* 31 F.3d 18, 26–27 (1st Cir. 1994).

There is no language in section 177 that would require the section 177 states to provide more lead time (an additional two years) in order to be consistent with the four years of lead time that commenters claim apply to California. EPA agrees with the CARB comment that it makes little sense to assume Congress would have provided four years of lead time for vehicle and engine manufacturers to prepare to comply in the California market but only two years to prepare for compliance in a potentially much larger market captured, collectively, in the section 177 States.

Further, EPA traditionally applies a ''record-based'' review to determine the actual technological feasibility of California's standards, and to the degree requisite technology is not currently available then EPA examines the factual record to determine whether sufficient lead time is provided for the California market, giving consideration to cost. In addition, EPA's technological feasibility assessment is conducted within the confines of the manufacturers' ability to meet the California standards within California and the California market.[324] It is illogical to couple EPA's limited role in reviewing the feasibility of CARB's standards, confined to the manufacturers' ability to meet the emission standards for new vehicles introduced into commerce in California, with the four-year lead time directive that Congress provided to EPA in setting national new heavy-duty vehicle emission standards which are required to secure the greatest degree of emission reduction achievable.

6. Section 209(b)(1)(C) and 209(e)(2)(A)(iii) Conclusion

As previously explained, EPA believes that the historical approach to section 209(b)(1)(C) (and the section 209(e)(2)(A)(iii)) prong reflects the best reading of the statute. The historical approach is to evaluate California's program including the changes to that program reflected in a waiver request for feasibility, and in doing so to determine whether the opponents of the waiver have met their burden of proof (as a factual matter) to demonstrate that California's standards are not technologically feasible, giving consideration to lead time and cost. Applying this approach with the reasoning noted above, with due deference to California, I cannot deny the respective waiver requests. CARB has demonstrated that technologies exist today to meet the most imminent standards and has identified refinements to emission control technologies and other emission controls reasonably projected to be available to meet the emission standards when needed in later model years. EPA finds that there is no evidence in the record to demonstrate that CARB's assessments, including those made in the state rulemakings, are unreasonable. In addition to CARB's demonstration and EPA findings, the Agency also notes that CARB's regulations include a number of provisions that may provide, if manufacturers choose to use them, additional compliance pathways. Therefore, I determine that I cannot deny either of the two waiver requests under section 209(b)(1)(C).

In addition, after a review of the text in sections 209, 202, and section 177, I find that the lead time and stability language Congress added in 1977 in section 202(a)(3)(C) was only directed at EPA and does not apply to California by way of EPA's review of section 209(b)(1)(C) and section 209(e)(2)(B)(iii). Further, EPA has reviewed the legislative history, EPA's prior waiver decisions, and applicable case law and concludes that each of these considerations further supports EPA's textual analysis and conclusion that section 202(a)(3)(C) does not apply to California and thus EPA cannot deny CARB's waiver requests on this basis.

E. Other Issues

1. Energy Policy and Conservation Act (EPCA)

One commenter argued that ZEV mandates are preempted by the Energy Policy and Conservation Act (EPCA) because they are ''related to'' fuel economy standards.[325] The commenter asserted that it would therefore be ''arbitrary and capricious'' for EPA to grant waivers for the ACT Regulation and the ZEAS Regulation (that each contain a ZEV mandate) because ''California's ZEV mandate is void *ab initio*'' and ''[a]s such, California does not have a valid waiver request.'' [326] EPA has long construed section 209(b) as limiting the Agency's authority to deny California's requests for waivers to the three listed criteria. This narrow review approach is supported by decades of waiver practice and judicial precedent. In *MEMA I,* the D.C. Circuit held that the Agency's inquiry under section 209(b) is ''modest in scope.'' [327] The D.C. Circuit further noted that ''there is no such thing as a 'general duty' on an administrative agency to make decisions based on factors other than those Congress expressly or impliedly intended the agency to consider.'' [328] In *MEMA II,* the D.C. Circuit again rejected an argument that EPA must consider a factor outside the 209(b) statutory criteria concluding that doing so would restrict California's ability to ''exercise broad discretion.'' [329] EPA's duty, in the waiver context, is thus to grant California's waiver request unless one of the three listed criteria is met. ''[S]ection 209(b) sets forth the only waiver standards with which California must comply . . . If EPA concludes that California's standards pass this test, it is obligated to approve California's waiver application.'' [330] EPA has therefore consistently declined to consider factors outside the three statutory criteria listed in section 209(b), including preemption under EPCA, explaining instead that preemption under EPCA is not one of these criteria.[331]

[324] *Id.* at 2143.

[325] AFPM at 15–16. EPA notes that this commenter cited to 49 U.S.C. 32903(h)(1) and the action taken in 2019 (''The Safer Affordable Fuel-Efficient Vehicles (SAFE) Rule Part One: One National Program''). SAFE 1 at 51320–21. NHTSA subsequently repealed all regulatory text and appendices promulgated in the SAFE Part One and made clear that no prior regulations or positions of the Agency reflect ongoing NHTSA views on the scope of preemption of states or local jurisdictions under EPCA. 86 FR 74236 (Dec. 29, 2021). EPA also notes that the ''related to'' language that was the subject of SAFE Part One and the subsequent repeal is in 49 U.S.C. 32919.

[326] AFPM at 15–16.

[327] *MEMA I,* 627 F.2d at 1119.

[328] *Id.* at 1116 (acknowledging that ''the Administrator must be sensitive to [CAA] section 207 concerns in approaching a waiver decision,'' but concluding that ''he has no duty beyond that to consider claims of anti-competitiveness in a waiver proceeding'').

[329] *MEMA II,* 142 F.3d at 464 (rejecting a claim that California's standards must comply with CAA section 202(m) because ''it would appear virtually impossible for California to exercise broad discretion if it had to comply with every subsection of section 202 that cross-referenced subsection (a).'').

[330] *Id.* at 462–63.

[331] 87 FR 14332, 14372 (March 14, 2022) (rescinding the SAFE 1 waiver withdrawal partially premised on EPCA preemption because, in part, ''[c]onsideration of preemption under EPCA is beyond the statutorily prescribed criteria for EPA in section 209(b)(1).''). The sole instance that EPA considered preemption under EPCA in a waiver proceeding was in SAFE Part One, a joint-rulemaking with NHTSA, where EPA simultaneously explained that the Agency ''d[id] not intend in future waiver proceedings concerning submissions of California programs in other subject areas to consider factors outside the statutory criteria in section 209(b)(1)(A)–(C).'' SAFE 1 at 51338. EPA subsequently rescinded that decision, finding that ''the joint-action context of SAFE 1 [w]as an insufficient justification for deviating from its statutory authority and the Agency's historical practice'' of ''limiting its waiver review to the criteria in section 209(b)(1).'' 87 FR at 14371–73. EPA hereby incorporates by reference the reasoning in this decision. *See also,* 43 FR 32182, 32184 (July 25, 1978) (rejecting objections to the procedures at state level, objections that section 207(c)(3)(A) establishes field protection, and constitutional

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In evaluating CARB's two waiver requests, including the ACT and ZEAS Regulations, EPA has not considered preemption under EPCA. As in previous waiver evaluations, the decision on whether to grant or deny these waiver requests is based solely on the criteria in section 209(b). Evaluation of whether these regulations are preempted under EPCA is not among the criteria listed under section 209(b). EPA may only deny waiver requests based on the criteria in section 209(b), and preemption under EPCA is not one of those criteria. In considering California's request for a waiver, I therefore have not considered whether California's standards are preempted under EPCA. As in previous waiver decisions, the decision on whether to grant the waiver is based solely on criteria in section 209(b) of the Clean Air Act and this decision does not attempt to interpret or apply EPCA.[332]

2. Equal Sovereignty and Other Constitutional Issues

One commenter objected to both the ACT and ZEAS Regulations because ''[b]y authorizing California, and only California, to set its own motor vehicle emission standards, Section 209(b) violates the constitutional equal sovereignty doctrine.'' [333] The commenter claimed that Section 209(b) is ''unconstitutional in all its applications'' or, in the alternative, ''to the extent it is construed to allow California to set emission standards aimed at addressing global climate change, as opposed to California's local conventional pollution problems.'' [334] Another commenter objected to the ACT Regulation as it ''calls for measures that may violate other constitutional provisions and principles.'' [335] [336] EPA has previously considered equal sovereignty objections to waiver requests as outside the scope of EPA's review and incorporates the reasoning in that prior decision as it pertains to the constitutional claims raised by commenters.[337]

As EPA has long stated, ''the Agency's task in reviewing waiver requests is properly limited to evaluating California's request according to the criteria in section 209(b), and . . . it is appropriate to defer to litigation brought by third parties in other courts, such as state or federal court, for the resolution of constitutionality claims and inconsistency, if any, with other statutes.'' [338] EPA's longstanding practice, affirmed by judicial precedent, has been to refrain from considering factors beyond section 209(b)(1) criteria, including constitutional claims, in evaluating California waiver requests.[339] For example, in 1978 EPA declined to consider First Amendment and Due Process objections to a waiver request, stating that constitutional arguments ''are beyond the scope of [the Administrator's] review, and the waiver hearing is not a proper forum in which to raise them.'' [340] The D.C. Circuit agreed with the Administrator's position, that there was no obligation to consider these constitutional objections, because ''it is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies.'' [341] Additionally, in 2009, EPA declined to consider comments that California's transport refrigeration unit (TRU) Rule violated the Dormant Commerce Clause, stating that ''EPA's review of California's regulations is limited to the

objections all as beyond the ''narrow'' scope of the Administrator's review); 74 FR 32744, 32783 (July 8, 2009) (declining to consider EPCA preemption, stating that ''section 209(b) of the Clean Air Act limits our authority to deny California's requests for waivers to the three criteria therein.''); 78 FR 2112, 2145 (Jan. 9, 2013), 79 FR 46256, 46264 (Aug. 7, 2014) (reiterating that EPA can only deny a waiver request based on the 209(b) statutory criteria, dismissing comments on preemption under EPCA, as well as the Constitution and the implications of the Federal Aviation Administration Authorization Act of 1994).

[332] EPA notes that both courts that have considered whether EPCA preempts greenhouse-gas emission standards have concluded that it does not. *See, e.g., Cent. Valley Chrysler-Jeep, Inc.* v. *Goldstene,* 529 F. Supp. 2d 1151, 1153–54 (E.D. Cal. 2007), as corrected Mar. 26, 2008; *Green Mountain Chrysler Plymouth Dodge Jeep* v. *Crombie,* 508 F. Supp. 2d 295, 300–01 (D. Vt. 2007).

[333] AFPM at 2.

[334] *Id.*

[335] Valero at 8–10. This commenter claimed that EPA's grant of a waiver represents a major question that was not contemplated by Congress. That claim is addressed above in Section III.C. This commenter also provided a list of other possible constitutional constraints that it believes the ACT Regulation may violate (*e.g.,* Dormant Commerce Clause, dormant foreign affairs preemption doctrine under the Supremacy Clause, the Takings Clause of the Fifth Amendment, and the Equal Sovereignty doctrine). EPA notes that it is unclear whether this commenter requested EPA to not grant the ACT Regulation waiver request based on these latter possible constraints. Nevertheless, EPA notes (as discussed in this section) that EPA's task in reviewing California's waiver requests is limited to the criteria in section 209(b) and therefore provides no assessment of these claims.

[336] The same commenter (Valero) raises miscellaneous claims not related to constitutional issues that we also address here. Valero claims that granting the ACT waiver exceeds EPA's statutory authority because the ACT allegedly ''bans internal combustion engines,'' has ''vast nationwide political and economic significance,'' would be ''beyond the scope of the type of emission standards the waiver was originally intended to accommodate,'' and accomplishes what failed Congressional bills would have done. Valero Comment 6, 8. EPA disagrees. The ACT constitutes standards for the control of emissions from motor vehicles, and thus clearly falls within the scope of section 209(a) preemption and EPA's authority to waive preemption under section 209(b)(1). Moreover, while the ACT increases the stringency of California's program, the requirements it imposes are not different in kind from earlier California ZEV rules for which EPA has waived preemption. See 71 FR 78190 (December 28, 2006) and Decision Document at EPA–HQ–OAR–2004–0437–0173, at 35–46) (explaining that certain earlier California ZEV requirements constituted emissions standards and waiving preemption for such standards under section 209(b)); 58 FR 4166 (January 13, 1993) (granting a waiver for California's first Low Emission Vehicle (LEV I) regulation that include the original California ZEV standards that were adopted in 1990). Valero's reference to failed Congressional bills is inapposite given the clear language of section 209. See also Public Law 117–169, tit. VI, Subtitle A, section 60105(g), 136 Stat. 1818, 2068–69 (2022) (providing funds for EPA to issue grants specifically to states to support their adoption of California's greenhouse-gas and zero-emission vehicle standards under Section 177). Moreover, the major questions doctrine, to the extent Valero is invoking it, does not apply to California's exercise of its police powers, nor to EPA's waiver of preemption to preserve the State's exercise of such powers. See supra fn. 135. Valero further claims that EPA must consider wide-ranging impacts of granting the waiver (*e.g.,* on the nationwide distribution of goods, renewable fuels, petroleum refiners, chemical manufacturing, agricultural sector, international and military consequences, etc.). Valero Comment 6–9. However, this is belied by the statutory waiver criteria in section 209(b), which require EPA to grant a waiver unless the agency makes one of the three statutory findings. See MEMA I, 627 F.2d at 1118 (Section 209 does not require EPA to consider the social costs of pollution control, for ''Congress, not the Administrator, made the decision to accept those costs.''). Finally, Valero suggests that granting the waiver is inconsistent with Congress's mandates designed to promote renewable fuels under the federal Renewable Fuel Standard. Valero Comment 6. However, nothing in section 209(b) suggests EPA must consider consistency with the Renewable Fuel Standard program in deciding to grant a waiver. See also section 211(o)(12) (''Nothing in this subsection . . . shall affect or be construed . . . to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions . . . of this chapter.'').

[337] 87 FR 14332, 14376–77 (March 14, 2022). *See also,* 42 FR 2337, 2338 (January 11, 1977); 41 FR 44209, 44212 (October 7, 1976).

[338] *Id.*

[339] EPA has declined to consider constitutional challenges to California Waivers since at least 1976. 41 FR 44212 (Oct. 7, 1976) (''An additional argument against granting the waiver was raised by the Motorcycle Industry Council and Yamaha, who contended that the CARB had violated due process when adopting their standards, by not allowing the manufacturers a fair and full opportunity to present their views at a State hearing. If this argument has any validity, the EPA waiver hearing is not the proper forum in which to raise it. Section 209(b) does not require that EPA insist on any particular procedures at the State level. Furthermore, a complete opportunity was provided at the EPA waiver hearing for the presentation of views.''). *See also, e.g.,* 43 FR 32182, 32184 (July 25, 1978) (rejecting objections to the procedures at state level, objections that section 207(c)(3)(A) establishes field protection, and constitutional objections all as beyond the ''narrow'' scope of the Administrator's review).

[340] 43 FR at 32185.

[341] *MEMA I,* 627 F.2d at 1114–15 (holding that EPA did not need to consider whether California's standards ''unconstitutionally burden[ed] [petitioners'] right to communicate with vehicle purchasers.'').

criteria that Congress directed EPA to review.'' [342] The D.C. Circuit again concluded that this constitutional claim was outside the scope of EPA's review, agreeing with EPA that the commenters had sought to ''improperly . . . engraft a type of constitutional Commerce Clause analysis onto EPA's Section 7543(e) waiver decisions that is neither present in nor authorized by the statute.'' [343] Such a question, the Court noted, is ''best directed to Congress.'' [344]

EPA notes that Congress struck a deliberate balance in 1967, when it chose to authorize two standards—the Federal standard and California's standards—rather than one national standard or 51 individual state standards.[345] EPA believes this balance reflected Congress's desire for California to serve as a laboratory of innovation and Congress's understanding of California's extraordinary pollution problems on the one hand, and its desire to ensure that automakers were not subjected to too many different standards on the other. Congress reaffirmed this balance in 1977 when it amended the Clean Air Act to allow other states facing similar air quality problems the option of adopting California's new waived motor vehicle standards.[346] Thus Congress has consistently and repeatedly made determinations regarding California's important role in driving advancements in motor vehicle emissions control (which benefit all Americans when subsequently reflected in federal standards) and the value of providing states with two regulatory pathways to address motor vehicle emissions.

In evaluating CARB's two waiver requests, including the ACT and ZEAS Regulations, EPA has not considered whether section 209(a) and section 209(b) are unconstitutional under the Equal Sovereignty Doctrine. As in previous waiver evaluations, the decision on whether to grant or deny the waiver is based solely on the criteria in section 209(b) and this decision does not attempt to interpret or apply the Equal Sovereignty Doctrine or any other constitutional provision.

IV. Decision

After evaluating California's 2018 HD Warranty Amendments, ACT Regulations, ZEAS Regulations, and the ZEP Certification Regulations, CARB's submissions, relevant adverse comment, and other comments in the record, EPA is granting a waiver of preemption and authorization, as applicable, for each of these regulations.

A. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, but ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.'' For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

This final action is ''nationally applicable'' within the meaning of CAA section 307(b)(1). In the alternative, to the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of ''nationwide scope or effect'' within the meaning of CAA section 307(b)(1), for several reasons.[347] This final action will not only affect manufacturers of new heavy-duty vehicles and engines sold in California, but also manufacturers that sell their new heavy-duty vehicles and engines in those states that have already adopted or may choose to adopt California's regulations.[348] For example, five states have already adopted California's ACT Regulation.[349] These jurisdictions represent a wide geographic area that falls within three judicial circuits.[350]

Furthermore, the regulations that are the subject of today's action are part of California's on-highway for which EPA may waive preemption under CAA section 209. As required by statute, in evaluating the waiver criteria in this action, EPA considers not only the HD emissions regulations in isolation, but in the context of the entire California program.[351] Moreover, EPA generally applies a consistent statutory interpretation and analytical framework in evaluating and deciding various waivers under CAA section 209. EPA also relies on the extensive body of D.C. Circuit case law developed by that court since 1979 as it has reviewed and decided judicial challenges to these actions. As such, judicial review of any challenge to this action in the D.C. Circuit will centralize review of national issues in that court and advance other Congressional principles underlying CAA section 307(b)(1) of avoiding piecemeal litigation, furthering judicial economy, and eliminating the risk of inconsistent judgments.

For these reasons, this final action is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the **Federal Register**. Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by June 5, 2023.

V. Statutory and Executive Order Reviews

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866. In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C.

[342] Decision Document, EPA–HQ–OAR–2005–0123–0049 at 67.

[343] *ATA* v. *EPA,* 600 F.3d 624, 628 (D.C. Cir. 2010) (quoting the U.S. brief). In a footnote to this statement, the Court said ATA could attempt to bring a constitutional challenge directly (which would argue that the waiver unconstitutionally burdens interstate commerce) but ''express[ed] no view on that possibility.'' *Id.* at n.1.

[344] *Id.* at 628.

[345] Motor vehicles are ''either 'federal cars' designed to meet the EPA's standards or 'California cars' designed to meet California's standards.'' *Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1079–80, 1088 (D.C. Cir. 1996) (''Rather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory standards.'').

[346] Under section 177, ''any State which has plan provisions approved under this part may adopt and enforce'' identical California standards and delineates three specific criteria for adoption.

[347] In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

[348] *See* CAA section 177.

[349] Massachusetts, New Jersey, New York, Oregon, and Washington have adopted the ACT Regulation.

[350] In the report on the 1977 Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that the ''nationwide scope or effect'' exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 32.

[351] *See* CAA sections 209(b)(1)(B) and 209(e)(2)(A) (requiring that the protectiveness finding be made for California's standards ''in the aggregate'').

601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities. Further, the Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: March 30, 2023.

Michael S. Regan,

Administrator.

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